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A TREATISE

ON

STOCK AND STOCKHOLDERS,

BONDS, MORTGAGES,

AND

GENERAL CORPORATION LAW,

AS APPLICABLE TO

RAILROAD, BANKING, INSURANCE, MANUFACTURING, MINING, TELEGRAPH, TELEPHONE. EXPRESS, GAS, WATER-WORKS, COMMERCIAL, TURNPIKE, BRIDGE, CANAL, STEAM-SHIP, AND OTHER PRIVATE CORPORATIONS.

WILLIAM W. COOK,

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PART IV

FRAUDS -- ULTRA VIRES ACTS -- INTRA VIRES ACTS --NEGLIGENCE AND IRREGULAR CONTRACTS OF DIRECTORS. STOCKHOLDERS. PROMOTERS AGENTS.

CHAPTER XXXIX

FRAUDULENT ACTS OF DIRECTORS. MAJORITY OF STOCKHOLDERS: AND THIRD PERSONS.

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A. THE OCCASION, SCOPE AND PURPOSE OF THE SUBJECT HEREIN.

§ 643. The cause and occasion of this subject.—Perhaps the most striking feature of the modern era of industrial development is the growth, wealth and power of corporations. They have built the railways, dug the canals, established the factories, carried the ocean commerce, and assumed control of the industries of Europe as well as of America. They have absorbed a large part of the surplus wealth of the world, and have accumulated or distributed enormous gains and profits. But these gains and profits have not always been honestly preserved and administered for the benefit of those who are entitled thereto - the stockholders of the company. Corporations, with their vast capital stock, their great income, their rapidly-changing personal property, and their large purchases and sales, have proved to be a temptation which corporate officers are too often unable to withstand. These companies have been found to be efficient instruments of fraud, speculation, plunder and illegal gain. In these latter days the robbery and spoliation of corporations and stockholders by the corporate directors and managers have been systematized into well-known methods of proceeding. and the carrying out of such plans has become a profession and an accomplishment. The skill, audacity, experience and talent of the highest order of administrative ability have reduced to a certainty the methods of diverting the profits, capital, and even the existence. of the corporation itself to the enrichment of the corporate managers and their co-conspirators. Corporations become insolvent and stockholders lose their investment, while individuals become millionaires. Illegitimate gains are secured and enormous fortunes are amassed by the few at the expense of the defrauded but generally helpless stockholders.

The expense, difficulty and delays of litigation; the power, wealth and unscrupulousness of the guilty parties; the secrecy, skill and evasive nature of their methods; and the fact that the results of even a successful suit belong to the corporation, and not to the stockholders who sue, all combine to baffle investigation and exposure, to discourage the stockholders and to encourage and protect the parties guilty of the wrong.

In England, ever since the year 1720, when the "South Sea Bubble" exploded and unsettled the finances of the kingdom, there has been a constant recurrence of "bubble companies" and dishonest promoters. The English reports are filled with cases of frauds of corporate directors, corporate agents and corporate organizers. A system of jurisprudence has grown up from these cases. This system, however, is as yet in a formative state; and there is no branch of the law more complicated, difficult and full of

pitfalls for the court, practitioner and client than that growing out of the frauds of corporate directors.

In America the cases involving a breach of trust by the directors arise generally out of the management of corporations and not in their formation. These cases frequently involve colossal transactions, and exhibit a scope, grasp and ability for railway management and manipulation that excite the stockholder's admiration fully as much as his indignation.

It is a curious fact that the American talent for organization, executive management and the invention and adoption of means to ends — a characteristic talent that formerly was engrossed in the political affairs of the nation — is now very largely engaged in the development and management of the American railroads. With commendable energy, enterprise, daring and sagacity the American railway has been built, improved, consolidated and perfected, frequently far in advance of even the remarkable growth of the country itself. For the most part this work has been done honestly, efficiently and creditably. But not always has this been the case. The ingenuity and fruitful cunning of adroit, experienced and unscrupulous talent have plundered and robbed the corporations and the stockholders, and have brought reproach on the management of the American railway. Great fortunes have been accumulated by "wrecking" great corporations. Railroads which were capable of earning a fair return upon the capital invested have been rendered insolvent by the fraudulent management and illegal gains of the corporate officers. The plans, devices and methods of accomplishing this result have been systematized and elaborated to a degree equal to the great resources and fertility of mind employed in their execution. It is the purpose of this part of the present work to explain, so far as is possible, the methods of those frauds, and to point out the remedy for the wrong.

§ 644. The three classes of stockholders' wrongs herein—The corporation is ordinarily the party to remedy these wrongs.—Stockholders' wrongs, arising from a breach of trust by directors, a majority of the stockholders or third persons, are clearly divisible into three classes. They are, first, fraudulent acts; second, ultra vires acts; third, negligence of corporate directors.

There is another class of grievances — that of internal dissensions in the corporation and dissatisfaction with its policy and acts. These, however, are *intra vires* of the directors or majority of the stockholders. The law gives no remedy for such dissensions, since the stockholder has the corporate elections as a remedy, and since

¹ This is the subject of this chapter. ³ See ch. XLIL

² See ch. XL. (57)

the majority are to rule so long as they do so without fraud and within the powers of the corporation. So also as regards the usual suits which a corporation might bring against third persons. the decision of the board of directors is binding.2

These frauds, ultra vires acts and acts of negligence are injuries to the corporation; and the corporation is ordinarily the party to bring suit to rectify them. The frauds, ultra vires acts and negligence of directors do not affect the stockholder directly: but they affect the stockholders indirectly by decreasing the corporate assets, and thereby affecting the value and privileges of the stock. Accordingly, it is the duty and right of the corporation to bring suit to remedy these wrongs, just as it is the duty and right of the corporation to bring suit to remedy an ordinary trespass, conversion or fraud, whereby third parties injure the corporate property and interests. That a corporation may bring suit to remedy the frauds, ultra vires acts or negligence of its trustees or directors was the decision of Lord Chancellor Hardwicke, in 1742, in the case of The Charitable Corporation against Sutton.3

§ 645. But the corporation failing to do so, a stockholder may bring the action .- During the next hundred years, however, corporations having a capital stock and stockholders came into existence and rose into prominence. The large capital and great profits of many of these corporations led to frequent frauds, breaches of trust and illegal acts on the part of the directors. It was the duty of the corporation to bring suit to remedy these wrongs. But it gradually became apparent that frequently the corporation was helpless and unable to institute the suit. It was found, where the guilty parties themselves controlled the directors and also a majority of the stock, that the corporation was in their power, was unable to institute suit, and that the minority of the stockholders were being defrauded of their rights and were without remedy: and it became apparent that there was a wrong which had no remedy. The time had come when the minority of the stockholders of a defrauded corporation, the corporation itself being controlled by the guilty parties, must be given a standing in court for the purpose of taking up the cause of the corporation, and in its name and stead bringing the guilty parties to an account. Accordingly, in 1843, in the leading case of Foss v. Harbottle, a stockholder brought suit in the name of himself and other defrauded stockholders, and

¹See ch. XLI.

² See § 750, infra.

³² Atk., 400, the court saying: "Nor will I ever determine that a court of such abuses, see § 635, supra. equity cannot lay hold of every breach

of trust, let the person be guilty of it either in a private or public capacity." As to the power of the state to remedy

⁴² Hare, 461.

for the benefit of the corporation, against the directors, for a breach of their duty to the corporation. This case was decided against the complaining stockholders on the ground that the complainant did not prove that the corporation itself was under the control of the guilty parties, and that it was unable to institute the suit. court, however, broadly intimated that a case might arise when a suit instituted by the defrauded stockholders would be entertained by the court and redress given. Acting upon this suggestion, and impelled by the utter inadequacy of suits instituted by the corporation, defrauded stockholders continued to institute these suits and to urge the courts of equity to grant relief.1 These efforts were unsuccessful in clearly establishing the rights of stockholders herein until the great cases of Atwood against Merryweather, in England, in 1867, and of Dodge v. Woolsey, in this country, in 1855.3 These two great and leading cases have firmly established the law for both England and America, that where corporate directors have committed a breach of trust either by their frauds. ultra vires acts or negligence, and the corporation is unable or unwilling to institute suit to remedy the wrong, a single stockholder may institute that suit, suing on behalf of himself and other stockholders and for the benefit of the corporation, to bring about a redress of the wrong done directly to the corporation and indirectly to all the stockholders.4

The rule as formulated and enounced therein has been repeated, applied, explained and extended by subsequent cases and by text-books until a system of jurisprudence may be said to be based thereon. That system is the subject of the present fourth part of

1 Mozley v. Alston, 1 Phil. Ch., 790 (1847), where the court said there is "no reason assigned why the corporation does not put itself in motion to seek a remedy;" Lord v. Governor, etc., of Copper Mines, 11 Phil. Ch., 745 (1848), where the court refused relief "because the acts were capable of confirmation" by the majority; Gray v. Lewis, L. R., 8 Ch., 1035, 1050 (1873). See, also, MacDougall v. Gardiner, L. R., 1 Ch. D., 13 (1875), in regard to the principle of law decided by these cases.

²L. R., 5 Eq., 464.

318 How., 331. The case of Hawes v. Oakland, 104 U. S., 450 (1881), is perhaps of greater importance than even Dodge v. Woolsey, and may take the place of the latter.

⁴ It is to be noticed that long prior to these cases it had been held by the courts in various cases that a stockholder's action herein would lie, but the principle was not clearly established until the foregoing decisions were made. Thus, in New York, as early as 1832, in the case of Robinson v. Smith, 3 Paige, 222 (1832), the remedy was declared to exist. In the early case of Preston v. Grand Collier Dock Co., 11 Sim., 327 (1840), a bill by a stockholder in behalf of himself and others to render certain persons liable as stockholders, they having subscribed in order to get a charter and then declared that they subscribed as trustees for the corporation, was snetained.

this work.¹ Stockholders are not liable for libel and slander by reason of allegations in their suit against directors for fraud. Not even a director who was not a party can sue them for libel.²

§ 646. The facts and conditions which allow and sustain a stockholder's suit herein.— Before a stockholder can sustain a suit to remedy the frauds, ultra vires acts or negligence of directors, he should be certain that three distinct facts or conditions exist in his favor. These are, first, that the acts complained of are such as amount to a breach of trust, and such as neither a majority of the directors nor of the stockholders can ratify or condone; second, that the complaining stockholder himself is free from laches, acquiescence or ratification of the acts to remedy which the suit is brought; third, that the corporation has been requested and has neglected or refused to institute the suit; that the suit is instituted by bona fide stockholders as complainants, and that the corporation and the guilt parties and other proper parties have been made defendants.

B. FRAUDS OF CORPORATE DIRECTORS, OF A MAJORITY OF THE STOCK-HOLDERS OR OF THIRD PERSONS, TO REMEDY WHICH A STOCK-HOLDER MAY BRING SUIT.

§ 647. Different methods of perpetrating these frauds.—The various ways in which stockholders are generally defrauded out of their legal rights in a corporation are described in subsequent sections of this chapter. These, however, are the older and more easily-remedied wrongs. The principles of law governing them are known to those who contemplate such frauds. Consequently, new plans and methods of circumventing the law are being constantly devised. There is a continual contest between the courts in branding certain acts as frauds and the unscrupulous corporate officers in forming new and unknown methods of defrauding the corporation and stockholders. Some of these devices vary little from the older ones, but others are new and are evolved by the fertile resources of the misdirected talent of modern times.

Thus, a frequent fraud is perpetrated by withholding or improperly increasing dividends in order that the corporate managers may cause fluctuations in the price of the stock, and by speculation in the market enrich themselves thereby. They exist also

¹See, also, Mason v. Harris, L. R., 11 Ch. D., 97 (1879).

² Runge v. Franklin, 10 S. W. Rep., 721 (Tex., 1889).

³This subject is treated in the remainder of this chapter and in chapter XL.

⁴ See ch. XLIV. ⁵ See ch. XLV.

⁶ It probably was by reason of such frauds that the New York legislature in 1884 passed the act (ch. 223) prohibiting directors from selling stock "short." For various instances of frauds herein,

when the corporate statements of its condition and business are garbled and arranged so as to mislead the investing public. A favorite modern device is the purchase, by corporate officers, of the stock and bonds of another corporation, and then by a consolidation of the two corporations, to the ruin of the former and the enrichment of the holders of the stock and bonds of the latter. Still another method is the diversion of traffic from a corporation, or a use of its income for improvements, whereby its dividends are cut off, until the managers have purchased the stock and bonds at a price far below the real value. These various frauds, and many others which might be enumerated, are discovered, and exposed with great difficulty, and generally at great expense and delay. The courts of equity are ready and reliable in remedying the wrong whenever the fraud can be proved. But in the fact that the proof is concealed or destroyed, and generally beyond the reach of the defrauded stockholder, lies the safety of the guilty parties.

§ 648. Directors as trustees.—It is frequently said, both in the cases and in the text-books, that the directors of a corporation are practically trustees, with the whole body of the stockholders as cestui que trust. This principle of law has been useful as a method of ascertaining what acts of directors constitute a fraud, and what remedies may be applied. These fraudulent acts and remedies have been quite accurately defined and ascertained. New methods and devices, however, are constantly being devised by unscrupulous directors and managers. There will be much doubt, confusion. inconsistency and difficulty in working out the questions which will arise; but there can be no doubt of the result if courts of equity are allowed the same freedom, fearlessness and power of searching and circumventing all frauds that characterized the origin of the courts themselves.2

see, also, Lindley on Partnership, 588,

¹ For a vivid description of a number of these devices to defraud stockholders and the public generally, see "An Investor's Notes on American Railroads," by Swann, p. 29 (1886). Concerning the subject of frauds on stockholders and creditors, see Cook on The Corporation Problem, pp. 80-96.

²That directors occupy the position of trustees towards the stockholders, see European, etc., R'y Co. v. Poor, 59 Me., 277 (1871); Koehler v. Black, etc., Co., 2 See, also, Green's Black, 715 (1862).

ing many cases. Cf. Smith v. Anderson, L. R., 12 Ch. D., 247 (1880); Imperial Hotel Co. v. Hampson, L. R., 23 Ch. D., 12; Angell & Ames on Corp., § 312, etc.; Pierce on R. R., 36-44. In Wasatch Min. Co. v. Jennings, 15 Pac. Rep., 65 (Utah, 1887), the court well said in reference to corporate directors: "Courts of equity bave carefully refrained from defining the particular instances of fiduciary relations in such a manner that other and perhaps new cases might be excluded." The corporation, however, stands in no fiduciary relation towards its stockholders. Karnes v. Rochester. Brice's Ultra Vires (2d ed.), p. 478, cit. etc., R. R. Co., 4 Abb. Pr. (N. S.), 107,

§ 649. Director or other corporate officer interested in construction company - Contracts between a director and his company .-The law is well settled that a director cannot as against the dissent of a single stockholder become a contractor with the corporation, nor can he have any personal and pecuniary interest in a contract between a third person and the company of which he is a director. The director cannot be interested in the construction company at the time the contract is made, nor subsequently: and it is immaterial that the contract was fair, or even to the advantage of the corporation. The corporation upon discovering the fact that the director is interested in the construction company may compel him to pay over to the corporation all profits that he has derived from the construction contract.² If the company con-

As stated in Hovle v. The Railroad Company, 54 N. Y., 314 (1873), whether a director of a corporation is to be called a trustee or not, in a strict sense, there can be no doubt that his character is fiduciary. Fougeray v. Cord et al., 24 Atl. Rep., 499 (N. J., 1892); Wickersham v. Chittenden, 28 Pac. Rep., 788 (Cal., 1892).

¹ Port v. Russell, 36 Ind., 60 (1871), where an injunction was granted against the payment by a plank-road company of money to a construction company of which a director of the former was a member. The court said that the three leading American cases on the subject of frauds by directors are Michaud v. Girod, 4 How., 503 (1845); Cumberland Coal Co. v. Sherman, 30 Barb., 553 (1863), and id., 20 Md., 117; and Hoffman Steam Coal Co. v. Cumberland Coal Co., 16 Md., 456 (1860); and in England the case of Aberdeen R'v Co. v. Blaikie, 1 Macq., 461 (1853). Where two contractors cause a railroad corporation to be formed, in which one contractor became a director and the other directors are clerks of the second contractor, and the construction contract is made with these two by means of "dummy" intermediaries, at an improvident price, one of the contractors cannot compel the other to divide the profits. Jackson v. McLean, 86 Fed. Rep., 213 (1888). A president is

personally liable on loans by his bank to an insolvent person with whom he has other interests. First Nat'l Bank v. Reed, 36 Mich., 263 (1877). A waiver of the statute of limitations by the board of directors is illegal where the party benefited was a director and was present when the resolution was passed. Lowndes v. Garnett, etc., Co., 33 L. J. (Ch.), 418 (1864). Although the officers of a railroad company take lands in their name which are donated to the railroad, yet the railroad cannot compel them to give up the lands, if the railroad company had no power to acquire such lands. Case v. Kelly, 133 U. S., 21 (1890).

² It is illegal for directors to be stockholders in a construction company to which a construction contract is let. Gilman, etc., R. R. v. Kelly, 77 Ill., 426 (1875). See, also, Bayliss v. Lafayette, M. & B. R. R. Co., 8 Biss., 193 (1878); Paine v. Lake Erie, etc., R. R. Co., 31 Ind., 283 (1869); Flint, etc., R'y Co. v. Dewey, 14 Mich., 477 (1866), where a director had become interested in the construction work after the contract had been given. To same effect, see Thomas v. Brownville, etc., R. R. Co., 109 U. S., 522 (1883), rev'g 2 Fed. Rep., 877, where, however, it is held that bonds issued to a construction company in which a director is interested cannot be altogether repudiated, but are valid to the extent

tracting with the corporation secretly gives to the contracting agent of the latter a subcontract for the construction work, the corporation may rescind the whole contract and recover back the money it has paid out thereon.¹ Nor is a contract valid and en-

of the actual value of work done. See, also, Rvan v. Leavenworth, etc., R'v Co., 21 Kan., 365 (1879), holding also that a stockholder in a corporation which is a stockholder in the defrauded corporation may sue to remedy the wrong to the latter: European, etc., R'v Co. v. Poor. 59 Me., 277 (1871). See, also, Risley v. Indianapolis, etc., R. R. Co., 62 N. Y., 240. 248 (1875); Whitman v. Bowden, 2 S. E. Rep., 630 (S. C., 1887), where a building committee of a joint-stock company secretly contracted with themselves. Where the president in order to get control of the corporation causes a meeting of the beard of directors to vote stock in payment for services and property whose value is much less than the par value of the stock, the stock being voted to outside parties but thereafter secretly transferred to the president, a stockholder may compel him to return the stock to the corporation for cancellation. Such an issue is also illegal by the statutory law of the state. Perry v. Tuscaloosa, etc., Co., 9 S. Rep., 217 (Ala., 1891). In Lewis v. Meier, 14 Fed. Rep., 311 (1882), the remarkable decision is made that the corporation cannot have such a contract set aside, since the corporation is responsible for the frauds of its directors, and hence both parties are in pari delicto. The president of a packet company may take a centract for carrying mails and may bave the service performed by the packet company, he paying it therefor. He is not liable to it for his profits, he having endeavored first to get the contract for the company. Clubb v. Davidson, 8 S. W. Rep., 545 (Mo., 1888). Where one of the common council and of the committee granting a street railway franchise to individuals who convey the same to a corporation becomes a stockholder in that corporation as soon as it is formed.

the franchise is void as having been fraudulently obtained. Finch v. Riverside, etc., R'y, 25 Pac. Rep., 765 (Cal., 1891). Where an agent to sell is able to sell for more than he accounts for to his principal, the latter cannot recover the difference unless the sale was actually made. Edison v. Gilliland, 42 Fed. Rep., 205 (1890). Where the rolling stock is purchased by the directors and in the name of a trustee of a car trust, he being merely a figure-head, payments being made from the funds provided for the building of the read under the construction contract, the court held that there was such a mingling of the funds and of the interests of the directors as directors with their interests as purchasers of the rolling stock, that the title to the rolling stock passed to the company and the car trust was invalid. The court said: "Any arrangement by which the road is equipped with rolling stock belonging to another corporation should be distinct, unequivocal and above suspicion." McGourkey v. Toledo, etc., R'y, 146 U.S., 536 (1892).

1"I take it, according to my view of the law of this court, to be clear that any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal cegnizable in this court," Panama, etc., Tel. Co. v. India Rubber, etc., Tel. Works Co., 32 L. T. (N. S.), 517 (1875). In this case the secret subcontractor was the agent and engineer of the corporation. He received a commission for his work, and the work was to be accepted subject to his approval. The case of Currier v. N. Y., West Shore, etc., R. R. Co., 35 Hun, 355 (1885), goes still further, and holds that a stockholder may compel the contractors to disgorge when they obtain the contract with the corperation through their associates or forceable against the corporation where the parties contracting with the corporation have given to the directors of the corporation a secret interest in the profits of the contract.\(^1\) The circumstances may be such, however, as will vary this rule. Thus, where the director was a surety for the contractor and the latter failed, the former, who finished the construction work under compulsion by the company, may set up its acquiescence as a bar to its suit to recover from him the profits of the transaction.\(^2\) So, also, where a director purchased an interest in the construction contract after it had been entered into, but sold that interest before any work was done thereunder, the illegality of his connection with the construction company cannot affect the legality of his sale of that interest.\(^3\)

The contracts between a director and the corporation are voidable, and not void. Accordingly, if none of the stockholders object to such a contract it is legal.⁴

hirelings being made directors. An agreement of an attorney to share his fees with a director who votes and aids him in getting the company's business is void. The courts will not compel the attorney to carry out the agreement. All parties are left as they are found by the law. Attaway v. Third Nat'l Bank, 5 S. W. Rep., 16 (Mo., 1887). See, also, Lindley on Partn., 590. Where the managing director of the Union Pacific Railroad caused a contract for its construction to be given to a person who acted as his agent, and the director then formed the Credit Mobilier company, a Pénnsylvania corporation, and had the construction contract assigned to it, and all the stockholders of the railroad were invited to become stockholders in the latter company, and all the facts herein were more or less known to all parties, a court of equity refused to enjoin the Credit Mobilier from collecting the contract price of the construction work. Union P. R. R. Co. v. Credit Mobilier. 135 Mass., 367 (1883). But a stockholder may be interested in the construction company and bonds be issued to him, even though he owns a majority of the stock and thereby has control. Porter v. Pittsburgh, etc., Co., 120 U.S., 649, 670. Although an assistant engineer of the company is secretly interested with

the contractor in the profits of the construction, yet where the former had nothing to do with the letting the contracts or accepting the work, and merely testified in an arbitration in the settlement, but did not testify falsely, the parties need not give up their profits. Union R. R. Co. v. Dull, 124 U. S., 173 (1888).

¹Wardell v. Railroad Co., 103 U. S., 651 (1880). A person who brings about a contract whereby the president obtains a secret profit in a corporate contract cannot recover for his services. Van Valkenburgh v. Thomasville, etc., R. R. Co., 4 N. Y. Supp., 782 (1889).

² Kelley v. Newburyport, etc., R. R. Co., 141 Mass., 496 (1886).

³ Barnes v. Brown, 80 N. Y., 527 (1880).

⁴ If all parties assent to a guaranty by the company of bonds and stock in another company owned by directors of the first company, such guaranty, being in consideration of a lease, will not be set aside. Barr v. N. Y., etc., R. R., 125 N. Y., 263 (1891). Creditors cannot object to a contract between the corporation and a director where the stockholders have assented thereto and the contract is a fair one. Welch v. Importers'. etc., Bank, 122 N. Y., 177 (1890). Where neither the corporation nor any stockholder objects, it is legal for the direct-

§ 650. Secret gifts to directors from persons contracting with the corporation.—It is a well-established principle of law that a director commits a breach of trust in accepting a secret gift or secret pay from a person who is contracting or has contracted with the corporation, and that the corporation may compel the director to turn over to it all the money or property so received by him. Thus, an agreement of a third person to pay a certain sum to a director if a certain location of a railroad is adopted, or an agreement to allow him to participate in the profits derived from such location, is not an enforceable contract.\footnote{1} So. also, where a director receives

ors to have any interest in the profits of a contract for the construction of the road, and they may compel the contractor to pay over to them their part of the profits. The contract was voidable, not void. Robinson v. McCracken, 52 Fed. Rep., 726 (1892). Bonds issued at their full par value to the president in payment for work done by him under a contract between himself and his company are valid and enforceable where all the stockholders assented to such contract. Arkansas, etc., Co. v. Farmers', etc., Co., 22 Pac. Rep., 954 (Colo., 1889). Where all the stockholders unite in the issue of watered stock to the president for his own use, and assent to a contract between him and the company, the corporation itself cannot subsequently complain. Id. The letting of a construction contract to one who owns ninety-nine one-hundredths of the stock, in payment for such stock, is legal, although he as president issues it to himself, where a bona fide board of directors ordered it in the usual discharge of their duties. The fact that the contractor received stock and bonds four times in par value the value of the work is not fatal where no fraud is alleged and the actual cost of the work is not alleged. But where the contractor then entered into a contract whereby the mortgage was to be foreclosed, and he was to participate at the sale, all for the purpose of cutting off other creditors, he is liable to them. Cleveland, etc., Co. v. Crawford, 9 R'y & Corp. L. J., 171 (Chicago, 1891). In the case McGourkey v. Toledo, etc., R'y, 146

U. S., 536 (1892), the court, speaking of a contract in which the directors were interested, said: "Did the vice of these contracts lie in an attempted concealment of the actual facts, as is frequently the case where preferences are secretly reserved in assignments, there would be much force in this suggestion: but if it inheres in the very nature of the contract.-if there be a thread of covin running through the web and woof of the entire transaction,-in other words, if the purpose be unlawful, it is not perceived that an open avowal of such purpose makes it the less unlawful. We do not wish to be understood as saving that the transaction in question necessarily involved actual fraud on the part of those participating in it." A contract between the president and a third party from whom the company buys lumber that such third party shall pay him a commission is not illegal per se. president may collect such commissions unless it is shown that the agreement was concealed from the corporation or that the president was exercising some discretion or trust. Jameson v. Coldwell, 31 Pac. Rep., 278 (Ore., 1892).

¹ Bestor v. Wathen, 60 Ill., 138 (1871); Linder v. Carpenter, 62 Ill., 309 (1872); Fuller v. Dame, 18 Pick., 473 (1836), holding that a promissory note given therefor is void. See, also, Union Pac. R. R. Co. v. Durant, 1 Cent. L. J., 582 (U. S. C. C., 1874, per Dillon, J.), holding that where the president uses his power oppressively and by threats to compel citizens to convey lands to him for the coma commission from one who obtains a loan from the corporation through the director's influence, the latter may be compelled to pay over the commission to the corporation.¹

A similar rule was applied where a director of an insolvent insurance company accepted a secret gift for re-insuring the company's risks in a certain other insurance company. And, in general, whenever an officer or agent of the corporation accepts a secret gift or participates in the profits of a contract with the corporation, the corporation is entitled to the gifts or profits, and a stockholder may bring the suit to compel the officer or agent to pay over.

pany, the court will decree a reconveyance to the grantors; Holloday v. Patterson, 5 Oreg., 177 (1874), where an agreement to pay money to a director and president of a railway if a depot was located in a certain place was held unenforceable. A subscription, however, conditioned upon the location of a depot is valid. See § 83. Cf. § 682, infra. In the case of Cook v. Sherman, 20 Fed. Rep., 167 (1882), the court refused to enforce specifically a contract whereby corporate officers agreed to purchase lands, the purpose of all the parties being to influence thereby the location of the railroad. 129 U.S., 642 (1889).

¹ Farmers' & M. Bank v. Downey, 53 Cal., 466 (1879); Imperial, etc., Ass'n v. Coleman, L. R., 6 H. L., 189 (1873).

² Bent v. Priest, 86 Mo., 475 (1885); Gaskell v. Chambers, 26 Beav., 360 (1858), where the director received a secret gift for bringing about a consolidation. *Contra*, if all assented. Southall v. British, etc., Assoc., L. R., 6 App., 614 (1871).

³Where the incorporating act required all the proceeds of sales of lots by a cemetery company to be used for embellishments, and the directors proceed to buy land for a consideration of \$500,000 in bonds, of which bonds \$480,000 are turned back hy the vendor to the directors, who divide them among themselves, the bonds are void in the hands of directors. The directors in this case had erected over the entrance to the cemetery a statue of Immortality and had done so "with

great pomp and solemnity." Campbell v. Cypress, etc., Cemetery, 41 N. Y., 34 (1869). In Tyrrell v. Bank of London, 10 H. L., 26 (1862), a solicitor was compelled to repay with interest a secret gift: General Ex. Bank v. Horner, 39 L. J. (Ch.), 393 (1870), where the manager was paid a large sum in order to obtain his aid to a consolidation scheme. Where the company pays to its solicitor a commission for shares which he induces the president to take, he must repay the commission on the winding up. In re Stapleford, etc., Co., 49 L. J. (Ch.), 253 (1880). A manager who takes secret gifts from parties with whom he contracts for his company must disgorge the same. He also may be dismissed and his contract salary stopped. Boston, etc., Co. v. Ansell, 59 L. T. Rep., 345 (1888). Where corporate agents organize local branch companies on a basis prescribed by the parent company, and the agents demand and obtain from the local company more than the parent company prescribed, the excess belongs to the parent company. Sheridan v. Sheridan Electric L. Co., 38 Hun, 396 (1886), Directors borrowing money from corporation and giving notes therefor cannot defend against notes on ground that a discount thereon was to be allowed to them. Alford v. Miller, 52 Conn., 543 (1865). See Western, etc., Tel. Co. v. Union, etc., R'y Co., 3 Fed. Rep., 721 (1880); and quære, as to the effect of a contract between the complainant and defendant where one of the minor provisions was that the railThe contract being illegal it cannot be enforced by the guilty officer or agent as against the party with whom it is made.

The party paying the bribe may also be held liable in damages to the defrauded party.²

There is another large class of cases, particularly in England, wherein persons who desire to form a company for the purpose of purchasing and working certain property, such as patents and mines, cause their friends to accept the position of directors or agents, and then give them money or stock in compensation therefor. This is still a common practice in business; but the courts have uniformly held that a stockholder or the corporation or a receiver on the winding up may compel such directors or agents to pay over to the corporation the money received, or, if stock was received, then to pay to it the highest price reached by such stock between the time when the gift was made and the time when it was discovered.

way officers were to have free telegraph service for themselves and families. Although the purchasing agent of a railroad company buys coal from a coal company in which such agent owns one quarter of the stock, the dividends received by such agent on such stock may be retained by him, although the railroad company was ignorant of the fact that he was such stockholder, there being no proof of fraud and the coal being sold at a cheaper rate than the going rate. Clark v. American Coal Co., 53 N. W. Rep., 291 (Ia., 1892).

1 "It seems to be illogical to contend that a contract can be avoided as between the officer and the corporation, and yet be held to be valid in favor of the officer against the party with whom he has contracted." Gillig v. Barrett, N. Y. L. J., January 6, 1891. A general manager of a road cannot enforce a contract by which he was to receive stock in another road for aiding the latter in procuring municipal bonds, his aid being due to his influence as general manager. Sargent v. Kansas, etc., R. R., 29 Pac. Rep., 1063 (Kan., 1892).

²The president and managing agent renders his corporation liable for a *bcnus* of stock in another corporation which he gives secretly and corruptly to the

agent of the latter corporation in order to get a contract for the former corporation. Grand Rapids, etc., Co. v. Cincinnati, etc., Co., 45 Fed. Rep., 671 (1891), holding the former corporation liable for the par value of the stock, inasmuch as it was the original issue of that stock.

3 Where a director is required to hold a certain amount of stock, and he takes that stock with a secret agreement by which the promoter is to purchase the stock from the director at a certain price whenever the director so desires. and after the company becomes insolvent the director sells the stock to the promoter at such price and receives the money, the director may be compelled to turn in the money to the corporation. Re North Australian, etc., Co., 65 L. T. Rep., 800, reversing id., 140. A gift by a promoter to a director of a company whilst there are any questions open between the company and the promoter must be accounted for by the director to the company; and the company is entitled to the highest value of the gift at any time between the wrongful act and the time when it came to their knowledge. Edeu v. Ridsdales, etc., Co., 61 L. T. Rep., 444 (1889); Pearson's Case, 25 W. R., 618 (1877), aff'g L. R., 4 Ch. D., 222; S. C., L. R., 5 Ch. D., In a somewhat similar class of cases the person selling to the corporation acts himself as a director and a promoter of the enterprise, and by the aid of other friendly directors controls the corpo-

336 (1877), the court saving: "Whether the purchase was or was not an advantageous one for the company . . is a question wholly immaterial for us to consider: he cannot, in the fiduciary position he occupied, retain for himself any benefit or advantage that he obtained under such circumstances:" Leeke's Case, L. R., 10 Ch. App., 469 (1871); De Ruvigne's Case, L. R., 5 Ch. D., 316 (1876); Ormerod's Case, 25 W. R., 765 (1875), where the director was elected and the gift received even after the contract was made. court said: "If it is lawful that a man may be bought as a director, it must be decided by some one else. I never will decide it;" Weston's Case, L. R., 10 Ch. D., 579 (1879), where the director was held liable for the full price of the stock less what he paid therefor; Clarke's Case, 37 L. T. (N. S.), 222 (1877), where the articles of association allowed the gift, but were held to be fraudulent: McKay's Case, L. R., 2 Ch. D., 1 (1875), where the secretary of the corporation was compelled to pay over; Hay's Case, L. R., 10 Ch., 593 (1875), where the court said: "No agent can in the course of his agency derive any benefit whatever without the sanction or knowledge of his principal; " Re Englefield Colliery Co., L. R., 8 Ch. D., 388 (1877); Emma Silver M. Co. v. Lewis, L. R., 4 C. P. D., 396 (1879), where the mining experts of the corporation were compelled to disgorge; In re Carriage, etc., Assoc., L. R., 27 Ch. D., 322 (1884); Re Drum Slate, etc., Co., 53 L. T., 250 (1885), where the party gave money to the directors. See, also, 55 L. J., Ch., 36 (1886); Madrid Bank v. Pelly, L. R., 7 Eq., 442 (1869), where the directors were held to be liable for the money received by them, but for no more; Nant-y-Glo, etc., Co. v. Grave, L. R., 12 Ch. D., 738 (1878), holding that the corporation may

sue herein the same as a liquidator: Metcalf's Case, L. R., 13 Ch. D., 169 (1879), where a director was held liable for the market value of stock given to him by the person to whom the stock was issued as full paid in consideration of property. There was no evidence that the director acted unfairly or acted as a promoter. He was held liable, although he had sold part of the stock. Where the directors vote money to a promoter, and he invests it in the company's debentures and divides them among the directors, the latter must refund the money so voted, and cannot offset a debt due to them from the company. Ex parte Pelly, L. R., 21 Ch. D., 492 (1882). Money paid to directors by the person selling to the company, in order to induce them to become directors, cannot be retained. Hunt's Case, 37 L. J. (Ch.), 278 (1868). Where the company's agent in negotiating a contract procures a larger sum for the company than it demands, on a secret agreement that it should pay him the increase, he cannot collect it. Owens, Irish Rep., 7 Eq., 235 (1873); aff'd, id., 424. In a case where the owners of property, the promoters, the directors and the solicitor sold to the company property the title to which was bad, and divided the proceeds, each was made to repay the amount received by him. Phosphate Sewage Co. v. Hartmout, L. R., 5 Ch. D., 394 (1877). And see many English cases in Company Law and Practice, by Healey, pp. 543, 544. Directors will be compelled, upon the dissolution of the company, to pay to it the par value of stock which has been presented to them by the promoters in order to induce them to act as directors, even though the arrangement was known to all stockholders; it appearing, however, that stock had been offered to the public without mention

ration; or the guilty party may be merely a promoter and also a director. In any case, unless all persons interested are fully informed of the facts and assent thereto, the promoter, director or vendor may be brought to account.¹

of these facts, although the public did not subscribe for any of the stock. So far, however, as the contract between the promoter and the company disclosed the facts, the directors were protected. Re Postage Stamp, etc., Co., 67 L. T. Rep., 88 (1892).

The same rule has been clearly sustained in America. In Chandler v. Bacon, 30 Fed. Rep., 538 (1887), the president and secretary were held liable for stock received by them secretly from a patentee to whom all the capital stock had been issued for his patent. Re The Drum Slate Quarry Co., Ltd., 53 L. T. Rep. (N. S.), 256 (Ch. Div., 1885). Here a director of a company received from the promoters a present of £1,000 to buy one hundred shares in the company, which was the qualification of a director, the present being expressly stated to be a commission for certain contracts which he was about to enter into at the request of the promoters in relation to the proposed company. The director afterwards took part in making an agreement for the purchase by the company of a quarry of which the promoters were part owners, the carrying out of which was stated in the memorandum and articles of association of the company to be the first object of the coinpany. The company was subsequently wound up. Held, that the director was liable to account to the liquidator for the value of the shares at the value at which they stood at the date he received the present, together with interest at five per cent. from the date of such gift. Re The Carriage Co., 51 L. T. Rep. (N. S.), 286 (Ch. Div., 1884). Here the articles of association of a company provided that each of the first directors (of whom R. was one) must take or hold at least twenty £5-shares within three months of his appointment, which shares might be shares originally issued as fully paid shares or otherwise. It was also provided by a contemporaneous agreement for the payment to the promoters of the company, for preliminary expenses and promotion, of £3,000 in cash and three hundred fully paid shares. Towards the end of the three months the five original directors, in order to qualify for their office, accepted from the promoters, at a board meeting, transfers without consideration of the requisite number of fully paid shares, part of the promotion shares. The company was afterwards ordered to be wound up. It was not disputed that each director was liable to the extent of the par value of his own shares if unpaid for: but all of the directors except R. being unable to pay, it was sought to make R. liable for the whole amount -£500. R. contended that he was not liable for anything, having, since the date of the transfer, advanced £520 to the company, and having since acknowledging his liability paid £100 more to the company, intending it to be as and for satisfaction of the amount due upon his twenty shares. He also urged that in any case there was no joint and several liability under the circumstances. Held, that there was no right of set-off in his favor: that the £100, however it had been intended, had been accepted as a further advance, and not in payment for his shares; and that he must be declared liable for the whole £500.

¹As regards the duties and liabilities of a promoter, pure and simple, see the next section. That a director is disqualified to buy for the corporation from himself, see § 652. The cases now under consideration involve a combination of frauds. Thus, where the owner of property agrees with two persons that if they form a company to pur-

§ 651. Frauds by promoters on the corporation.— A promoter is a person who brings about the incorporation and organization of a corporation. He brings together the persons who become interested in the enterprise, aids in procuring subscriptions and sets in motion the machinery which leads to the formation of the corporation itself.

chase the property he will secretly pay them a certain amount, and they form a company and act as a minority of the directors, and it purchases the property even at a fair valuation, the court, upon corporate insolvency, will refuse to allow the two persons their salaries and will declare their agreement to be a fraud. In re Hereford & Co., L. R., 2 Ch. D., 621 (1876). Where the directors, who were also promoters, had purchased property before the company was formed and then sold to the company at an advance, and induced the public to subscribe by representations that the price paid was the original price paid by them to the original vendors, they must pay the secret profit to the company. Simons v. Vulcau, etc., Co., 61 Pa. St., 202 (1869). Where the directors had purchased property before the company was formed, and then as directors bought it for the company at an advance, the title passing direct from the first vendor to the company, and the directors' interest being concealed, the court held the directors liable to the company for their profit, the suit being brought by stockholders. Hichens v. Congreve, 1 Russ. & M., 150 (1829). Under similar facts and to same effect, Benson v. Heathorn, 1 Younge & C., 326 (1842). A stockholder cannot rescind a subscription for fraud where a person purchased a patent outright on condition that he could resell it, and then proceeded to promote and organize a company and to sell to it the patent at an advanced price, even though he was a director, it being clearly known to all that he owned and sold the patent as his own. Gover's Case, L. R., 1 Ch. D., 182 (1875). Where, however, parties purchase property and

agree absolutely to pay therefor themselves, and not by the issue of the stock of a corporation to be formed, or by the money of that corporation, the fact that they intend to and do then form a company to buy the property from themselves at an advance does not render them liable to the company for the profit. If they had formed the company partially or completely before they purchased, the case might be different. The court referred to the word "promoters," but only to refuse to use it on account of its indefiniteness. The party purchasing the mine and afterwards selling to the company was a director in the latter at the time of purchase. The right to rescind however. was barred by the fact that the company had lost the property, a leasehold. by non-payment of rent. Ladywell, etc., Co. v. Brooks, 56 L. T. Rep., 677 (1887). For a valuable explanation of this case, see, also, 2 R'y & Corp. L. J., 481.

¹ Great difficulty is experienced in determining who is and who is not a promoter. An old English statute defined a promoter as "every person acting, by whatever name, in the forming and establishing of a company at any period prior to the company" being fully incorporated (7 and 8 Vict., ch. 110, § 3). Other definitions are, "one who undertakes to form a company with reference to a given project and to set it going, and who takes the necessary steps to accomplish the purpose." Twyncross v. Grant, L. R., 2 C. P. Div., 469, 541 (1877); Bagnall v. Carlton, L. R., 6 Ch. D., 381, 382, 407 (1877). See, also, New Sombrero Co. v. Erlander, L. R., 5 Ch. D., 118 (1877); Erlanger v. New Sombrero Co., L. R., 3 App. Cas., 1268; Whaley Bridge. etc., Co. v. Green, L. R., 5 Q. B. Div.,

A promoter is considered in law as occupying a fiduciary relation towards the corporation. He is an agent of the corporation, and is subject to the disabilities of such. There are two classes of cases in which he may be guilty of a breach of his duties to the company.

First, where he sells property to the corporation. If he purchased the property before he began promoting the company he may sell to the company at an advance without disclosing his profit. But where the promoter obtains merely an option on property and then causes a company to be formed to which he sells it at a profit he is liable in damages to subscribers for the stock. So also if he

111; Emma Silver Min, Co. v. Lewis, L. R., 4 C. P. D., 396, 407 (1879), where Lindley, J., says: "The term promoter involves the idea of exertion for the purpose of getting up and starting a company (or what is called 'floating' it), and also the idea of some duty towards the company imposed by or arising from the position which the so-called promoter assumes towards it." See, also, In re Great Wheal Polgroath, 32 W. R., 107 (1883), holding that the solicitor was not a promoter; but see Bank of London v. Terrell, 10 H. L. C., 26. An agent of a person selling property to the corporation may be also a promoter of the latter and liable as such. Lydney, etc., Co. v. Bird, 55 L. T. Rep., 558 (1886), reversing L. R., 31 Ch. D., 328. For other definitions, see Ladywell, etc., Co. v. Brooks, supra; Healey's Company's Law and Practice, p. 33, and articles in 1 R'y & Corp. L. J., 27; 2 id., 1. In Emma, etc., Co., v. Grant, L. R., 11 Ch. D., 918 (1878), a promoter is defined as "a trustee, agent or person in a fiduciary position as regards the company - one who has undertaken a duty towards the company of such a character as incapacitates bim from making a secret profit at the expense of the company." "No doubt a very little will make people promoters of a company, if it can be seen that they were really doing something in the way of speculation for their own interest and not acting merely as agents for others." 60 L. T. Rep., 591 (1889). An attorney is not by rea-

son of his employment a promoter, or officer of the company. In re Great Wheal, etc., 49 L. T. Rep., 20. Re Great Western, etc., Co., 54 L. T. Rep., 531, practically overruling Ex parte Valpy, etc., 22 L. T. Rep., 598. Nor is the banker a promoter. Re Imperial, etc., Co., 22 L. T. Rep., 598. See, also, an article in 10 R'y & Corp. L. J., 238.

¹ In the case Brewster v. Hatch, 122 N. Y., 349 (1890), the plan adopted was as follows: The promoters took an option for which they gave \$5,000, and by which they had the privilege of purchasing certain mines at any time within four months for \$135,000. This agreement is set forth in the case. They then issued a prospectus to the public soliciting subscriptions to a corporation thereafter to be formed to purchase the mines for all its capital stock which was to be \$500,000. The stock was offered to the public at forty cents on the dollar. Subscriptions for \$610,000 par value were received, netting \$244,000. The corporation was then formed, the promoters making themselves directors, and the above plan carried out. A subscriber now sues the promoters for damages. The court held that the plaintiff could recover. The defendants were not mere vendors of the stock. The fatal defect seems to have been in the fact that the promoters did not buy the property before offering the stock. On the contrary they merely obtained options and would have abandoned them if the stock had not been taken. Moreover they placed

purchased after he began promoting and then sold to the company, the sale is valid only when he informs the directors that the property belongs to him, and when, also, the directors are competent and impartial judges as to whether the purchase ought or ought not to be made.

the stock before the corporation was organized. All this made them fiduciary agents of the subscribers. If they had been intrinsically vendors of the stock it was admitted that they would not have been liable. In the case South Joulin Land Co. v. Case, 16 S. W. Rep., 390 (Mo., 1891), it was held that a person who secures an option on a property with a view to organize a corporation, and selling the property to it, and who, together with another person employed by him, forms the company, and places the stock on representations that the property cost \$2,000 more than it actually did, and also that certain notes would be included in the sale, but after the company is organized informs the etockholders that the notes were not included, though they were received by himself, is accountable to the corporation for the profits thus realized by himself, as he occupied a position of trust towards the subscribers, and could not make secret profits out of the transactiou. The court said that persons who "project and form a corporation, by soliciting and procuring others to subscribe for and take shares of stock, for the purpose of selling or turning over to the company property which they own, or have a right to acquire by executory contract, do occupy a double position. On the one hand they represent their own interest in respect of the disposition of the property; on the other, they represent the proposed corporation." The court also said that a vendor is a promoter, and is bound to protect the interests of those who ultimately constitute the company "if he assumes to act for them, or if he induces them to trust him or to trust persons who are under his control, and who are practically

himself in disguise. He also assumes such duty if he calls the company into existence in order that it may buy what he has to sell: but he does not assume such duty by negotiating with persons who have themselves assumed that duty, and who are in no way under his influence." Where the person holding an option for the purchase of a mine represents that he is to pay a certain price for the mine, and induces parties to form a corporation and to have the corporation purchase the mine at that price, the corporation may rescind the contract if the actual price paid by such person was much less. But the corporation cannot recover back its expenses. Cortes Co. v. Thaunhauser. 45 Fed. Rep., 730 (1891).

¹ Erlanger v. New Sombrero Co., supra, and L. R., 5 Ch. D., 73; In re Coal, etc., Co., Givens' Case, L. R., 20 Eq., 114; L. R., 1 Ch. D., 182; Lindsay, etc., Co. v. Hurd, L. R., 5 P. C., 221: Emma Silver, etc., Co. v. Grant, L. R., 11 Ch. D., 918 (1878), where the promoter was compelled to disgorge a gift given to him by the vendors of a mine to the corporation, but he was allowed to retain therefrom his disbursements. It is immaterial that the sale was a fair one. The court said: "He must let his company know what profit he has taken, and deal with them, so to say. at arm's length;" South, etc., Iron Co. v. Shaw, W. N., 1879, p. 159; Beck v. Kantorowick, 3 K. & J., 230; Whaley Bridge, etc., Co. v. Green, L. R., 5 Q. B. D., 109 (1879), holding, also, that if the vendor has not yet paid the money to the promoter the corporation may recover it from the former; Whaley, etc., Co. v. Green, supra; Twycross v. Grant, supra, disapproving Craig v. If the promoter conceals the fact that he is selling his own property to the company, the latter may rescind the sale; or, if the promoter was such at the time he purchased the property, the company may recover from the promoter the profit made by him. If the promoter owns the property at the time of forming the company and sells it to the company at an advance over its cost to him.

Phillips, L. R., 3 Ch. D., 722: Kent v. Freehold, etc., Co., L. R., 4 Eq., 588. In Densmore Oil Co. v. Densmore, 64 Pa. St., 43 (1870), the court refused to hold the defendants liable who owned property and formed a company, and sold the property to the company at a profit, without disclosing the original price, but without misrepresenting that price. The court said, however, "that where persons form such an association, or begin or start the project of one, from that time they do stand in a confidential relation to each other, and to all others who may subsequently become members or subscribers; and it is not competent for any of them to purchase property for the purpose of such a company and then sell it at an advance without a full disclosure of the facts. They must account to the company for the profit, because it legitimately is theirs." Where a promoter, after the company is formed, buys land for \$6,000 and sells it to the company at \$12,000, and represents to a subscriber for stock that the land cost \$12,000 originally, the stockholder may recover from the promoter the amount paid for his stock. Short v. Stevenson, 63 Pa. St., 95 (1869). In Rice's Case, 79 Pa. St., 168 (1875), where a promoter elected the directors and sold property to the corporation at an exorbitant price, taking payment in money, stock and bonds, the court refused to allow the bonds upon the winding up. In McElhenny's Appeal, 61 Pa. St., 188 (1869), where a person bought land for \$2,000, and then induced others to join him in organizing a company to purchase it for \$40,000 after he had sold it to them for \$12,000, is liable to account to the company for his part of the \$28,000 profit, but not for

his \$10,000 profit. A person may purchase property and then proceed to form a corporation and sell the property to it an advanced price. He is not bound to disclose his profit, nor is he liable therefor unless he makes misrepresentations. Lungren v. Pennell, 10 Weekly N. of Cas., 297 (Pa., 1881).

¹ Lindsay, etc., Co. v. Hurd, supra: Erlanger v. New Sombrero Co., L. R., 3 App. Cas., 1218; aff'g L. R., 5 Ch. D.. 73 (1877): Ex parte Taylor, L. R., 14 Ch. D., 390; In re Cape Breton Co., L. R., 29 Ch. D., 795. But not if the company is unable to restore the property. where the disability to restore it is due to the company and not the promoter. Addie v. Western Bank, etc., L. R., 1 H. L., Sc., 145; Phosphate, etc., Co. v. Hartmout, L. R., 5 Ch. D., 394; Head v. Tattersell, L. R., 7 Ex., 7; In re Cape Breton Co., supra. The company may rescind as to part if the transaction is severable. Maturin v. Tredinnick, 2 N. R., 514; 4 id., 15. Where a mine was sold to a company for \$30,000, the promoters representing that they did not have any interest therein, and it afterwards was discovered that they received \$20,000 of the price, the corporation succeeded in having the whole purchase set aside and the \$30,000 and interest and expenditures refunded. St. Louis, etc., Co. v. Jackson, 5 Cent. L. J., 317 (1877, St. Louis Ct.).

² In re Cape Breton Co., supra, L. R., 26 Ch. D., 221; Lydney, etc., Co. v. Bird, 55 L. T. Rep., 558 (1886), reversing L. R., 31 Ch. D., 328; Tyrrell v. Bank of London, 10 H. L. C., 26; Benson v. Heathorn, 1 Y. & C. (Ch.), 326; Emma Min. Co. v. Grant, supra; In re Ambrose, etc., Co., L. R., 14 Ch. D., 390.

and then induces persons to subscribe by stating that he made no profit thereby, he is liable in equity to account to them for the injury they have sustained.1

Second, a promoter may commit a breach of trust by accepting a commission or bonus from a person who sells property to the The company may compel him to turn it into the corcorporation. porate treasury.2 or the company may rescind its purchase of the

¹ Getty v. Devlin, 54 N. Y., 403 (1873): id., 70; id., 504 (1877); id., 9 Hun, 603 (1877): Brewster v. Hatch, 10 Abb. N. C., 400 (1881). See, also, chs. IX and XX, supra. In the important case of Ex-Mission, etc., Co. v. Flash, 32 Pac. Rep., 600 (Cal., 1893), where persons purchased land at \$5 an acre, and subsequently proceeded to organize a corporation to purchase it at \$25 an acre, representing to the stockholders that \$25 an acre was the lowest price at which the land could be purchased, it being concealed from the stockholders that one of their number, a large subscriber, was interested in the contract, and that the organizers of the corporation were his agents, the corporation caused to be set aside a mortgage and foreclosure thereof which was given to the promoters in part payment for such land, and the notes will be ordered canceled. In this case it appears that the representation was made that \$25 per acre was the lowest price for which the land could be purchased, and that the subscribers came in "on the ground floor at bed-rock figures." The Solicitors' Journal thus summarizes the law on this subject as it now stands: "Where the promoter had originally bought, not for himself, but for a company to be afterward formed, in such a case it was an ordinary instance of purchase by an agent, and the company would be entitled both to keep the property and to call upon the promoter to repay the profit he had made. But it is for the company to prove this relationship of principal and agent, and also that it existed at the time of the original purchase. Hence, where this

apply, not even although the promoter subsequently becomes a director of the company. In this case it is his duty to inform the company of the profit he is making; and in default they are entitled, if they so choose, to a rescission of the contract. But they cannot affirm the contract and also claim the profits: and if rescission of the contract had become impossible, they seem to have no 3 R'y & Corp. L. J., remedy at all." 143. citing cases.

² Where the promoters receive pay from the contractor, such pay being in excess of their disbursements, the company may compel them to turn in the amount to the company, although all the stockholders and directors knew of the transaction. Mann v. Edinburgh. etc., Co., 68 L. T. Rep., 96 (1892); Hichens v. Congreve, 4 Russ., 562; Beck v. Kantorowicz, 3 K. & J., 230; Phosphate Sewage Co. v. Hartmout, L. R., 5 Ch. D., 394; Bagnall v. Carlton, L. R., 6 Ch. D., 371; Emma Mining Co. v. Grant, supra; Whaley Bridge Co. v. Green, L. R., 5 Q. B. D., 109, holding also that if the bonus has not yet been paid to the promoter the company may claim it from the person contracting with it. Cf. Arkwright v. Newbold, L. R., 17 Ch. D., 301, 319; Lydney, etc., Co. v. Bird, 55 L. T. Rep., 558 (1886), reversing L. R., 31 Ch. D., 328; Albion Steel Co. v. Martin, L. R., 1 Ch. D., 580. The promoter is allowed a reasonable sum for disbursements. Lydney, etc., Co. v. Bird, supra. Cf. Emma Mining Co. v. Grant, supra; Bagnall v. Carlton, supra; South, etc., Co. v. Shaw, W. N., 1879. p. 159. The promoter must disgorge, is not shown, the above rule does not though by his efforts the company paid property. The law is rigid in its protection of the corporation and stockholders.

If the commission or bribe paid to the promoter consisted of shares of stock, then the company may recover from him the amount received by him upon a sale of the shares and all dividends previously received, together with interest; 2 or, if he still holds the shares, the company may recover the highest price which the shares of the company have touched in the interval between the gift and the action, together with interest. The subscriber for stock may sue the directors for fraudulent representations if they knew that the promoter was secretly receiving large illegal profits. Bond-

for the property less than it was worth. Emma, etc., Co. v. Grant, supra. The statute of limitations bars the suit. Metropolitan Bank v. Heiron, 5 Ex. Div., 319, 325. But only from the time when the facts are known to the directors, or, if the directors are also implicated, to the stockholders. In re Fitzrov, etc., Co., 50 L. T., 144. Where promoters, in collusion with the owner of a mine, pay him \$20,000 therefor, and cause him to transfer it to a corporation for \$100,000 of the capital stock, and then induce third persons to buy such stock at par on representations that the mine cost the promoters \$90,000, and then receive from the owner of the mine the proceeds from the sale of the stock, less the \$20,000, the corporation may compel them to pay over the profits to it. Pittsburg Min. Co. v. Spooner, 42 N. W. Rep., 259 (Wis., 1889).

¹ Munson v. Syracuse, etc., R. R. Co., 103 N. Y., 58 (1886); Erlanger v. New Sombrero Co., supra; Lindsay, etc., Co. v. Hurd, supra; Bagnall v. Carlton, supra. Cf. Smith v. Sorby, L. R., 3 Q. B. D., 552, u.

² Emma Min. Co. v. Lewis, L. R., 4 C. P. D., 396.

³ In re Norvah, etc., Co., McKay's Case, L. R., 2 Ch. D., 1 (1875); id., 24 W. R., 49; Pearson's Case, L. R., 4 Ch. D., 222; 5 id., 336; In re Fitzroy, etc., Co., 50 L. T., 144; Nant-y-glo, etc., Co. v. Gravi, L. R., 12 Ch. D., 738; and see § 650, supra; Chandler v. Bacon, 30 Fed. Rep., 538 (1887), where promoters were

compelled, at the option of the corporation, to transfer stock back to it or pay over the amount received by them for stock sold, or to pay to it the market value of stock which they as promoters had received from him to whom all the capital stock had been issued in payment for a patent. The agent of the person who deals with the corporation may recover his compensation from that person, but he cannot recover compensation for improperly influencing the agents of the corporation to make the contract. Lydney, etc., Co. v. Bird, L. R., 31 Ch. D., 328 (1885); Arkwright v. Newbold, L. R., 17 Ch. D., 301 (1881): Davidson v. Seymour, 1 Bosw. (N. Y.), 88 (1857), where the court say: "There was secrecy, applications to individuals, a concealed promise of compensation. and utter ignorance and recklessness as to the competency of the party whose cause he was promoting and whose reward he was to receive,"

⁴ Persons induced to subscribe by a prospectus stating that a certain price was paid for a business, when in fact a large part of that price went as a bonus to promoters, may sue the directors for fraudulent misrepresentations. Capel v. Sinis, etc., Co., 58 L. T. Rep., 807 (1888). Where a promoter induces a person to subscribe and pay for stock by representing that property conveyed by the promoter \$20,000, when in fact it cost him \$14,000, the subscriber may sue the promoter for damages for false representa-

holders cannot complain of promoters in the same way that the corporation may.1

A plaintiff may, upon the trial, be compelled to elect whether he sues to hold the promoters liable for fraud or whether he sues in behalf of all stockholders and for the benefit of the corporation.²

The compromise and settlement of suits between promoters and the corporation will be upheld by the court.³

§ 652. Sales of property by corporate officers to the corporation.—
It is well said in the case of Michaud v. Girod 4 that a person cannot legally purchase on his own account that which his duty or trust requires him to sell on account of another, nor purchase on account of another that which he sells on his own account. He is not allowed to unite the two opposite characters of buyer and seller. Especially is this the rule with corporate directors. If they make sales to the corporation they may be compelled to pay over to the corporation the profit realized by such sales, 5 or the corporation may refuse altogether to complete the contract. 6 Gen-

tions. Teachout v. Van Hoesen, 40 N. W. Rep., 96 (Iowa, 1888). See, also, ch. XX, supra; 60 L. T. Rep., 591 (1889).

¹ Banque, etc., v. Brown, 34 Fed. Rep., 145, 196 (1888). Cf. §§ 42, 44, 735.

² Brewster v. Hatch, 122 N. Y., 349 (1890).

³ Coburn v. Cedar, etc., Co., 138 U. S., 196 (1891).

44 How., 503 (1846).

⁵ Albion Steel, etc., Co. v. Martin, L. R., 1 Ch. D., 580 (1875), holding the director liable to refund profits on contracts made subsequent to incorporation, but not on those made previous to incorporation; Dunne v. English, L. R., 18 Eq., 524 (1874), where two brokers having agreed to divide the profits on a mine to be bought by one and sold by the other, the former compelled the latter to divide a secret profit which the latter had obtained; Benson v. Heathorn, supra, § 650, and other cases therein.

⁶ Coleman v. Second Ave. R. R. Co., 38 N. Y., 201 (1868). Cf. In re Cape Breton Co., 19 W. N., 54 (1884), where the court declined to hold a director responsible for profits made by a sale of property from himself to the company, and declined to rescind the sale,

since the corporation could not restore the property. Where the corporation is insolvent, a director cannot turn in his property in payment of his debt due to the corporation. White, etc., Co. v. Pettes, etc., Co., 30 Fed. Rep., 864 (1887). A purchaser of corporate assets at a receiver's sale cannot claim a leasehold which the president holds to premises which were used by the corporation. Crooked, etc., Co. v. Kenka Nav. Co., 37 Hun, 9 (1885). Directors cannot purchase machinery and then sell it to the company at an advance. Redmond v. Dickerson, 9 N. J. Eq., 507 (1853). In the case of Great Luxembourg R'y Co. v. Magnay, 25 Beav., 586 (1856), where the director purchased for the corporation property secretly owned by himself, the court refused to interfere after the corporation had resold the property without loss. Under the above principle of law the court refused to enforce a contract by a director to furnish railway chairs to his corporation. Aberdeen R'y Co. v. Blakie, 1 Macq., 461 (1853). And in the case of Flanagan v. Great Western R'sy Co., L. R., 7 Eq., 116 (1868), the court refused to enforce a corporate agreement to lease property to a director. Stockholder's bill does not lie to enjoin

erally the director has purchased the property for the express purpose of selling it to the corporation. When such is the case the company may ratify and confirm the transaction, or it may keep the property and recover from the director the profit realized by him, or the company may repudiate the whole transaction, return the property and recover back the purchase-money.^I

Where, however, the directors sell to the corporation at a profit to themselves, but with a full and fair disclosure thereof, and without participating in the acceptance of the property by the corporation, the transaction cannot be impeached afterwards.²

an execution sale of the corporate franchise and property on a judgment obtained against the corporation by a director for property sold to it by him, there being no actual fraud, nor proof of directorship at time of sale. Ward v. Salem St. R'y, 108 Mass., 332 (1871). School directors may be enjoined from selling their property to the district. Appeal of Witmer, 15 Atl. Rep., 428 (Pa., 1888).

¹ Parker v. Nickerson, 112 Mass., 195 (1873), where the directors were held liable for a price paid by the corporation for a boat purchased from another corporation, in which the directors were also the directors and sole stockholders. Held liable to refund all profit above cost of the boat to the vendor corporation. If the corporation has made improvements on land purchased from the director, it cannot compel him to take the land and pay it the price paid him and also the cost of the improvements. Paine v. Irwin, 16 Hun, 390 (1878). Where the corporation secretly agrees to give a subscriber extra stock if he will subscribe for a certain amount, and he subscribes and intends that his subscription shall be used to induce others to subscribe without knowledge of the secret gift, and they do subscribe, he cannot receive from the corporation such extra stock. The contract is void as against public policy. Nickerson v. English, 8 N. E. Rep., 45 (Mass., 1886). A sale of mortgaged property under a power to sell by the mortgagee to a newly-formed corporation in which he

holds stock does not invalidate the sale. though he could not sell to himself. Farrar v. Farrar's Limited, 59 L. T. Ren. 619 (1888). The president of a stockyard company, who takes a lease of property in his own name and then assigns the lease to the company on a guaranty of a large stockholder in the corporation that said president shall have one-fifth of the profits from the use of the property, cannot enforce that gnaranty. Robinson v. Jewett, 14 N. Y. St. Rep., 223 (1888). A director cannot be a partner with the corporation in sharing profits. Rudd v. Robinson, 54 Hnn, 315 (1889).

² Chesterfield Colliery Co. v. Black, 37 L. T., 740 (1878), where the court refused to bold liable for profits a director and a promoter where they had purchased a mine before incorporation and had sold it to the company at a profit. it being clearly stated to the company that a profit was being made, but the amount of that profit not being divulged. Battelle v. Northwestern, etc., Co., 33 N. W. Rep., 327 (Minn., 1887). In St. Louis, etc., R. R. Co. v. Tiernan, 15 Pac. Rep., 544 (Kan., 1887), it is held that a sale, by the directors, of a roadbed to the corporation is legal where all the facts are known to all except a few nominal holders of stock. But a partial disclosure is insufficient. Imperial, etc., Co. v. Coleman, L. R., 6 H. L., 189 (1873), reversing L. R., 6 Ch., 568. Where, upon foreclosure of corporate property, the president and manager of the corporation purchases the property

Moreover, it is within the power of the majority of the stock-holders to ratify and confirm such a transaction where there is no actual fraud involved. The fraud is not an actual one if the director sold at a fair price and did not use his position to induce the corporation to purchase. Such a sale, however, is always a constructive fraud, and is voidable at the option of a majority of the directors or a majority of the stockholders.

There is some difficulty in determining what will constitute a confirmation of such a transaction. If a majority of the directors and of the stockholders, without counting the votes controlled by the director who is interested, favor a confirmation of the transaction, a dissenting stockholder cannot bring suit to set it aside unless he can show the existence of some fraud other than the mere fact that the vendor was a director when he made the sale. If, however, a majority of the stockholders, excluding the votes owned directly or indirectly by the guilty parties, are in favor of bringing the directors to an accounting, greater difficulty arises. The weight of authority holds that the votes of the director as a stockholder are to be counted. If, however, actual fraud is involved, this question is immaterial, since no majority, however large, can ratify actual fraud.

§ 653. Sales of property by the corporation to corporate officers and purchases by corporate officers at foreclosure sales.— One of the most frequent frauds perpetrated upon a corporation and its stockholders is where one or more of the directors purchase property from the corporation directly or indirectly or participate in the profits of such a purchase. The law is well settled that a director's purchase of property from the corporation is voidable at the option of the corporation, even though the directors paid fully as much as or more than the property is worth. This principle of law was fully established by the cases of Cumberland Coal Company against Sherman ² and Hoffman Steam Coal Company against Cumberland Coal and Iron Company.³

at its full value, other judgment creditors of the corporation cannot attack his purchase. Inglehart v. Thousand, etc., Co., 109 N. Y., 454 (1888).

1 See § 662, infra.

² 30 Barb., 533 (1859). The court also held that the purchase by the directors could be ratified only by the unanimous vote of all the stockholders, and that a ratification by proxy would not bind the stockholder himself. S. C., 20 Md., 117.

³ 16 Md., 456 (1860), where a minority

of the directors purchased part of the corporate property at an undervaluation and then sold it to the Hoffman Company, in which they were large stockholders. The court held that the latter was chargeable with notice of the voidable act. This case and the preceding one grew out of the same transaction. See, also, Buell v. Buckingham, 16 Iowa, 284 (1864), holding that the purchase is voidable but not void. It may be avoided, however, without proving any

Similar rules prevail in regard to a director's purchases of corporate property at foreclosure sale thereof. He cannot be a purchaser, either directly or indirectly, at the foreclosure sale. This

actual fraud on the part of the director or injury to the corporation. It is fraudulent per se. See, also, Jones v. Arkansas M. & A. Co., 38 Ark., 17 (1881), involving a scheme where a director purchased at a foreclosure sale and reorganized. A stockholder who did not come in caused the purchase to be set Dennis v. Kennedy, 19 Barb., 517 (1854). Where the directors had purchased corporate property after its sale on a lien, and the purchase by them was held to be fraudulent, the passive connivance of a director renders him liable the same as though he participated. Weetjen v. Vibbard, 5 Hun, 265 (1875). A sale of corporate bonds to a syndicate of which three of the directors are members is valid, the price being adequate. Du Pont v. Northern Pac. R. R. Co., 18 Fed. Rep., 467 (1883), per Wallace, J. Where a director takes for himself the right of the corporation to subscribe for new stock he is liable in damages. Greenfield, etc., Bank v. Simons, 133 Mass., 415 (1882). But corporate creditors cannot have set aside an old sale of land by the corporation to the directors through "dummies," even though the sale was at a totally inadequate price. Graham v. Railroad Co., 102 U.S., 148 (1880). But a sale of an insolvent corporation's property to a director for its full value is upheld when bona fide and advantageous to all. Ashhurst's Appeal, 60 Pa. St., 291 (1869). Director may be trustee in a trust deed executed by his corporation. Bassett v. Moote, etc., Co., 15 Nev., 293 (1880). though a company is insolvent a lease of its property to a director on fair terms is legal, especially where for many years there is no complaint. Pneumatic Gas Co. v. Berry, 113 U. S., 322 (1885). A sale of property of an insolvent foreign corporation, for an insufficient consideration, by the executive committee

to two of the trustees, is void. Third Nat'l Bank v. Elliott, 42 Hun, 121 (1886); aff'd, 114 N. Y., 622. See, also, Reilly v. Oglesby, 25 W. Va., 36 (1884), where the court said: "It is a well-settled priuciple of equity jurisprudence that a party holding a fiduciary relation to trust property cannot become the purchaser of such property, either directly or indirectly: and if he does the sale is voidable, and will be set aside at the mere pleasure of the beneficiaries, although such fiduciary may have paid a full price and gained no advantage. . . . A purchase by or for them at a sale ordered by them, acting in the capacity of directors, . . . would be voidable and would be set aside at the mere pleasure of any stockholder." Where a sale of land is made by the corporation to a director, in order to raise funds to pay debts due to mismanagement, the corporation itself may subsequently cause the sale to be set aside. Crescent, etc., Co. v. Flanner, 10 S. Rep., 384 (La., 1891). Where a director buys land of the corporation at one-tenth of its value, a stockholder may cause the transaction to be set aside. Woodroof v. Howes, 26 Pac. Rep., 111 (Cal., 1891). Where a contract is made by a corporation with a director to sell to the director coal, and the corporation does not fulfill, the director cannot recover damages where the money for the coal was to pay a personal debt of the president, and the director has relieved the corporation from liability. Main, etc., Co. v. Lotspeich, 20 S. W. Rep., 377 (Ky., 1892). A corporation having a leasehold with the privilege to purchase the fee may sell the latter to a director where the company has neither the money nor credit to exercise such privilege. Hannerty v. Standard, etc., Co., 19 S. W. Rep., 82 (Mo., 1892).

is the rule whether the foreclosure is instituted by those interested in the corporation or by third parties. If the director purchases at such a foreclosure sale he holds the property as trustee for the benefit of the corporation and the stockholders. Upon being repaid the price he gave therefor, he must make over the property to the corporation.¹ Thus, where a director who practically con-

¹ Harts v. Brown, 77 Ill., 226 (1875). To same effect, Hope v. Salt Co., 25 West Va., 789 (1885), where the director resold the property at three times its cost to himself. See, also, Jackson v. Ludeling, 21 Wall., 616, 625 (1874), where the directors were part of those who purchased at a foreclosure sale of the corporate property; also, Munson v. Syracuse, etc., R. R. Co., 29 Hun, 76 (1883), where the directors purchased for the purpose of re-organizing the corperation; S. C., 103 N. Y., 58 (1886), where Munson was a director in an insolvent railroad corporation and also a director in a corporation that wished to purchase said railroad, and in behalf of the latter company contracted to purchase the said railroad from the bondholders after the latter should purchase the same at a foreclosure sale. The court refused to enforce the contract; Raleigh v. Fitzpatrick, 11 Atl. Rep., 1 (N. J., 1887), where the directors of a cerporation owning land subject to a mortgage allowed a foreclosure to be made and then purchased at the sale. Foster v. Oxford R. R., 13 C. B., 200. See, also, Allen v. Jackson, 13 N. E. Rep., 840 (Ill., 1887), holding a director who had purchased corporate property at a foreclesure sale liable to former purchasers of that property from the corporation, subject to the mortgage. Where a director purchases property from an insolvent corporation "it devolves on the directors to show that the transaction was made in good faith, and that the sale produced the full value of the property. If they fail to show these facts, creditors are entitled to compel them to account for the full value of the property." Wilkinson v.

Bauerle, 7 Atl. Rep., 314 (N. J., 1886). Sale of property to a syndicate of which a director is a member will not be set aside when the full value was received by the corporation, and the sale was made in order to protect the parties who were sureties for the price to be paid by the corporation for the propertv. Hill v. Nisbit, 100 Ind., 341 (1884). A purchase by a stockholder, however, is legal. Mickles v. Rochester City Bank. 11 Paige, 118 (1844). In Twin Lick Oil Co. v. Marbury, 91 U. S., 587 (1875), a director loaned money to the corporation, took bonds therefor, and had the bonds secured by a mortgage running to a third person as a trustee, and upon a sale by the trustee the director purchased for himself. Directors may purchase at foreclosure sale. Saltmarsh v. Spaulding, 147 Mass., 224 (1888). A director may own bonds and may purchase at the foreclosure sale. The sale is valid even though allowed by the directors from corrupt motives, and this was known to the purchasing trustee. At least the stockholders must offer to redeem before they can do anything. Harpending v. Munson, 91 N. Y., 650 (1883). The president of the company may purchase at the foreclosure sale. He does not thereby become a trustee for the bondholders. Credit Co., etc. v. Arkansas, etc., R. R., 5 McCrary, 23 (1882). Seven years' delay in complaining that the directors issued bonds to themselves for no consideration aud then foreclosed and bought the road in is fatal. Burgess v. St. Louis, etc., R. R., 12 S. W. Rep., 1050 (Mo., 1890). At a reorganization sale a director may purchase in hehalf of a part of the stockholders, and the transaction be upheld trolled the board of directors caused all the earnings of the railroad to be used in improving the property, thereby preventing a payment of interest on the corporate indebtedness and bringing about a foreclosure of the mortgage, the director himself having purchased the bonds secured by the mortgage and having purchased the railroad at the foreclosure sale, the court in an able opinion held that the purchase at the foreclosure sale by the director was voidable. Upon repayment to him of the purchase price he may be compelled to retransfer the property to the corporation, even though another foreclosure will be the result. Third persons who have purchased the road from him with notice stand in no other position than the director himself.

A director cannot purchase corporate property sold under execution,² nor purchase, either in his own name or the name of an-

if the price is a fair one. Hayden v. Official, etc., Co., 42 Fed. Rep., 875 (1890). A director's purchase for the creditors and certain mortgage bondholders of the mortgaged property at a foreclosure sale cannot be set aside by a stockholder five years after the sale, where the road was sold for all it was worth and was badly in debt, and required large expenditures, and there was no possible means of raising more money, and the stockholders knew of the condition of things but made no effort to prevent a sale, and the director offered to allow the stockholders to come into a re-organization, and offered to resell the property for less than what he paid for it. This is the rule even though the property subsequently becomes very valuable. borne's Adm'x v. Monks, 21 S. W. Rep., 101 (Ky., 1893). Where a contractor taking stock and bonds in payment for work subcontracts the work for the stock and then forecloses the mortgage and buys the property in, the subcontractor cannot hold him liable for the stock. McLane v. King, 144 U.S., 260 (1892). An insurance company cannot refuse payment of a loss on the ground that the insurer was a director and had bought the corporate property at a foreclosure sale. Caraher v. Royal Ins. Co., 63 Hun, 82 (1892).

1 Covington & Lex. R. R. Co. v. Bow-

ler's Ex'rs, 9 Bush (Ky.), 570 (1872). In the case of Kitchen v. St. Louis, etc., R'v Co., 69 Mo., 224 (1878), the court says: "Whatever is sufficient to put a person on inquiry is notice; that is, where a man has sufficient information to lead him to a fact he shall be deemed cognizant of it." So, also, where a director agrees to redeem from an execution sale, certain corporate property, on an understanding that he does it for the corporation and his payment is to be a preferred corporate debt, the corporation may redeem long subsequently, even though the director had, after a time, treated the property as his own. Wasatch Min. Co. v. Jennings, 15 Pac. Rep., 65 (Utah, 1887). Where a corporation is liable to an officer on a debt, the officer may purchase at a foreclosure sale property upon which the corporation has a subsequent lien; may pay the prior lien out of the corporate funds; and may hold the title to secure the debt due him. Smith v. Lansing, 22 N. Y., 520 (1860).

² Hoyle v. Plattsburg, etc., R. R. Co., 54 N. Y., 314 (1873). Where the president and a director purchase the corporate property at an execution sale, and agree to convey it to the corporation upon repayment of the amount paid, the corporation may redeem it long subsequently upon payment and reimburse-

other, corporate property sold for the payment of taxes.¹ The corporation may reclaim the property upon payment to the director of the amount he paid therefor. A similar rule applies where a director allows or brings about a forfeiture of a lease which the company holds as lessee, and then takes a new lease of the same property in his own name.² The disability of directors to purchase property from the corporation may restrict their right to subscribe for unissued stock of the corporation.³ There is some difficulty in determining whether this disqualification of a corporate officer to purchase property from the corporation extends to officers other than the president and directors. It has been held to affect the treasurer of the corporation ⁴ and also the cashier of a

ment for improvements made. Wasatch Min. Co. v. Jennings, 16 Pac. Rep., 399 (Utah, 1888). Where in a joint-stock company one member buys all the company's property at an execution sale, though he owes the company more than the price paid, the company is entitled to the property and an accounting lies. Bradberry v. Barnes, 19 Cal., 120 (1861). Where the director of an insolvent corporation buys its property at an execution sale to which he is not a party, he is liable to the corporation for the value of the property less the amount he paid for it. Tobin, etc., Co. v. Fraser, 17 S. W. Rep., 25 (Tex., 1891). The purchase of a boat at judicial sale by the manager of the corporation owning such boat for himself and other stockholders may not cut off the maritime lien of another per-Crosby v. The Lillie, 42 Fed. Rep., 237 (1890).

¹ Smith v. Fagan, 17 Cal., 178 (1860).

² Bengley v. Wheeler, 45 Mich., 493 (1881); Smith v. Bank of Victoria, 41 L. J. (P. C.), 34 (1872). In the latter case the director re-organized and allowed part of the old stockholders to come in. A dissenting stockholder caused the whole transaction to be set aside.

³Where the directors cause treasury stock to be sold to themselves at less than its real value and for the purpose of carrying an election, the court will set the transaction aside as fraudulent. Hilles v. Parish, 14 N. J. Eq., 380 (1862). Where long after the company has com-

menced business it has disposed of its property and is ready to declare a five per cent, dividend, the directors issue to themselves at par that part of the original capital stock which never had been issued, it is a fraud on the remaining stockholders. Arkansas, etc., Soc. v. Eichholtz, 25 Pac, Rep., 613 (Kan., 1891). Where a director issues to himself at par stock belonging to the corporation and which is worth more than par, the transaction is voidable; but if all the stockholders acquiesce therein for a long time, the acquiescence of the executors of a deceased stockholder binds the estate. St. Croix L. Co. v. Mittlestadt. 44 N. W. Rep., 1079 (Minn., 1890). But see Sims v. Street R. R. Co., 37 Ohio St., 556 (1882). See, also, § 65. Cf. Charleston Ins. & Trust Co. v. Sebring, 4 Rich. Eq. (S. C.), 342 (1853), where the directors purchased from the corporation stock which the corporation had previously issued and had purchased for itself. See, also, Parker v. McKenna, L. R., 10 Ch., 96 (1870), and York, etc., R'y Co. v. Hudson, 16 Beav., 485 (1853), holding that upon an increase of the capital stock the directors have no right to make a secret profit in its disposal.

⁴McAllen v. Woodcock, 60 Mo., 174 (1875), holding that the treasurer's purchase of the corporate property at an execution sale thereof is a purchase for the benefit of the corporation. See, also, Parker v. Nickerson, 112 Mass., 195 (1873).

bank.¹ It has also been intimated that a superintendent of the corporation is under the same disability.²

An insurance company's secretary has no right to insure in the company his own property, unless other officers properly approve of it.

§§ 654-656. Reorganization of corporations.— This subject is considered elsewhere.

§ 657. Voting salaries or compensation to corporate officers.— A frequent fraud upon corporations and stockholders is perpetrated by the corporate funds being used to pay salaries and compensation to corporate officers and assistants. It is well-established law that a director is not entitled to any pay for his services to the corporation as a director where there has been no agreement in advance that he shall have a salary.⁵

A salary or back pay voted to a director after the services have been rendered cannot be enforced. It is invalid and void. It is the same as giving away the assets of the corporation.⁶

¹ First Nat'l Bank v. Drake, 29 Kan., 311 (1883); Torrey v. Bank of Orleans, 9 Paige, 648 (1842); affirmed, 7 Hill, 260. ²Cook v. Berlin Woolen M. Co., 43 Wis., 433 (1877). In this case the superintendent's purchase was illegal, inasmuch as one of the directors was a secret partner in the purchase. A corporation may set aside an execution sale fraudulently concealed by its agent, who was interested in the judgment, which fact the purchaser knew. Lang, etc., Co. v. Ross, 18 Pac. Rep., 358 (Nev., 1888). The superintendent and surveyor of a rural cemetery association may purchase from it a large number of lots in the cemetery, although he intends to resell them. Palmer v. Cypress, etc., Cemetery, 122 N. Y., 429 (1890).

³ Pratt v. Dwelling, etc.. Ins. Co., 130 N. Y., 206 (1891). Where the secretary, who is also general manager, buys in the corporate property at an execution and tax sale, he must yield it up to the company upon payment of the amount for which it was sold, and his grantee, who is also in a fiduciary relation, must do the same. San Francisco, etc., Co. v. Pattee, 25 Pac. Rep., 135 (Cal., 1890).

⁴ See ch. LII, infra.

⁵ American, etc., R'y Co. v. Miles, 52

Ill., 174 (1869); Illinois Co. v. Hough, 91 id., 63 (1878); Citizens' Nat'l Bank v. Elliott, 55 Iowa, 104 (1880); Smith v. Putnam, 61 N. H., 632 (1882). A director who receives a salary for certain services cannot recover a further sum for other services, where he was not expressly employed to render the latter services and there was no promise to pay. Acceptance of the service is immaterial. Gill v. N. Y. Cab Co., 48 Hun, 524 (1888). A vice-president cannot recover for extra services where there was no agreement to pay him. Id.

⁶ Bennett v. St. Louis, etc., Co., 19 Mo. App., 349; S. C., 1 West. Rep., 736 (1885); Ogden v. Murray, 39 N. Y., 202 (1868); Blatchford v. Ross, 5 Abb, Pr. (N. S.), 434 (1869); Jones v. Morrison, supra; Maux, etc., Co. v. Branegan, 40 Ind., 361 (1872); Loan Ass'n v. Stonemetz, 29 Pa. St., 534 (1857); Holder v. Lafayette, etc., R'y Co., 71 Ill., 106 (1873), where the director even acted as treasurer; Gridley v. Same, 71 Ill., 200 (1873), where the director was a member of the executive committee. Directors are not liable to account for extra pay voted to a director for his services as an agent. Godbold v. Branch Bank, 11 Ala., 191 (1847). Majority of stockholdThere is authority to the effect that directors cannot vote a salary to themselves even in advance of their services as directors. But it can hardly be said to be the law, even though the directors perform no services except attendance at board meetings; ² and it

ers cannot, on the winding up, vote hack pay to directors. Hutton v. West., etc., R'y Co., L. R., 23 Ch. D., 654 (1883); Northeastern R'v Co. v. Jackson, 19 W. R., 198 (1870), holding a director liable for back salary paid him by vote of the directors, when the statute required such vote to be by the stockholders. In Hall v. Vermont, etc., R. R. Co., 28 Vt., 401 (1856), compensation for taking subscriptions had been voted by the stockholders. After the rescinding of that vote no compensation was allowed, and none was allowed for lobbying the charter through the legislature. A vote by the stockholders of free passes over the road to a director in consideration of his efforts as a promoter before incorporation may be repudiated at any time by the corporation. New York, etc., R. R. Co. v. Ketchum, 27 Conn., 170 (1858). But see St. Louis. etc., R. R. Co. v. Tiernan, 15 Pac. Rep., 544 (Kan., 1887), where back pay to directors for services in promoting and launching the enterprise was voted and upheld. A director cannot collect pay from the company for his services on the executive committee and for his expenses in travel where there has been no resolution passed previous to the services entitling him to the pay. Lafayette, etc., R'y v. Cheeney, 87 Ill., 446 (1877). Directors cannot vote compensation to themselves after the services have been performed. Pfeiffer v. Lansberg, etc., Co., 44 Mo. App., 59 (1890), reviewing at length the cases; Burns v. Commencement, etc., Co., 30 Pac. Rep., 668 (Wash., 1892). A director cannot recover pay for past services even though he devoted considerable time to the affairs of the company and traveled on several occasions in its behalf, his expenses on such occasions having been paid by the company. The court held that the rule that the director was entitled to pay for services rendered clearly outside of his duties as director is subject to the condition "that they were performed under circumstances sufficient to show that it was well understood by the proper corporate officers as well as himself that the services were to be paid for by the corporation," Brown v. Republican, etc., Mines, 30 Pac. Rep., 66 (Col., 1892). Where no salary is attached to the office none cau be recovered. Field v. Union Box Co., 2 Weekly Notes Cas., 426. Nor when the salary is fixed will extra compensation be allowed for extra services. Carr v. Chartiers Coal Co., 25 Pa., 337. a resolution remunerating officers who have been elected to serve without compensation is merely voluntary and revocable. Loan Ass'n v. Stonemetz, 29 Pa., 534. See, also, note 6, p. 927.

A resolution that directors shall receive pay for attendance in the future does not sustain action therefor. It is a promise to give a gratuity, and is not enforceable compulsorily. Dunston v. Imperial Gas Light Co., 3 B. & Ad., 125 (1832). Directors voting stock to themselves in compensation for selling corporate stock are liable for value of the stock upon corporate insolvency. Freeman's Assignee v. Stine, 15 Phil., 37 (1881). Stock issued to directors, on a vote of themselves, in payment for extra services, will be ordered canceled by the court. Jones v. Johnson, 6 S. W. Rep., 582 (Ky., 1888); Collins v. Godfrey, 1 B. & Ad., 956, where a director was not allowed to receive a reward offered for the recovery of stolen property; Kelsey v. Sargent, 40 Hun, 150 (1886), denying this right of the directors to vote salaries to themselves: and see cases in following note.

² Directors may vote themselves a

certainly is not in accordance with the policy of inducing directors to give careful attention to their duties in return for a compensation paid them. It should be added, however, that the better and more prudent way is for the stockholders to vote upon and regulate the compensation of directors. Nevertheless, even without any vote, a director is entitled to pay for extra services which he performed with the consent of the board as general manager. It has been held that he may recover reasonable compensation for his services as superintendent, or attorney in a suit; or secretary and agent; or cashier; but not for services as a promoter; nor for acting as president and master-builder; but might recover for acting as agent of the company.

salary before the end of the year and apply it to their subscriptions. Creditors cannot attack it. Re Wood's, etc., Co., 62 L. T. Rep., 760 (1890). Where directors are allowed a salary by the charter it may be paid out of the capital if no profits are made. Lewis' Case, 26 L. T., 673 (1872).

¹ Eales v. Cumberland, etc., Co., 6 H. & M., 481 (1861). A salary voted to a director by the directors for services as manager is not legal where the charter requires a vote of the stockholders on contracts in which a director is inter-In re State Fire Ins. Co., 36 L. J. (Ch.), 634 (1867). In Benson v. Heathorn, 1 Younge & C., 326 (1842), the court compelled a director to pay back a salary which he had received for acting as "ship's husband" for the company, whose business was the working of vessels. The president cannot bind the corporation by an agreement to pay a director extra compensation. Bailey v. Buffalo, etc., R. R. Co., 14 Hun, 483 (1878); Hodges v. Rutland, etc., R. R. Co., 29 Vt., 220 (1857). A salary voted by a board of three directors to one of their number as general manager is valid at least so far as concerns a person who purchases the stock after the salary has been paid. Clark v. American Coal Co., 53 N. W. Rep., 291 (Ia., 1892). A director who performs services as general manager may recover therefor. Kryger v. Railway, etc., Mfg. Co., 49 N. W. Rep., 255 (Minn., 1891).

² A director who, at the request of the president, superintends the construction of the road, may recover pay therefor. Henry v. Rutland, etc., R. R. Co., 27 Vt., 435 (1855); Chandler v. Monmouth Bank, 13 N. J. L., 255 (1832), where there was even a charter prohibition.

³ Jackson v. New York, etc., R. R. Co., 2 T. & C. (N. Y.), 653 (1874); Santa, etc., Min. Assoc. v. Meredith, 49 Md., 389 (1878); 41 N. W. Rep., 905 (1889).

⁴ Rogers v. Hastings, etc., R'y Co., 22 Minn., 25 (1875). As to secretary, Talcott v. Olcott, etc., Co., 11 Week. Dig., 141 (1880). Contra, Fraylor v. Sonora Min. Co., 17 Cal., 594 (1861).

⁵ National Bank v. Drake, 29 Kan., 311 (1883).

⁶Rockfort, etc., R. R. Co. v. Sage, 65
 Ill., 328 (1872). See 42 N. W. Rep., 982.
 ⁷Levisee v. Shreveport, etc., R. R. Co., 27 La. Ann., 641 (1875).

8 A director and stockholder who by contract with the company is entitled to a certain salary may upon the insolvency of the company prove his claim the same as other creditors. Re Dale, etc., Line, 62 L. T. Rep., 215 (1889). Director may collect reasonable compensation for services and materials given to his company. Greensboro, etc., Co. v. Stratton, 22 N. E. Rep., 247 (Ind., 1889). A director may recover for services rendered. McDowall v. Sheehan, 13 N. Y. Supp., 386 (1891). A salary payable when lands are sold is collectible

The voting of a salary or compensation, however, must be entirely free from fraud, actual or constructive. The vote is illegal if it is carried only by including the vote of the director who receives the salary or pay.¹

Where the board of directors vote large pay to themselves, evidently in bad faith, and with a view to depriving the corporation of more than a reasonable proportion of its net earnings, a dissenting stockholder may file a bill in equity to have the amount recov-

in cash if they are not sold within a reasonable time. Indianapolis. etc., R. R. v. Hvde. 23 N. E. Rep., 706 (Ind., 1890); Cheeney v. Lafayette, etc., R'y Co., 68 Ill., 570 (1873); Shackleford v. New Orleans, etc., R. R. Co., 37 Miss., 202 (1859): Santa, etc., Assoc. v. Meredith. 49 Md., 389 (1878), where he obtained patents and negotiated their sale. ¹ Butts v. Wood, 37 N. Y., 317 (1867), where the vote was set aside, although the salary was for services by the director as secretary and treasurer: Ward v. Davidsou, 89 Mo., 445 (1886), where increased pay was voted to the president of the corporation: Gardner v. Butler, 30 N. J. Eq., 702 (1879); Jones v. Morrison, 31 Minn., 140 (1883); Kelsey v. Sargent, 40 Hun, 150 (1886). A salary voted to the president by a quorum of three directors, two being absent, and the president being one of the three, is not enforceable. Copeland v. Johnson, etc., Co., 47 Hun, 235 (1888); MacNaughton v. Osgood, 41 Hun, 109 (1886), holds that a stockholder cannot cause the vote of salary to be set aside and repayment made merely by proving that the officers voted it to them-He must prove actual fraud. This decision, however, may well be doubted. Where the president presides over a meeting which votes a future salary to himself for life, the salary is illegal although he did not vote. Beers v. N. Y. L. Ins. Co., 66 Hun, 75 (1892). Stock voted to the president as a salary at a meeting where his presence is necessary to form a quorum may be recov-

ered back, but acquiescence for ten

years is fatal. United States, etc., Co. v. Reed, 2 How, Pr. (N. S.), 253 (1885). A stockholder may compel the president to refund a salary voted to himself at an illegal meeting of a part of the directors. Back pay is illegal. Where the president takes part in the proceeding or his vote is essential, the vote of salary to him is illegal. Wickersham v. Chittenden, 28 Pac. Rep., 788 (Cal., 1892). A salary voted to the president at a meeting at which he presides. the minutes showing no dissenting vote. is illegal where he had performed no substantial service, even though he swears that he did not vote. Ashlev v. Kinnan, 2 N. Y. Supp., 574 (1888). A director cannot collect a salary voted to him as general manager, even in advance of the services, where there were only three directors, and the other two were voted salaries, one as vice-president and the other as assistant treasurer. Delay in objecting thereto for some months is no bar to this defense. Mallory v. Mallory, etc., Co., 23 Atl. Rep., 708 (Conn., 1891). Where a company is prosperous the directors may vote increased salaries to themselves. each one refraining from voting when the resolution affecting himself is voted upon. McNab v. McNab, etc., Co., 62 Hun, 18 (1891). In the case of Bagaley v. Pittsburgh, etc., Iron Co., 23 Atl. Rep., 837 (Pa., 1892), a salary to the president, fixed by the president and another director, was upheld where the company was a close corporation. The value of the services of clerks may be determined by a jury.

ered back.¹ And where the chief stockholder, who is president, induces the directors, his "dummies," to vote a large salary to him, the corporation may defeat the officer's action at law to recover it.² It has been held also, where the majority of the stock of a corporation was held by one family, who voted away the corporate profits for salaries, that the minority might call upon a court of equity to remedy the fraud.³

Where for seven years a stockholder who owned a majority of the stock elected himself and two of his dummies as directors of the company and caused the board to vote a large salary to himself as president and manager, and leased to the company his property at a large rental, the salary and rental are illegal and void.⁴

Where persons buying a majority of the stock thereupon take control and vote to the retiring president a large salary for past services, he being one of the persons selling the stock to them, and such salary so paid is credited to the vendees on the purchase price of the stock, the vendees are liable to restore the money so paid.⁵ The president cannot claim a salary for his services where none was voted to him before the services were rendered.⁶

1 Where during eight years all the profits of a turnpike company, amounting to \$20,000, are used to pay exorbitant salaries to the treasurer and secretary, the court will order a repayment of the same with interest. Wayne Pike Co. v. Hammons, 27 N. E. Rep., 487 (Ind., 1891); Blatchford v. Ross, 54 Barb., 42 (1869): In the case of 5 N. Y. Supp., 305. Hodges v. Paquett, 3 Oreg., 77 (1869), the court refused to interfere though fraud was charged, in that the directors credited large bills to themselves, and paid themselves large sums for services, had destroyed the business, and had wasted the funds and property. This case, however, has met with universal disapproval, and must be considered as contrary to law.

² Davis v. Memphis City R. R. Co., 22 Fed. Rep., 883 (1885). In the case of Hubbard v. New York, etc., Co., 14 Fed. Rep., 675 (1882), wherein a person contracted in advance to become a director and superintendent at a remuneration of one-third of the profits of the business, the court refused to uphold the agreement, and said the contract is to be "construed in the same manner as if he was actually a director at the time of its inception, and as if it was made with him while he was a director."

 3 Sellers v. Phœnix Iron Co., 13 Fed. Rep., 20 (1881).

⁴Where the company had failed to pay its dividends by reason of such acts, a court of equity, upon the suit of another stockholder, ordered the president to account, and appointed a receiver of the company and directed that its affairs be wound up. Miner u. Belle Isle Ice Co., 53 N. W. Rep., 218 (Mich., 1892).

 5 Ellis v. Ward, 25 N. E. Rep., 530 (Ill., 1890).

6 The president and directors who vote back pay to him and cause corporate notes to be issued therefor are liable to the company therefor, but directors not taking part in the issue of the notes are not liable. Metropolitan, etc., R'y v. Kneeland, 120 N. Y., 134 (1890); Merrick v. Peru Coal Co., 61 Ill., 472 (1871); Holland v. Lewiston, etc., Bank, 52 Me., 564 (1864); Burrill v. Calendar, etc., Co., 50 Hun, 257 (1888); Commonwealth Ice Co. v. Crane, 47 Mass., 64 (1843), where it was even proved that the former president had a salary; Kilpatrick v.

A person who is appointed and acts as secretary, and is neither a director nor a stockholder, is entitled to pay although the corporation never agreed to pay him.1

Penrose, etc., Co., 49 Pa. St., 118 (1865), where the president was also the treasurer. Salary of president ceases upon a discontinuance of corporate business by a sale of all its property. Long Island T. Co. v. Terbell, 48 N. Y., 427 (1872). The president is not entitled to a preference in payment under a statute giving to "laborers" of an insolvent corporation such a preference. England's Ex'rs v. Beatty, etc., Co., 41 N. J. Eq., 470 (1886). Note is not collectible by a principal whose agent made the note as president of a corporation, where the consideration therefor was unpaid salary of the president, and the note was ratified by the corporation only by the casting vote of the president. Chamberlain v. Pacific, etc., Co., 54 Cal., 103 (1880), Under a peculiar charter provision it was held in Grundy v. Pine, etc., Co., 9 S. W. Rep., 414 (Kv., 1888), that there was an implied obligation of the corporation to pay its president a salary. A salary as fixed for a preceding year gives no right to a salary for prior years. Smith v. Woodville, etc., Co., 66 Cal., 398 (1885). Where directors buy the stock owned by the president and pay for it by checks on the company, and a part of the sum so drawn they by resolution cause to be charged to the president's salary for past services, they are liable to the receiver for such salary. The president, who did not claim any salary nor know that it entered into the amount paid to him, is not liable. Ellis v. Ward, 20 N. E. Rep., 671 (Ill., 1889). Stock may be issued to the president in payment of past salary and debts. Reed v. Hayt, 4 R'y & Corp. L. J., 135 (N. Y., 1888), holding, also, that though the president himself was one of the three directors voting for the same, yet that long acquiescence cures any right to object. Aff'd, 109 N. Y., 659. A meeting of four legally elected and three ille-

gally elected directors of a corporation is not such a meeting as sustains an action for salary by the president who was elected by them. Waterman v. Chicago, etc., R. R., 29 N. E. Rep., 689 (Ill., 1892). In Bowen v. Carolina, etc., R. R., 13 S. E. Rep., 421 (S. C., 1891), the president of a railroad company was allowed to recover from the company what the jury believed bis services to have been worth. A president is not entitled to pay for his services unless an agreement in advance to that effect is made. Martindale v. Wilson, etc., Co., 19 Atl. Rep., 680 (Pa., 1890). A president is not entitled to pay unless it has been voted to him in advance. Burrill v. Calendar, etc., Co., 50 Hun, 257 (1888). The president may be entitled to compensation for extra services performed with the knowledge of the directors although a former resolution, of which he had no knowledge, prohibited pay unless voted in advance. Bartlett v. Mystic, etc., Corp., 24 N. E. Rep., 780 (Mass., 1890). A mutual life insurance company having no capital stock cannot make a contract to pay its retiring president a future salary for life. Beers v. New York L. Ins. Co., 66 Hun. 75 (1892). The president cannot enforce the payment of a salary out of the assets of the insolvent corporation even though the by-laws provided therefor and the salary had been voted to him, such vote having been after the services were rendered. Wood v. Lost, etc., Co., 23 Pac. Rep., 848 (Cal., 1890). A salary voted to the president after the services were performed and the company has become insolvent is not collectible. Mc-Avity v. Lincoln, etc., Co., 20 Atl. Rep., 82 (Me., 1890). See, also, note 6, p. 923.

¹ Smith v. Long I. R. R. Co., 102 N. Y., 190 (1886); Edwards v. Fargo, etc., R'y, 33 N. W. Rep., 100 (Dak., 1887); Greenleaf v. Railroad, 91 N. C., 33 (1884); MisAlthough a treasurer is presumed to be entitled to compensation, yet if he is a stockholder and his firm have the banking business of the company and nothing has ever been said about compensation, he cannot afterwards claim or obtain it.¹

A contract of a director, officer or president that he will not ask any compensation for his services cannot be insisted upon by the company if it was not a party to the contract.²

Various decisions in regard to other officers of the company are given in the notes below.³

souri, etc., R. R. v. Richards, 8 Kan., 101 (1871). The secretary and president cannot by their own votes cause the board to vote them a salary for past services. Graves v. Mono, etc., Co., 22 Pac. Rep., 665 (Cal., 1889). A secretary is not entitled to pay for his services as secretary unless there is an express contract to that effect; but where he gives up his whole time to the company's business, one-half as secretary and one-half in doing engineering work, he is entitled to pay. Talcott v. Olcott, etc., Co., 11 N. Y. Weekly Dig., 141 (1880). In England the law "is settled by a series of decisions that it is impossible for a company to ratify anything that is done or any contract that is made before it comes into existence." Hence a contract as to the secretary's salary is unenforceable. He can recover only on a quantum meruit. Re Dale, etc., Limited, 61 L. T. Rep., 206 (1889). The salary of a secretary, where it consists of a fixed sum and also dividends on certain stock not owned by him, continues as to both until stopped on notice. Crane Bros., etc., Co. v. Adams, 30 N. E. Rep., 1030 (Ill., 1892).

1 Mather v. Eureka, etc., Co., 118 N. Y., 629 (1890); 44 Hun, 333 (1887). The question may be one for the jury. Pendleton v. Empire, etc., Co., 19 N. Y., 13 (1859). A director who is also treasurer and manager may recover compensation for his services although none has been agreed upon. It is for the jury to decide what is reasonable. Fitzgerald Can. Co. v. Fitzgerald, 137 U. S., 98, 111 (1890), quoting with approval Pew v. First

Nat'l Bank, 130 Mass., 391. "No duties, no pay." A treasurer's salary ceases upon the sale of all its assets even though there is no dissolution; but if substantial duties continue, the salary continues. Rodney v. Southern R. R. Assoc., 3 N. Y. St. Rep., 564 (1886), distinguishing Long Island, etc., Co. v. Terbell. 48 N. Y., 427.

² An agreement among the officers to reduce their salaries cannot be insisted upon by the corporation. It was not a party to the agreement. Richard, etc., Co. v. Brook, 14 N. Y. Supp., 370 (1891). An agreement of the president with certain creditors that he would not take a salary until other claims were paid cannot be enforced by the receiver. The president may come in as a creditor. Snow v. Russell, etc., Co., 11 N Y. Supp., 492 (1890). Lambert v. Northeru, etc., R'y Co., 18 W. R., 180 (1869), holds that a promise by directors to perform their duties gratuitously is nudum pactum. and does not prevent them from recovering upon a previous binding agreement for salaries.

³ The president may employ the vice-president, his brother, to do work for which the company will pay him. McDowell v. N. Y., etc., R. R., 12 N. Y. St. Rep., 877 (1887). When it is understood by the directors that the officers are to be paid for their services, and at the end of the year a note is given for services to the superintendent, who is also a director, he may collect it. Stewart v. St. Louis, etc., R. R., 41 Fed. Rep., 736 (1887). Where the vice-president sues for services as general manager he must

§ 658. Contracts between corporations having one or more directors in common.—It has been difficult to determine whether a stockholder in one corporation could cause to be set aside a contract or agreement between two corporations having one or more directors in common. A guaranty where there are directors in common is voidable.¹ This class of contracts certainly are not void. They may be validated by a unanimous vote of the stockholders.² If, however, the minority stockholders object to the contract the court will consider it and will sustain it if fair and set it aside if unfair.³

§ 659. Foreclosure of mortgage on corporate property, and collusion with directors, whereby no defense is made to the foreclosure.—A frequent fraud on stockholders, and one which it is difficult

prove services clearly outside of his duties as an officer, and that there was no contrary agreement (citing many cases). Topouce v. Corinne, etc., Co., 24 Pac. Rep., 534 (Utah, 1890). Unpaid salaries voted to its officers by an insolvent corporation which has never made any profits cannot be offset as against the stockholders' liability to creditors. Burns v. Beck, 10 S. E. Rep., 121 (Ga., 1889). The conduct of an officer may be such as to preclude the idea that he was to have a salary. Simonson v. N. Y., etc., Ins. Co., 25 N. Y. Week. Dig., 90 (1886). A contract with directors for their services ceases upon the winding up of the company. Frames v. The Bulfontein. etc., Co., 64 L. T. Rep., 12 (1890). Where there are no duties or the duties cease there is no pay. Long Island, etc., Co. v. Terbell, 48 N. Y. St. Rep., 427. Cf. Rodney v. Southern R. R., 3 N. Y. St. Rep., 564 (1886). For the services of ordinary clerks, etc., the corporation is of course liable. Legrand v. Manhattan, etc., Assoc., 80 N. Y., 638 (1880); Pollock v. Shultze, 1 Hun, 320 (1874); 39 Fed. Rep., 13 (1889); 73 Ill., 608.

¹Barr v. N. Y., etc., R. R., 125 N. Y., 263 (1891); Metropolitan R'y Co. v. Manhattan R'y Co., 15 Am. & Eng. R. R. Cases, 1 (1884). A contrary conclusion was reached by the federal court on the same facts. Flagg v. Manhattan R'y Co., 20 Blatch., 142 (1881); S. C., 10 Fed. Rep., 413. For other cases connected with this litigation, see N. Y. El R. R.

Co. v. Manhattan R'v Co., 14 Abb. N. C., 152, note (1884); Manhattan R'v Co. v. N. Y. El. Co., 29 Hun, 309 (1883), rev'g N. Y. Daily Reg., Dec. 2, 1882; People ex rel. Content v. Metropolitan R'y Co., 26 Hun, 82 (1881); Harkness v. Manhattan R'y Co., N. Y. Daily Reg., Oct. 8, 1886. See, also, Wardens, etc., v. Rector, etc., 45 Barb., 356 (1865), where one religious corporation gratuitously conveyed property to another, the directors being common. A consolidation of two religious corporations having a director in common is illegal and may be set aside. Stokes v. Phelps Mission, 47 Hun. 570 (1888). See 5 N. Y. Supp., 623. A sale of property by one corporation to another is not fraudulent merely because there was one director common to both, where the directors and stockholders assented thereto. Leathers v. Janney, 6 S. Rep., 884 (La., 1889).

²If the stockholders unanimously ratify a contract between two corporations having directors in common, the contract is legal. Coe v. East, etc., R. R., 52 Fed. Rep., 531 (1892). A sale of property by one corporation to another, all of the directors except one being in common, is legal where such sale is subsequently ratified by a meeting of the stockholders. Grant v. United, etc., R'y, 60 L. T. Rep., 525 (1889).

³ Where a rolling-stock company by its board of five directors makes a contract with a railroad company having thirteen directors, five of whom are the

to detect and prove, is where the directors collusively neglect to defend against a suit brought to foreclose a mortgage on the corporate property, in consequence of which a default is taken and the corporation speedily deprived of all its assets. It is a fraud difficult to detect, since ordinarily there is no defense to foreclosure suits, and the defenses which should have been set up by the corporation are difficult of proof themselves. At an early day the leading case of Koehler against Black River Falls Iron Com-

same as the directors of the rollingstock company, and the railroad company makes the contract at a meeting of eight directors, two of whom are of the five, and for two years the railroad company lives up to the contract. it cannot then repudiate. The majority of its directors were not in common and it should have objected before. United S. R. Stock Co. v. Atlantic, etc., R. R. Co., 34 Ohio St., 450 (1878). Cf. Bill v. Boston Union Telegraph Co., 16 Fed. Rep., 14 (1883), where the illegality was clear, since the directors common to both corporations constituted a majority of the directors of one of them. Where a town board of three are authorized to make a grant to a railroad, and two of them, one being a director of the railroad, made the grant, the court will set it aside. San Diego v. San Diego, etc., R. R. Co., 44 Cal., 106 (1872). The fact that two directors out of eight of one packet company are also directors out of six directors of a competing packet company does not render them liable for fraud, although the former company loans the latter company much money and takes a chattel mortgage and closes out its property. Booth v. Robinson, 55 Md., 419 (1880). In England contracts between companies having directors in common are void by statute, unless they are ratified by vote of the stockholders. 60 L. T. R., 526; Ernest v. Nicholls, 6 H. of L., 401 (1857). See, also, Mayor, etc., v. Inman, 57 Ga., 370 (1876), where the town officers merely executed bonds to a railroad company of which they were directors. The bonds were held to be valid. In

Wallace v. Long Island R. R. Co., 12 Hun, 460 (1877), held, that a dissenting stockholder could not sue to set aside a lease made between two railroads having directors in common but that a majority of the stockholders might have objected. A conveyance of all the property of an insolvent corporation to one of its creditors, a corporation having two directors in common with the insolvent corporation, such conveyance being to secure the latter corporation's deht, is prima facie fraudulent and voidable. If free from actual fraud, and if reasonable, it is sustained. Sweeney v. Grape Sugar Co., 4 S. E. Rep., 431 (W. Va., 1887). The fact of having stockholders in common is immaterial. Warfield v. Marshall, etc., Co., 34 N. W. Rep., 467 (Iowa, 1887). The fact that a construction contract is assigned by the contractor to a corporation having directors in common with the railroad does not render the contract fraudulent per se. Union Pac. R. R. v. Credit Mobilier, 135 Mass., 367 (1883). A contract between two corporations having directors in common is voidable, but equity will cause such payments to be made for work done as are just, irrespective of the written contract. Thomas v. Peoria, etc., R'y, 36 Fed. Rep., 808 (1888). Where one director is a director also in another company with which a contract is being made, he cannot be counted in making up a quorum. Metropolitan, etc., Co. v. Domestic, etc., Co., 14 Atl. Rep., 907 (N. J., 1888), A contract between corporations having common directors is voidable, not void. If it is fair it will not be disturbed. pany established the principle that a stockholder in such a case may be allowed to come in as a defendant, and set up the defenses which the corporation ought to have set up.

A stockholder's remedy during the pendency of the foreclosure suit is in that suit and not by an independent action.² In Pennsyl-

Manufacturers', etc., Bank v. O'Reilly. 10 S. W. Rep., 865 (Mo., 1889). A lease of one railroad to another by directors who are directors in both companies is invalid. Thouron v. East, etc., R'v Co., 5 R'y & Corp. L. J., 77 (Tenn., 1888). If the contract is a just one the courts will not disturb it. Alexander v. Williams, 14 Mo. App., 13 (1888). In the case Pearson v. Concord R. R. Co., 13 Am. & Eng. R. R. Cas., 102 (N. H., 1883), the court, in setting aside a contract made by corporations having common directors, said: "Stockholders and creditors are entitled not only to the vote of a director in the board, but to his influence and argument in discussion."

12 Black, 715 (1862), where the directors took a mortgage to themselves to secure debts due to them from the corporation, and then foreclosed. The foreclosure was defeated. So, also, in Bayliss v. Lafayette, etc., R. R. Co., 8 Biss., 193 (1878), where the directors were silent partners with the construction company mortgagees. The court, on the application of a stockholder, directed that the mortgagees be allowed only the amount honestly due them. Although a foreclosure of a railroad is brought about by another railroad which desires and thereby obtains the former road through the foreclosure proceedings, and the directors, trustees in the trust deed, attorneys and stockholders of the two companies are practically the same in interest, yet the proceedings will not be set aside in the absence of actual fraud. County of Leavenworth v. Chicago, etc., R. R., 25 Fed. Rep., 219 (1885). In the case, however, of Samuel v. Halladay, 1 Woolw., 600 (1869), where a sale under foreclosure

had been made after an advertisement of five weeks, the court refused to set it aside for fraud in the foreclosure proceedings, although on the sale only onefifth of the value of the property was realized. In Drury v. Cross, 7 Wall., 299 (1868), and James v. Railroad Co., 6 Wall., 752 (1867), foreclosures and sales were set aside where they were obtained by fraudulent issue of bonds in pledge, and the purchase of them by the directors at the pledgee's sale. See, also, Bronson v. La Crosse R. R. Co., 2 Wall., 283, 302 (1863), clearly sustaining the stockholder's right. That at common law a stockholder cannot defend, even though the corporation is in no position to do so, see the discussion in Kelley v. Miss., etc., R. R. Co., 1 Fed. Rep., 564 In the case of Union Trust Company v. Rochester & Pittsburgh R. R. Co., 29 Fed. Rep., 609 (1886), it was held that the defeuse of a collusive foreclosure judgment herein, in a state court, cannot be set up to defeat an action thereon in a federal court. See Pittsburgh, etc., R. R. Co. v. Rothschild, 4 Central Rep. (Pa., 1886).

²Graham v. Boston, etc., R. R. Co., 118 U. S., 161 (1886). In Blackman v. Central R. R., etc., Co., 58 Ga., 189 (1877), the court said: "That the action is groundless and collusive, and that, from motives of fraud or favor on the part of the officers, the corporation fails or refuses to defend, will make no difference. The stockholders may protect all their rights by instituting a proper action of their own." In Central Trust Co. v. Wabash, etc., R. R. Co., 23 Fed. Rep., 858 (1885), the application of a stockholder to have the receiver institute certain suits was denied. In Mussina v. Goldthwaite, 34 Tex., 125 (1870), there vania¹ and New Jersey,² however, it has been doubted whether the stockholder would be allowed to intervene in a fraudulent foreclosure suit, the court saying that his remedy is to have the judgment set aside for fraud. In New York, by statute, the courts have power to allow the stockholder to come in as a party defendant.³

Where stockholders seek to enjoin a foreclosure, they must furnish the money or point out a reasonable prospect of the company's resuming business and meeting interest charges.⁴

Another remedy of the stockholder is to redeem the property before the foreclosure sale, and then give the corporation a reasonable time to redeem the property from him or be forever barred from its rights therein.⁵

A stockholder cannot cause a foreclosure suit to be set aside on the ground of corrupt motives of the directors who allowed the default to be taken, unless he can show collusion between them and the purchaser at the foreclosure sale.⁶ Where the corporation brings a suit to redeem its property from a foreclosure sale, a stockholder has no right to come in as a party complainant.⁷

having been a fraudulent foreclosure suit instituted, the court allowed an intervenor to come in. In Forbes v. Memphis, etc., R'y Co., 2 Woods, 323 (1872), the court said: "It is questionable whether, in any case where a suit is properly instituted against a corporation, a stockholder of that corporation can, even on a suggestion of fraud on the part of its officers, come in by way of intervention as party to that suit, and seek to defend or control the proceed-An original bill would rather seem to be the proper mode of proceeding. . . . It is in the discretion of the court whether or not to permit a stockholder to become a party defendant in any case where he is not made such by the bill." As to the right of a bondholder to become a party herein, see ch. XLVI, infra. Where there are defenses to the bonds, and the officers are in collusion with the foreclosing trustee and make no defense, a stockholder may intervene, but not unless he shows clearly the officers are not making the proper defenses and refuse to make them. Alexander v. Searcy, 8 S. E. Rep., 630 (Ga., 1889). Stockholders in one of three consolidating corporations cannot

intervene in a mortgage foreclosure suit against the consolidated company, there being no allegation of fraud or collusion. Their remedy is by an independent suit. Central Trust Co. v. Marietta, etc., R. R., 48 Fed. Rep., 14 (1891). Where the bondholders control the corporation, a stockholder will be allowed to intervene in a foreclosure suit in order to set up the defense that the bonds are not a valid lien. Henry v. Travelers' Ins. Co., 26 Pac. Rep., 318 (Col., 1891).

Gavenstine's Appeal, 49 Pa. St., 310 (1865); County of Tazewell v. Farmers' etc., Trust Co., 12 Fed. Rep., 752 (1882).
 Brown v. Vandyke, 8 N. J. Eq., 795

³ Code of Civil Procedure, § 452. See Ithaca Gas-light Co. v. Treman, 93 N. Y., 660 (1883).

⁴ Carey v. Houston, etc., R'y, 45 Fed. Rep., 438 (1891).

⁵ Wright v. Oroville M. Co., 40 Cal., 20 (1870), where the court, on the stockholder's application, fixed the time within which the corporation must redeem, if at all.

⁶ Harpending v. Munson, 91 N. Y., 650 (1883).

t ⁷ Kennebec, etc., R. R. Co. v. Port-933

(1853).

Where a foreclosure was collusive and fraudulent the corporation may subsequently to the sale file an original bill in the nature of a bill of review to redeem and to have a resale. The United States court which granted foreclosure has jurisdiction on bill to set aside that foreclosure as fraudulent irrespective of citizenship in latter case.²

Where a corporation has the leasehold and a director has the fee, and the board of directors at the instigation of such director allow the lease to be forfeited for non-payment of rent, the company being in funds to pay such rent, a stockholder may set aside the forfeiture.

Where the directors have instituted suits against the company for fictitious claims, and have directed the secretary to accept service and waive notice in any suit by creditors, and have speculated with the company's property and refused to carry on the business, a stockholder may obtain an injunction against the suits and may have relief against the directors.⁴

§ 660. Directors' purchases of property needed by the corporation, and purchases of outstanding debts or claims against the corporation.— It is an abuse of trust for a corporate director to purchase property which he knows the corporation will need and then to sell the same to the corporation at an advanced price. This generally occurs where the director purchases in his own name land which the corporation must purchase for its enterprise, or over which it will need a right of way. Where, however, the director

land, etc., R. R. Co., 54 Me., 173 (1866). If a collusive judgment for an ordinary cause of action has been entered against the corporation it may be set aside. Whittlesey v. Delaney, 73 N. Y., 571 (1878).

1 Northern, etc., Iron Co. v. Young, 12 Fed. Rep., 809 (1882). The corporation itself, after a change of directors by a new election, may file a bill to set aside the foreclosure. Where the foreclosure was in the United States court, the suit to set aside may be in that court on that ground. Pac. R. R. Co. v. Mo. Pac. R'y, 111 U. S., 505 (1884), rev'g 12 Fed. Rep., 641; Northern, etc., Co. v. Young, 12 Fed. Rep., 809 (1882). The trustee of the trust deed is a necessary party to a suit to set aside the foreclosure as fraudulent. Harwood v. Railroad Co., 17 Wall., 78. Also other parties to the fraud.

Ribbon v. Railroad Cos., 16 Wall., 446 (1872).

² Pacific R. R., etc., v. Missouri Pac. R'y Co., 111 U. S., 505 (1884), rev'g 12 Fed. Rep., 641.

³ Hannerty v. Standard, etc., Co., 19 S. W. Rep., 82 (Mo., 1892).

⁴ Birmingham, etc., Co. v. Mutual L. & T. Co., 11 S. Rep., 368 (Ala., 1892).

⁵ Blake v. Buffalo Creek R. R. Co., 56 N. Y., 485 (1874). See Buffalo, etc., R. R. Co. v. Lampson, 47 Barb., 533 (1867); Blair, etc., Co. v. Walker, 50 Iowa, 376 (1879); Taylor v. Solomon, 4 Mylue & C., 134 (1838), where the corporate agent took in his own name a lease which the company desired and had instructed him to obtain for itself. See, also, Mitchell v. Reed, 61 N. Y., 123 (1874). Corporate treasurer cannot purchase stock at discount and sell to

offers the land to the corporation at the price which he paid for it, and the corporation refuses it, he cannot long subsequently be compelled to accept that price.\(^1\) A director may construct works to compete with the works of the corporation in which he is a director. He is not disqualified from so doing.\(^2\) Where the president takes a renewal of a corporate lease in his own name, and admits that he takes it for his company, he cannot claim any of the profits arising from it, even though in order to get the lease from him a contract is made that he have a part of the profits.\(^3\)

It is a fraud on the corporation and on corporate creditors for the directors to buy up at a discount the outstanding debts of the corporation, and compel it to pay them the full face value thereof. In such a case the directors may be compelled to turn over to the corporation the evidences of indebtedness upon being paid the money which they gave for the same. ⁴ A director cannot take a

corporation at par, though such stock is needed by the corporation to fulfill its contracts. East N. Y., etc., R. R. Co. v. Elmore, 5 Hun, 214 (1875). Where the president is directed to buy the boats of a rival company and does so by buying them for another corporation which he controls, and credits himself with an advance, he may be made to refund. Ward v. Davidson, 1 S. W. Rep., 846 (Mo., 1886). A treasurer is not liable for profits in coal sold by himself to the corporation where he purchased the coal with no intent of selling to the company. Parker v. Nickerson, 137 Mass., 487 (1884). A director who takes an assignment to himself of a patent that ought to have been assigned to his corporation must account for all profits that he has received. Averill v. Barber, 6 N. Y. Supp., 255 (1889).

¹Sandy River R. R. Co. v. Stubbs, 77 Me., 595 (1885). A president and treasurer who purchase land as agents for a railroad company and allow it to pay part of the purchase price, and obey its direction to sell part, whereby the purchase price is repaid, are liable to convey to the company the remainder, the title to which is in their names. Church v. Sterling, 16 Conn., 388 (1844).

² Barr v. Pittsburgh Plate G. Co., 51 Fed. Rep., 33 (1892).

³ Robinson v. Jewett, 116 N. Y., 40 (1889).

⁴ A stockholder who is also a director cannot buy up claims against the insolvent company and offset them at their face value. Bulkley v. Whitcomb, 121 N. Y., 107 (1890); Duncomb v. N. Y., etc., R. R. Co., 84 N. Y., 190, 202 (1881); Ex parte Larkin, 46 L. J. (Ch.), 235 (1877). See, also, Davis v. Rock, etc., Co., 55 Cal., 359 (1880), where a mortgage given to a director to secure debts purchased by him at a discount was defeated in foreclosure. The fact that a director buys up the securities of an insolvent corporation for the purpose of using them in re-organization is not fraudulent or a breach of his duty, he having paid all that the securities were worth. Powell v. Willamette Val. R. R. Co., 15 Pac. Rep., 663 (Oreg., 1887). If the corporate managers buy up corporate debts with corporate funds, a corporate creditor may compel them to give up the claims so purchased. Thomas v. Sweet, 14 Pac. Rep., 545 (Kan., 1887). Directors who authorize acts by the corporation infringing on a patent cannot afterwards buy the patent and enforce the right to damages. N. Y., etc., Co. v. Buffalo, etc., Co., 24 Fed. Rep., 604 (1885). A corporate creditor cannot complain that a director has

contract in his own name for himself where such contract really should belong to the corporation. An attachment and execution sale of railroad bonds on a judgment obtained by a director was disregarded and declared void, where the director himself purchased at the sale and the whole transaction was tainted with a fraudulent contract exercised by the director over the company.

§ 661. Loans by directors to the corporation; mortgages by the corporation to the directors, and the right of an insolvent corporation to give a mortgage or assignment of its property to a director in order to prefer the payment of his debt.— There is no question that a corporation, while solvent, may borrow money of a director, and may give a mortgage to secure its payment. The giv-

purchased property needed by the corporation. Cornell v. Clark. 104 N. Y.. 451 (1887). The case of St. Louis, etc., R. R. Co. v. Chenault, 12 Pac. Rep., 303 (Kan., 1886), clearly holds that a corporate treasurer may buy up outstanding notes against the corporation and may then pay such notes out of the corporate funds in his possession. Payment by a director of corporate notes may entitle him to a preference in the distribution of the assets. Appeal of Atkinson, 11 Atl. 'Rep., 239 (Pa., 1887). Cf. Inglehart v. Thousand, etc., Hotel Co., 109 N. Y., 454; 32 Hun, 377 (1884), where the assignee of a judgment from a director who purchased it at a discount was allowed to enforce it for the full amount. Where the directors issued bonds as collateral to the company's note, and, upon the sale of the bonds by the pledgee for nou-payment of the note, purchased the bonds at five cents on the dollar, a foreclosure based chiefly on such bonds will be set aside. James v. Railroad Co., 6 Wall., 752 (1867). Euglish debentures may be issued to directors at a discount. Campbell's Case, L. R., 4 Ch. D., 470 (1876). Where a corporation is without funds, its president may purchase for himself its overdue bond, and may agree with the corporation that the rate of interest of the bond shall be increased. There was no proof that he purchased at a discount. Bradley v. Marine, etc., Co., 3 Hughes, 26 (1879). The law is clear, however,

that any device by which a director or officer of an insolvent corporation obtains a preference in the payment of his debt is illegal. See sub. Also Lingle v. Nat'l Ins. Co., 45 Mo., 109 (1869); Holland v. Heyman, 60 Ga., 174 (1878), holding that the purchased claims are good only for the amount paid. After the corporation has assigned for the benefit of creditors and all its property has been sold, a director may buy up claims against it, and participate in the distribution of assets. Hammond's Appeal, 16 Atl. Rep., 419 (Pa., 1889). Officers. moreover, occupy a quasi-fiduciary relation to the corporation, and cannot profit by purchasing claims against it. Hill v. Frazier, 22 Pa. St., 320. Aliter after their fiduciary relation has ceased. Hammond's Appeal, 123 Pa. St., 503.

 1 Richardson v. Green, 133 U. S., 30 (1890).

² Where the president of a coal company contracts in his own name to supply coal to parties, and the board of directors, a majority of whom are his relatives, contract to furnish the company's coal to him on a royalty, a stockholder may compel him to turn into the corporation the profits of his contract. An assignee of his interest who took with notice is not protected. Davis v. Gemmell, 17 Atl. Rep., 259 (Md., 1889). See, also, Ward v. Davidson, 1 S. W. Rep., 846 (Mo., 1886). Cf. 8 S. W. Rep., 545.

ing of the mortgage is viewed with suspicion; but it is legal when it is perfectly free from actual fraud.

The supreme court of the United States, speaking of loans made by an officer and stockholder to a corporation, said: "Undoubtedly

¹Twin Lick Oil Co. v. Marbury, 91 U. S., 587 (1875); Duncomb v. N. Y., etc., R. R. Co., 88 N. Y., 1 (1882); 84 id., 190; Hotel Co. v. Wade, 97 U. S., 13 (1877): Directors may execute judgment bonds to themselves at a time when the company is solvent, and may enforce them after it becomes insolvent. Neal's Appeal, 18 Atl. Rep., 564 (Pa., 1889). mortgage is not void on the ground that it was to a director, where the director was absent when elected, did not serve, was not eligible and soon sent in Augusta, etc., R. R. v. a resignation. Kittel, 52 Fed. Rep., 63 (1892). A solvent corporation may make a mortgage to one of its officers and stockholders to secure a loan made by him. Mullanphy Bank v. Schott, 26 N. E. Rep., 640 (Ill., 1891). The fairness of a debt alleged to be due from the corporation to directors and audited by them will be closely scrutinized, and a note and mortgage therefor set aside if not found entirely in good faith, and the whole amount justly due. Graves v. Mono, etc., Co., 22 Pac. Rep., 665 (Cal., 1889). A director may loan money to a corporation and take a mortgage to secure the same, and foreclose and buy in the property. Preston v. Loughran, 58 Hun, 134, 210 (1890). A mortgage to a creditor on part of the property of an insolvent corporation is legal although some of the stockholders and directors are indorsers of the debt. Weihl et al. v. Atlanta, etc., Co. et al., 15 S. E. Rep., 282 (Ga., 1892). A mortgage may be given by a corporation to secure directors who at the time of the giving of the mortgage guaranty certain debts of the company. Re Pyle Works, 63 L. T. Rep., 628 (1890). mortgage by a company to its directors to secure them as loaners of money to the company is valid and may be enforced where the transaction was in

good faith and beneficial to the company, and sanctioned by the stockholders, and no offer is made to restore the Gorder v. Plattsmouth. consideration. etc., Co., 54 N. W. Rep., 830 (Neb., 1893); Hope v. Salt Co., 25 W. Va., 789 (1885); Warfield v. Marshall, etc., Co., 34 N. W. Rep., 467 (1877). And see the principles and cases in § 653, supra. See, also, Harpending v. Munson, 91 N. Y., 650 (1883); Hallam v. Indianola Hotel Co., 56 Iowa, 178 (1881), where, however, the purchase of the property by the director at the foreclosure sale for a small price was set aside: Claflin v. South C. R. R. Co., 8 Fed. Rep., 118 Cf. Wilbur v. Lynde, 49 Cal., (1880)..290 (1832), invalidating a note given to a director. In the important case of Koehler v. Black, etc., Iron Co., 2 Black, 715 (1862), the court held void a mortgage given by the directors to themselves, where there were other unsecured claims, and where the giving of the mortgage was inequitable. In Cumberland, etc., Co. v. Paresle, 42 Md., 598 (1875), a mortgage to a director was defeated, there being no clear proof that the debt was actually incurred. Directors who guaranty a corporate debt may take a mortgage from the company as security, and may foreclose it. Hopson v. Ætna, etc., Co., 50 Conn., 597 (1883). A company indebted to its president may, to secure such debt, give a mortgage to secure a debt due from him to a third party. Bank v. Flour Co., 41 Ohio St., 552 (1885). Where two out of four directors of an insolvent corporation are liable as indorsers on a corporate debt, a mortgage given to secure that dcbt will be set aside as an illegal preference, even though the mortgage has been foreclosed. Lippincott v. Shaw, etc., Co., 34 Fed. Rep., 570 (1888).

his relation as a director and officer, or as a stockholder of the company, does not preclude him from entering into contracts with it, making loans to it and taking its bonds as collateral security; but courts of equity regard such personal transactions of a party in either of these positions not perhaps with distrust, but with a large measure of watchful care; and unless satisfied by the proof that the transaction was entered into in good faith, with a view to the benefit of the company as well as of its creditors, and not solely with a view to his own benefit, they refuse to lend their aid to its enforcement." A person may enforce a note against a corporation, although he was a promoter thereof, and is a director, stockholder and manager of the corporation.²

But where the corporation is insolvent an entirely different question arises. There has been a difference of opinion in the courts, but the weight of authority clearly and wisely holds that an insolvent corporation cannot pay a debt due to a director in preference to debts due others, either by turning out property or cash to him or by giving him a mortgage on corporate assets.³

¹ Hence where an officer for a loan of \$100,000 to the company takes its notes therefor and four hundred bonds as collateral and twelve hundred and fifty shares of paid-up stock as a "bonus," the court characterized the transaction as a fraud, and held that the pledge of the bonds would be disregarded and declared void. Richardson v. Green, 133 U. S., 30 (1890).

Fitzgerald Con. Co. v. Fitzgerald, 137
 U. S., 98, 110 (1890).

³ Where a corporation is practically insolvent and has assigned its property by deed of trust to pay certain debts for which the directors are liable, a court of equity in Missouri will enjoin proceeding under the deed of trust and will appoint a receiver. Consolidated, etc., Co. v. Kansas City, etc., Co., 43 Fed. Rep., 204 (1890). A mortgage by an insolvent corporation to secure debts for which the directors are sureties is illegal and will be set aside. Id., 45 Fed. Rep., 7 (1891). A mortgage by an insolvent corporation to its directors as security for past indorsements is illegal, though in good faith, and the company still a going concern. Howe, etc., Co. v. Sanford, etc., Co., 44 Fed. Rep., 231 (Ind.,

1890). Although a sale of property by an insolvent company to a director in order to prefer his debt is void, yet another creditor cannot levy on the property as though the sale was void. Beach v. Miller, 22 N. E. Rep., 464 (Ill., 1889). Where a corporation has \$15,000 assets, owes \$160,000, and confesses judgment for \$40,000 to its largest stockholder for an old indebtedness due him, a court of equity will restrain a sale under that judgment until the rights of all creditors are determined. Krause v. Malaga. etc., Co., 18 Atl. Rep., 367 (N. J., 1889). Corporate creditors may enjoin the collection of judgments fraudulently confessed by an insolvent corporation to its officers and stockholders. Nimocks v. Grimm, 14 S. E. Rep., 684 (N. C., 1892). A preference by an insolvent corporation to one of its directors is invalid. It is insolvent when early suspension of business and a failure are inevitable. Corey et al. v. Wadsworth, 11 S. Rep., 350 (Ala., 1892). A director of an insolvent corporation cannot obtain a preference for his debt. Gibson et al. v. Trowbridge, etc., Co. et al., 11 S. Rep., 365 (Ala., 1892). An insolvent corporation cannot transfer all its property to pay a An officer of an insolvent corporation cannot acquire a preference over its unsecured creditors by accepting its bonds on account

note of which a director is an indorser. joint maker or guarantor. Goodyear Rubber Co. v. George D. Scott Co. et al., 11 S. Rep., 370 (Ala., 1892). Where an act by the directors amounts to a preference to them, the corporation being insolvent, the act cannot be validated by a vote of the stockholders, the directors themselves voting a majority of the Farmers' L. & T. Co. v. San stock. Diego, etc., St. R'v Co., 45 Fed. Rep., 518 Although creditors may complain of a mortgage given to directors by the corporation when largely in debt. yet the president, who is also a large stockholder and who signs the mortgage, cannot do so. Perry v. Pearson, 25 N. E. Rep., 636 (Ill., 1890).

Where a corporation purchases a firm's business it cannot legally pay a debt due by the firm to a director in the corporation, if such payment is induced by such director and the corporation is insolvent. Rudd v. Robinson, 54 Hun, 315 (1889). If a director as a creditor takes all the corporate assets in payment of his debt he is liable to other creditors for the difference between the actual value of the property and the price at which he took it. Wilkinson v. Bauerle, 41 N. J. Eq., 635 (1886). The president of an insolvent corporation cannot provide for the payment of a debt to his wife, thereby giving her a preference. West v. West Bradby, etc., Co., 9 N. Y. St. Rep., 255 (1887). Directors of an insolvent corporation cannot turn in its assets to themselves to pay a debt due them from the corporation. Beach v. Miller, 14 N. E. Rep., 698 (Ill., 1888). Directors knowing that the company is insolvent cannot assign its property in trust to pay debts due to themselves. Gaslight, etc., Co. v. Terrell, L. R., 10 Eq., 168 (1870); Haywood v. Lincoln Lumber Co., 64 Wis., 639 (1885). Where an insolvent corporation prefers a director it is unlawful, and the directors who cause

the preference are personally liable for property so applied. A director who took no part is not liable. Adams v. Kehlor, etc., Co., 36 Fed. Rep., 212 (1888). The law "prohibits directors, when a corporation is insolvent and about to go into liquidation, from preferring debts due to themselves from the corporation. or from preferring debts in the payment of which they have a personal interest." So held in a case where a deceased director was preferred by the other directors, his brothers and agents. Adams v. Kehlor M. Co., 35 Fed. Rep., 433 (1888). A director of an insolvent corporation cannot have his own debt due from the corporation paid to the exclusion of other creditors. Adams v. Cross, etc., Co., 5 R'y & Corp. L. J., 18 (Ill., 1888), holding void a mortgage upon which this suit for foreclosure was brought, it having been given by an insolvent corporation to its directors to secure debts due from it to them. A confession of judgment by an insolvent corporation to one of its directors is a fraudulent preference, and the preference will be cut off. The director will be allowed to come in the same as other creditors. Stratton v. Allen, 16 N. J. Eq., 229 (1863). A mortgage by an insolvent corporation preferring its president and director was canceled in Lippincott v. Shaw Carriage Co., 25 Fed. Rep., 577 (1885). In Bradley v. Farwell, 1 Holmes, 433 (1874), a transfer by an insolvent corporation of all its assets to a partnership in payment of a debt was set aside, where one member of the partnership was also a director in the corporation. The fact that nine months elapsed before the corporation passed into a receiver's hands was immaterial. Sale of corporate property to a director in payment of debts due him from the insolvent company cannot be objected to in a suit at law by him for the conversion of the property. The objection must be made by bill in equity. of his claims against it, even though the officer did not actually know of the insolvency.1

The directors of an insolvent corporation are trustees for the creditors. They cannot, after it becomes insolvent, take mortgages to themselves on its property to secure advances and indorsements made by them for it.2

If a majority of the directors of an insolvent corporation, knowing it to be insolvent, vote and cause the treasurer to execute to themselves the corporation's judgment note and then enter judgment on it at once, the judgment is fraudulent as to other creditors, though the debt was legal.3

A mortgage by an insolvent corporation to a director will be upheld to the extent that the director at the time of the mortgage advanced funds to pay its debts, but not as regards antecedent debts due the director.4

There are cases which uphold mortgages given by insolvent corporations to their directors, but these cases are wrong in principle and law.5

Little Rock, etc., R'v Co. v. Page, 35 Ark., 304 (1880); Cochran v. Ocean, etc., 30 La. Ann., 1365, holding that stockholders cannot appropriate assets to pay their salaries as officers, or to pay money due them on their accounts, until all creditors who are not stockholders have been paid. Swepson v. The Bank, etc., 9 Lea, 713, holding that a conveyance of land by the president of a bank after its insolvency to its sole stockholder would be set aside at the suit of a judgment creditor of the bank who had levied upon and sold it. Directors may loan money to the corporation and have it repaid. Ulster R'v v. Banbridge R'v. L. R., Irish, 2 Eq., 190 (1868); Borland v. Haven, 37 Fed. Rep., 394 (1888).

¹Sicardi et al. v. Keystone Oil Co. et al., 24 Atl. Rep., 163 (Pa., 1892).

²Olney v. Conanicut Land Co., 18 Atl. Rep., 181 (R. L, 1889).

³ Roseboone v. Warner, 23 N. E. Rep., 339 (Ill., 1890).

⁴ Corbett v. Woodward, 5 Sawyer, 403 (1879). See, also, Williams v. Patrons of Husbandry, 5 West. Rep., 105 (Mo., 1886); White, etc., Co. v. Pettes, etc.,

v. Shaw, etc., Co., supra; Stout v. Yaeger, etc., Co., 13 id., 802 (1882).

^b Planters' Bank v. Whittle, 78 Va., 737 (1884), dictum, that directors may make preferences in favor of themselves. if they are creditors; but in so doing they must act in perfect good faith. A mortgage given by an insolvent corporation is valid, although given to secure debts due to the wife of a director, the administrator of another deceased director, and the payee of a note indorsed by still another director. Garrett v. Burlington Plow Co., 70 Iowa, 697 (1886). A sale of all the property of an insolvent corporation to a director, who is also president, in payment of his debt cannot be set aside by other corporate creditors. Bush v. Buckingham, 16 Iowa, 284 (1864). A preference is legal although given by directors who are relatives of the creditor. Rolling v. Shaver, etc., Co., 45 N. W. Rep., 1037 (Iowa, 1890). Corporate creditors cannot object to a sale of all the corporate property to one of the creditors in payment of her debt, even though she be the wife of the president and chief Co., 30 Fed. Rep., 864 (1887); Lippincott stockholder. Ragland v. McFull, 27 N.

In New York a statute prohibits a director, officer or stock-holder in an insolvent corporation from obtaining a preference.¹

E. Rep., 75 (Ill., 1891). An insolvent corporation may give a mortgage to one of its directors to secure a present or precedent debt and such mortgage is valid. Gould v. Little Rock, etc., R'v. 52 Fed. Rep., 680 (1892), reviewing the author-An insolvent corporation may mortgage its property to any one of its creditors. Such a mortgage is not for the benefit of all creditors, even though it is given to secure several. The mortgage may be given to a director or stockholder. Bank of Montreal v. Potts. etc., Co., 51 N. W. Rep., 512 (Mich., 1892). The following cases are exceptions to and not contradictory of the general rule: Where a part of the trustees are the only creditors and the business is a losing one, they may take a mortgage to secure moneys loaned by them to the company, and may foreclose such mortgage. Skinner v. Smith, 134 N. Y., 240 (1892). The payment and securing of a corporate debt is not fraudulent merely because some of the directors had guarantied the debt. County Court v. Baltimore, etc., R. R., 35 Fed. Rep., 161 (1888); Whitwell v. Warner, 20 Vt., 425, holding that stockholders who avail themselves of their superior advantages to obtain security from the corporation for debts due them, whether by attachment or assignment, are not guilty of fraud so as to render themselves personally liable for corporate debts. Where a corporation owes money to the directors, and to pay the same borrows money and gives a mortgage, and subsequently the property is sold for less than the mortgage. a creditor whose debt was not due when the mortgage was given cannot complain. Holt v. Bennett, 16 N. E. Rep., 5 (Mass., 1888). But see St. Louis v. Alexander, 23 Mo., 483, 528, 531 (1856), where it was attempted to overturn a deed of trust on the ground that it was executed by a bare quorum of the directors and one or more of them were legally in-

capacitated by being directly interested. The language of the court was: "I can see no reason why a member of the board of directors might not sit in the board, and, without fraud, in conjunction with others, consent to an order for securing a debt actually due to him from the corporation." A stockholder cannot have a receiver appointed and mortgages set aside where all the stock is "water," even though the controlling party has made the mortgages to himself and is about to sell the assets of the company to another company controlled by himself and has levied an assessment on the stock of the old company in order to sell out the stock. Robinson v. Dolores, etc., Co., 29 Pac. Rep., 750 (Colo., 1892).

1 The officers of a New York corporation may allow judgment to be taken against the corporation by default and the property to be sold on execution thereunder. Such acts are not in violation of the New York statute against preferences. Varnum v. Hart. 119 N. Y., 101 (1890). But such a judgment in favor of a director is illegal. Throop v. Hatch, etc., Co., 125 id., 530 (1891). The remedy in such a case is in equity and not at law. Braem v. Merchants' Nat'l Bank, 127 id., 508 (1891). A statute against preferences by an insolvent corporation is violated by an offer of judgment by the corporation and the appointment of a receiver under it. National Broadway Bank v. Wessell, etc., Co., 59 Hun, 470 (1891). A West Virginia corporation will not be allowed to prefer one of its officers, in New York, by allowing judgment and execution in his behalf. Worthington Co. v. Pfister, etc., Co., N. Y. L. J., Dec. 9. 1892. Under the New York act a director cannot obtain a preference by attachment. Throop v. Hatch, etc., Co., 125 N. Y., 530 (1891); 58 Hun. 149: Paulding v. Jerome, etc., Co., 94 N. Y., A director cannot vote on a renewal of a note to himself. The purchaser of such a note is not protected.¹ A stockholder's action lies where the directors owe large sums to the corporation and refuse to pay or charge themselves with the same, and are about to sell the corporate property at a sacrifice.²

§ 662. Directors owning stock in another corporation with which a contract is made—Stockholders' ratification of the voidable acts of directors—Frauds by a majority of the stockholders on the minority—One corporation voting stock in another competing corporation.—It often happens that a consolidation, lease, sale or contract between two corporations is made where the directors of one of the corporations are largely interested in the stock of the other. There then is likely to arise a conflict between interest and duty. Such contracts as these are investigated very closely by the courts. They are not necessarily void and are not constructively fraudulent. But if there is actual fraud, or if there has been an undue advantage taken or an unconscionable bargain made, the court will set it aside. If the transaction is fair the court will sustain it; if it is unfair the court will undo it.³

334 (1884). A director cannot obtain a preference by causing a receiver to be appointed on his judgment and then purchasing the property at an inadequate price. Nat'l Broadway Bank v. Wessell, etc., Co., 13 N. Y. Supp., 744 (1891). So in Pennsylvania. Under the Pennsylvania statute, directors cannot obtain a preference by taking judgment by default and issuing execution. Hopkins' Appeal, 90 Pa. St., 69 (1879).

¹ Smith v. Los Angeles, etc., Assoc., 20 Pac. Rep., 677 (Cal., 1889).

² Sears v. Hotchkiss, 25 Conn., 171 (1856). See, also, Hardon v. Newton, 14 Blatch., 376 (1878), involving somewhat similar facts.

³The use of a "dummy" corporation does not change the law. Thus where the directors let a contract and then the contractor assigns his rights to a corporation the majority of whose stock is owned by the directors, the court will not aid the contractor as a stockholder in the second corporation. Wardell v. Railroad, 103 U. S., 651 (1880). Where the directors of a railway company enter into a contract with third persons, whereby a new company is organized,

franchises secured, and a road built and leased to the old company, and the profits realized from the transaction are equally divided between the directors and the third persons, the latter are not liable for their profits, even though exorbitant, on suit by stockholders of the old company, unless the contract of lease is rescinded and the road restored to the new company. Hitchcock et al. v. Barrett et al., 50 Fed. Rep., 653 (N. Y., 1892). Although a lessee railroad company has directors, a minority of whom are largely interested in the stock and bonds of the lessor railroad; and such bonds and stock are largely "water," yet this does not necessarily vitiate the lease. The court will not set the lease aside if no undue advantage was taken and no actual fraud involved. Jesup v. Ill. Ceut. R. R., 43 Fed. Rep., 483 (1890). Although certain persons being directors and owners and in control of a railroad company cause it to make a construction contract with a company which they also control, yet if all stockholders assent, subsequent consolidated bondholders cannot object that a part of the old issue of bonds was issued below Thus, where the officers of a lessee corporation, which has leased the property of the lessor corporation, control a majority of the stock of the latter, and conspire to compel the minority to sell

par and was fraudulently and illegally issued. Coe v. East. etc., R. R., 52 Fed. Rep., 531 (1892). An agreement of persons holding a majority of the stock. they being directors also, that a person purchasing stock from them shall be general manager and may at the end of two years sell the stock back to them at a stated price, is contrary to public policy and void. The vendors need not repurchase. The arrangement is unfair to the corporation. Wilbur v. Stoepel, 46 N. W. Rep., 724 (Mich., 1890). It is illegal for directors to be stockholders in a construction company to which a construction contract is let. Gilman, etc., R. R. v. Kelly, 77 Ill., 426 (1875). Where the officers and owners of a majority of the stock of a company vote as stockholders and officers to lease its property to another corporation, all of whose stock they own, the minority stockholders in the first corporation may cause it to be set aside. Meeker v. Winthrop Iron Co., 17 Fed. Rep., 48 (1883). See, also, Brewer v. Boston Theater, 104 Mass., 378 (1870).

Professor Edmund J. James, in his pamphlet on "The Railway Question," says in regard to this subject:

"It was found again that the directors of the railroads, even where they have been constructed with some reference to honesty and economy, had interests which were not necessarily the same as those of the rest of the corporation or of the public. For example, the directors were often interested in manufacturing or trading enterprises where it was necessary to resort to the railroads in the course of their business. By giving to themselves, as directors, special rates and privileges, it was possible to build up their own business at the expense of rivals, thereby practically depriving the public of free competition in the particular branches of industry on the one hand, and cheating

their fellow-stockholders on the other hand, by lessening by so much the possibilities of income, and consequently the frequency or size of dividends.

"It was, moreover, possible for the directors to form companies of all kinds for the purpose of supplying the parent company with supplies, or of doing certain kinds of buiness for it, and in their capacity as directors of the parent companies, awarding to themselves as directors of the barnacle companies fat contracts of all sorts, which increased the expenses of the road, raised the charges of service, thus cheating the public on the one hand, and the stock-holders on the other.

"It was also found that directors could grant special rates to men who brought business to the railroad on condition that the latter would pay them handsomely as individuals for using their power as directors or officials for their benefit.

"This power of fixing the rates at pleasure led to all sorts of privileges to individuals, or families, or communities, which by the very fact of their existence produced an artificial state of industry in which it was absolutely impossible for an enterpriser to estimate the probable profits of a business until he had come to terms with the managers of one or more railroads to give, him some special tariff. This system led to all sorts of bargains, and put in the place of the skill or industry of the manager the grace of some railroad corporation as the deciding factor of industrial success or ruin. As examples of the deals within the railway itself. none were more common than for some of the directors of a railroad to build a branch railroad, and then, after stocking and bonding it heavily, sell it out to the parent road at a high valuation. Among the minor though most common forms

their stock by refusing to pay the rent due on the lease, a court of equity, on the application of the minority, will compel a payment of the rent.¹

Where a director has sold his property to the corporation or has committed some other act which is voidable and not void, and where a majority of the stock can ratify and validate that act, it being not actually fraudulent, but fraudulent by public policy, the important question arises whether in taking the vote of the stockholders on such a question the stock held by the director himself is to be counted. The well-settled rule is that his stock is to be counted even though the vote would have failed if his stock had not been voted.²

of this kind of illegitimate manipulating should be mentioned that by which the directors of a road buy up real estate in a certain locality and then place a station there so as to enhance the value of their property; or where they charge more in the neighborhood of a large city for a fare to a near station where they do not own land than to a more distant one where they do own real estate which they are eager to sell."

1 Barr v. N. Y., etc., R. R. Co., 96 N. Y., 444 (1884).

2A director may sell property to the corporation where the purchase is adopted at a meeting of the stockholders. Such director may vote in favor of such purchase all the stock that he owns, but if the result is "so detrimental to the interests of the corporation itself as to lead to the necessary inference that the interests of the majority of the shareholders lie whelly outside of and in opposition to the interests of the corporation and of the minority of the stockholders, and that their action is a wanton or fraudulent destruction of the rights of such minority," then a court of equity will set the act aside. Gamble v. Queens. etc., Co., 123 N. Y., 91 (1890). The court said: "In such cases it may be stated that the action of the majority of the shareholders may be subjected to the scrutiny of a court of equity at the suit of the minority shareholders." And in Transportation Co. v. Beatty, L. R., 12 App. Cas., 589, in which the same

thing was held, it was said, in effect, that in such case the ratification must net be brought about by unfair or improper means, nor be illegal or fraudulent or oppressive toward those shareholders who oppose it. A rule excluding stockholders from the right to vote merely because they might be personally interested to vote in a particular way, contrary to the interests of the other stockholders, would be likely to lead to great confusion. Northwest, etc., Co., 5 Canadian Law Times, 277 (1885), rev'g S. C., 5 C. L. T., 85, holding that a purchase by the directors of a vessel from one of the directors could not be set aside by a dissenting stockholder where a majority of the stock had ratified the purchase, even though the director himself held aud veted that majority. A purchase of a steamboat from one who is a director and owns a majority of the stock is valid where ratified by a majority vete at a stockholders' meeting. The director may vote his stock. Northwest, etc.. Co. v. Beatty, 57 L. T. Rep., 426 (1887). A stockholder may vote to ratify a purchase of property from a corporation by the directors, although such stockholder is a director himself. The court said: "The fact that he may have a personal interest separate from the others or from that of the corporation in the matter to be voted upon does not affect his right to vote. It is not to be understood that the majority stockholders may use their

Another phase of this subject arises where the majority of the stockholders in a corporation are interested in another corporation with which a contract is being made. The law requires of the majority of the stockholders the utmost good faith in their control and management of the corporation as regards the minority, and in this respect the majority stand in much the same attitude towards the minority that the directors sustain towards all the stockholders. Thus, where the majority are interested in another corporation, and the two corporations have contracts between them, it is fraudulent for that majority to manage the affairs of the first corporation for the benefit of the second. A court of equity will intervene and protect the minority upon an application by the latter. The principle of law has been clearly laid down that "when a number of stockholders combine to constitute them-

power of voting for the purpose of defrauding the minority." Biorngaard et al. v. Goodhue County Bank et al., 52 N. W. Rep., 48 (Minn., 1892); Foss v. Harbottle, 2 Hare, 461 (1843), where the directors sold their property to the corporation. Inasmuch as the majority of stockholders could ratify the purchase, the court refused to entertain a stockholders' suit until they had voted. Where a person fraudulently misrepresented a mine in its sale to the company for shares of stock, a suit by the company against him does not lie where a majority of the stock votes against the suit, although the shares obtained by the vendee were voted by him and were necessary to make the majority, and although he was a director of the company at the time. East, etc., Co. v. Merryweather, 2 Hen. & M., 254 (1864). This case goes much farther than the modern rule would uphold. See Mason v. Harris, L. R., 11 Ch. D., 97 (1879), holding explicitly that where a director is guilty of fraud as a promoter a dissenting stockholder may bring him to an accounting, although the director controls the directorate and a majority of the shares of stock. Atwool v. Merryweather, L. R., 5 Eq., 464, note (1867), where a dissenting stockholder sued to set aside a sale of property to the company by the defendant, who divided the

profits with one of the directors. though a majority of the stockholders had voted not to bring the action, vet this majority was made up by counting the stock of the guilty parties, and hence was not binding. In a stockholders' vote ratifying the acts of directors, a stockholder has no right to vote stock which he has transferred to others, even though it still stands in his name on the books. Graves v. Mono, etc., Co., 22 Pac. Rep., 665 (Cal., 1889). A creditor who is also a stockholder may vote his stock in favor of a mortgage to himself. Rittenhouse v. Winch, 11 N. Y. Supp., 122 (1890). Works built by a director in opposition to the corporation may be purchased by the latter and new stock issued therefor. Such a transaction is legal where a majority of the minority stockholders, not including the parties interested, vote in favor of it. Barr v. Pittsburgh, etc., Co., 51 Fed. Rep., 33 (1892). In Cumberland Coal Co. v. Sherman, 30 Barb., 533 (1859), the court held that a unanimous vote of the stockholders was necessary to confirm. A ratification by the stockholders of directors' acts cannot be made by a general resolution ratifying "all of the acts of the officers." Farmers' L. & T. Co. v. San Diego, etc., St. R'y Co., 45 Fed. Rep., 518 (1891).

selves a majority in order to control the corporation as they see fit, they become for all practical purposes the corporation itself, and assume the trust relation occupied by the corporation towards its stockholders." ¹

Thus the majority of stockholders cannot cause the corporate property to be sold to them at private sale at a price agreed upon by them and the directors whom they placed in office. The minority are entitled to a public sale.²

Where two stockholders own two-thirds of the capital stock and they cause the directors to sell all the corporate property to a person who buys for them, the owner of the other one-third may cause the sale to be set aside, even though a stockholders' meeting has authorized it.³

Where a stockholder is under contract to carry along the corporate debt, and instead of doing so obtains control of the board of directors and causes a mortgage to be given to a confederate, and thereby causes the corporate property to be foreclosed and sold and wrecks the corporation, he is liable in damages to other stockholders.⁴

Where the majority stockholders, through directors who are their tools, having sold property to the corporation and agreed to pay a mortgage on such property, afterwards cause the corporation to assume and pay the mortgage, the minority stockholders may have the transaction set aside.⁵

Where a person controls a majority of the stock of a ferry and also a railroad company, and puts his "dummies" in as directors and leases all the property of the former to the latter at an unfair price, the court will set the lease aside, at the instance of a minority stockholder.

¹ Erwin v. The Oregon R. & Nav. Co., 27 Fed. Rep., 625 (1886); S. C., 20 id., 577, and id., 833.

Mason v. Pewabic Min. Co., 133 U. S.,
 (1890). See, also, ch. LII, infra.

³ Chicago Hansom, etc., Co. v. Yerkes, 30 N. E. Rep., 667 (Ill., 1892).

⁴ Hanley v. Balch, 53 N. W. Rep., 954 (Mich., 1892).

⁵ Woodroof v. Howes, 26 Pac. Rep., 111 (Cal., 1891). Where the majority stockholders cause the directors to purchase stock of them for the corporation at a price higher than the market price, the minority may cause the transaction to be set aside. Id.

Meyer v. Staten Island R'y Co., 7

N. Y. St. Rep., 245 (1887). Where a lessor and a lessee company are controlled by the same person, and the lessor company is insolvent and the lessee company is advancing large sums of money to pay interest on the bonds of the lessor company with no hope of repayment, the minority stockholders of the lessee company may enjoin such payments. Jeans v. Pittsburgh, etc., R'y (Com. Pl. Ct. Ohio, 1885), stated in Moran v. Pittsburgh, etc., R'y, 32 Fed. Rep., 882. See, also, Merier v. Hooper's Tel. Works, L. R., 9 Ch., 350 (1874). See, also, Peabody v. Flint, 88 Mass., 52 (1863), where, however, laches barred the remedy; Gorham v. Gilson, 28 Cal., 479 Where two companies in litigation pass under the same control the court will no longer retain the case, inasmuch as the same parties control both sides, but in order to protect the minority stockholders the case will be left open.¹

Where on a winding up the court decrees a sale of the corporate

(1865), where, however, the action failed because the stockholders sued to compel a conveyance to each of his proportionate part. Where the majority of the stockholders vote to make a lease of the whole corporate property to themselves, a dissenting stockholder may have the lease set aside. Meeker v. Winthrop Iron Co., 17 Fed. Rep., 48 (1883); and Rice's Appeal, 79 Pa. St., 168, 204 (1875). Where, however, corporate property has been sold and the proceeds retained by one stockholder, another stockholder cannot sue him for money had and received. The action must be in equity and for the benefit of the corporation. Hodsdon v. Copeland, 16 Me., 314 (1839). Equity will set aside a lease which the directors make of a mine to the minority stockholders in order to take it from the control of incoming directors who were elected by the majority. Mahony Min. Co. v. Bennett, 5 Sawyer, 141 (1878). The mere fact that a person owns a majority of the stock does not raise a legal inference that he dominates the board of directors. Porter v. Pittsburg, etc., Co., 120 U. S., 649, 670 (1887). The sale of all corporate assets to the majority, where others offer a higher price, is fraudulent. Wilson v. Prop. Central Bridge, 9 R. I., 590 (1870); Gregory v. Patchett, 33 Beav., 595 (1864), where a sale of all the corporate assets to two of the stockholders on the purchase of their stock by the company was set aside as a fraud on the remaining stockholders. Where the stockholders enter into a contract by which they give a certain amount of their stock to a person who agrees to do certain work for the corporation in consideration of the stock, the remedy for a breach of contract on his part is an

action for damages, unless by the contract the stock was to be returned in case of non-payment. Gillett v. Bowen, 23 Fed. Rep., 625 (1885). If the action is to recover back the stock the corporation is a proper party in order to ohtain a transfer. Johnson v. Kirby, 65 Cal., 482 (1884). See, also, in general, Cates v. Sparkman, 11 S. W. Rep., 846 (Texas, 1889). See, also, § 350, supra. Where a branch corporation faithfully performs its duty as agent the contract of agency cannot be set aside on the ground that individuals supposed to be hostile to the principal own a majority interest in a corporation which in turn owns a majority interest in the agent corporation. Brush Electric Co. v. Brush, etc., Co., 49 Fed. Rep., 8 (1892). nority stockholders cannot have an accounting on the ground that the company is managed in the interest of one stockholder, who owns a majority of the stock; also that the corporation is insolvent, and that under different management it would be profitable, no fraud being alleged. Wheeler v. Pullman, etc., Co., 32 N. E. Rep., 420 (Ill., 1892). A majority of the members of a corporation organized not for profit cannot vote a part of the assets to themselves. Another member may prevent it. Ashton v. Dashaway Assoc., 22 Pac. Rep., 660 (Cal., 1889). Damages may be recovered by a corporation for a fraud practiced upon it, even though an agent of the corporation who aided in the perpetration of the fraud was a stockholder in the corporation. Grand Rapids, etc., Co. v. Cincinnati, etc., Co., 45 Fed. Rep., 671 (1891).

¹ South Spring, etc., Co. v. Amador, etc., Co., 145 U. S., 300 (1892).

mining property at public sale, any one or more of the stockholders may bid, and the court will not readily set the sale aside on the ground that after the property was struck off some one offered a higher price.¹

Sales of property by a corporation are valid, although made at the instigation of stockholders whose stock really belongs to others.² If one person owns all of the stock of the corporation, he may do many acts of which the corporation cannot afterwards complain.³

§ 663. Stockholders' actions against third persons for frauds against the corporation.— Ordinarily, where third persons have defrauded a corporation, and have defrauded it by collusion with the corporate officers, the stockholder's action is against both the officers and the third persons, all being joined as parties defendant. When such is the case the cause of action comes under some one of the preceding sections of this chapter. Another class of cases arises when third persons commit frauds against the corpo-

¹ Pewabic Min. Co. v. Mason, 145 U. S., 349 (1892). A stockholder may bid for the property at a public sale, even though he owns a majority of the stock. Wilson v. Proprietors of Central Bridge, 9 R. I., 590 (1870).

² Gottfried v. Miller, 104 U.S., 521 (1881). 3 Where the owner of all the stock of three railroad corporations and one coal corporation forms a new corporation and takes its stock in exchange for his stock in the three railroad corporations, and subsequently exchanges his stock in the coal corporation, worth less than \$1,500,000, for \$8,000,000 of bonds of the new corporation, he being the sole stockholder in all these transactions, except a holder of seven shares who does not object, the new corporation cannot hold him liable for breach of trust in regard Columbus, etc., R'y Co. v. thereto. Burke. See ch. XLVI in relation to this famous litigation. See, also, Swift v. Smith, 3 Central Rep., 899 (Md., 1886),

4 Thus, where a railroad has been leased to another railroad company under a certain agreement of the latter guarantying a fixed sum to the former, and the lessee railroad company refuses to fulfill its contract and has control of the lessor railroad, a stockholder of the

latter may bring suit against the former to remedy the wrong. March v. Eastern R. R. Co., 40 N. H., 548 (1860). And the case of Lewis v. St. Albans, etc., Works, 50 Vt., 477 (1878), very properly says "that whenever the trustee has been guilty of a breach of trust, and has trausferred the trust property by sale or otherwise to any third party, the cestui que trust has a full right to follow such property into the hands of such third party, unless he stauds in the situation of a bona fide purchaser for value without notice." See, also, Imperial, etc., Co. v. Coleman, 6 H. L., 189 (1873). A person receiving corporate money in compromise of his suit against guilty directors may be compelled to pay it back to the corporation. Erie R'y Co. v. Vanderbilt, 5 Hun, 123 (1875). A person sued on a contract hy a corporation cannot claim that the contract is unenforceable because another of the parties thereto was a director of the corporation. Stewart v. Lehigh V. R. R. Co., 38 N. J. L., 505 (1875). In Beach v. Cooper, 72 Cal., 99 (1887), in a stockholder's suit to hold officers liable for paying \$315,000 for a few months' loan of \$140,000, the court held that the act was not a fraud per se, and that it was possible that the directors might explain it. See § 738.

ration without the collusion of the corporate officers, but the latter neglect or refuse to institute a suit to rectify the wrong. The right of the stockholder is then not so clear. It is ordinarily within the discretion of the corporate officers to enforce, compromise or abandon claims which the corporation may have against third persons. Generally this exercise of discretion cannot be questioned or remedied by the stockholders, except by electing at a subsequent election directors more in accord with the stockholders' views. It is possible, however, that cases may occur where the judgment of the directors is so palpably and injuriously wrong that the courts will sustain a stockholder's action herein. This subject, however, is treated elsewhere.

§ 663a. The use of a corporation as a "cloak" for defrauding the public or particular individuals — The courts will sometimes ignore the corporate existence.— A corporation is in law a person or entity entirely distinct from its stockholders and officers. It may become insolvent and yet not make them insolvent. It may commit fraudulent or ultra vires acts and vet they be not liable therefor. It may do acts which its stockholders as individuals may be under contract not to do, and the stockholders may do acts which the corporation cannot do. The disabilities of the corporation are not disabilities of the stockholders, nor are the disabilities of the stockholders the disabilities of the corporation. Hence it is that a corporation is often organized to act as a "cloak" for frauds. Such cases as these are becoming common, and the courts are becoming more and more inclined to ignore the corporate existence and thereby circumvent the fraud.² Hence it has been held that, where a person has contracted that he will not do a certain act, he cannot form and control a corporation and have the corporation do that act.3 The mere fact, however, that a person has contracted

¹ See § 750, infra.

² See § 6, supra. Although a new railroad corporation is clearly a "dummy" corporation, its incorporators and officers being officers in another railroad corporation, and its expenses being paid by the latter company, still it is a legal corporation. Southern Kan, etc., R. R. v. Towner, 21 Pac. Rep., 221 (Kan., 1889).

³ Beal v. Chase, 31 Mich., 490 (1875). When a person sells a trade-mark and then sells an infringement upon it to a corporation organized and controlled by himself, the latter may be enjoined from using it. Lepage Co. v. Russia,

etc., Co., 51 Fed. Rep., 941 (1892). foreign corporation cannot prevent a domestic corporation from using the same name, especially where the latter was incorporated first, even though the public may be misled. In this case a party sold out to individuals, but did not sell any trade-marks. He then incorporated a company under the name of the trade-mark. Hazelton, etc. Co., v. Hazleton, etc., Co., 30 N. E. Rep., 339 (Ill., 1892). Unless there is a positive allegation and proof that the corporation was fraudulently formed to violate the individual contract, the suit will fail. Moore, etc., Co. v. Towers. to sell a patent-right does not affect the title of a corporation to whom he transfers such patent. Where it would be illegal for two or more corporations to unite in regulating the production and price of an article, it is illegal to accomplish that result by placing all the shares of stock of those corporations in the hands of trustees and thereby securing co-operating boards of directors.

There are many other instances in which the corporate existence will not suffice to evade liabilities, disabilities and frauds. A partnership cannot transfer all its property to a corporation for shares of stock and thereby defraud the creditors of the partnership.³ The officers and agents of a corporation who cause the corporation to defraud its creditors or subscribers to its stock by means of fraudulent misrepresentations are liable to the persons so defrauded.4 The stockholders and officers of a corporation which was not properly organized may be liable as partners for all of its debts,5 but this liability is not based on fraud. A few cases hold that a corporation incorporated in one state for the purpose of doing all its business in another state is a fraud on the law, and is only a partnership; but the weight of authority holds otherwise.6 If the promoters or officers or a majority of stockholders defraud the corporation itself or the minority stockholders, a court of equity will give full and ready relief. Where persons in control of a corporation use that control to defraud persons with whom they have contracted, a court of equity will aid the persons so defrauded.8 The stockholders of a corporation are distinct from the corporation itself, and may transact business irrespective of their contracts

etc., Co., 6 S. Rep., 41 (Ala., 1889). A contract by a person to sell all lumber manufactured by him through certain agents cannot be evaded by his forming a corporation and manufacturing and selling through it. Hagg v. Maguire, 23 Atl. Rep., 806 (Pa., 1892).

Davis, etc., Co. v. Davis, etc., Co., 20
Fed. Rep., 699 (1884); Averill v. Barber,
N. Y. Supp. 255 (1889). See, also,
ch. XLIII, infra, on Notice.

²See ch. XXIX. Corporate action may arise in other ways than by the formal action of its board of directors or meeting of stockholders or of its agents. It may arise by passively allowing itself to be used as an instrument of wrong or illegal acts. People v. North River S. Rep. Co., 121 N. Y., 582, 619

(1890). But an agreement of the stockholders of a corporation that they will not compete with a "trust" into which they have entered will not bind the corporation itself. It may revive its business even though its stockholders are the ones who entered into the "trust." American Preservers' Co. v. Norris, 43 Fed. Rep., 711 (1890).

³ See ch. XL, infra.

 4 See § 48; also, chs. IX and XX, and § 243, supra.

⁵ See ch. XIII. supra.

⁶ See §§ 237–239, supra.

⁷See the previous sections of this chapter for many instances of such frauds.

 8 See \S 350, etc., and the notes thereto.

9 See ch. XLIII.

or obligations; but an injunction against their doing a specified act is violated if they cause or aid the corporation to do that act.1

A railroad company owning all the stock and bonds of another company does not own the property of the latter and cannot sue on a cause of action belonging to the latter; 2 and ordinarily is not liable for its debts.3

But where a railroad company causes a telegraph company to be incorporated and subscribes to all its stock and appoints all its officers and holds it out as the future owner of a telegraph system which the railroad owns, and then sells that system to some one else, a person contracting with the telegraph company on the faith of the scheme being carried out may hold the railroad company liable on the contract on the principle of law that a principal is liable on the contracts of its agent.4

Where the corporation does business by organizing branch corporations, and the stockholders in the latter are disregarded, and the main corporation pays up the stock and manages it without regard to its corporate character, the property of the branch corporation is subject to the debts of the parent company.5

Sometimes a "dummy" corporation is used to hold land, the stockholders being aliens or foreign corporations.6

Where a corporation secures a rebate from a railroad company, not only on shipments made by the former but on shipments made by other parties, the active agents of such corporations receiving such moneys may be held personally liable for them. The court said that inasmuch as the company "was organized by the promoters, the defendants, simply for the purpose of consummating the illegal agreement, and shielding themselves from the consequences of receiving the illegal exactions made under it, the act of incorporating can be of no avail to them as a defense"7

The subject of the personal liability of officers and directors of corporations is more fully considered elsewhere.8

(1889).

² Fitzgerald v. Missouri P. R'y, 45 Fed. Rep., 812 (1891).

3 Although one railroad owns or controls all the stock of another railroad, yet the former is not personally liable for the negligence, dehts, etc., of the latter. Atchison, etc., R. R. v. Cochran, 23 Pac. Rep., 151 (Kan., 1890). When a corporation or person owns all the stock and bonds of another corporation and causes the latter to lease all its property,

1 See King v. Barnes, 113 N. Y., 476 it is legal to have the rent made payable to the first-named corporation or person. Union Pacific R'y v. Chicago, etc., R'y, 51 Fed. Rep., 309 (1892).

> ⁴ Interstate Tel. Co. v. Balt. & O. T. Co., 51 Fed. Rep., 49 (1892).

> ⁵ Day v. Postal Tel. Co., 7 Atl. Rep., 608 (Md., 1887).

> ⁶ See ch. XLI, infra, concerning this subject.

> ⁷ Brundred v. Rice, 32 N. E. Rep., 169 (Ohio, 1892).

8 See § 682.

CHAPTER XL.

ULTRA VIRES ACTS AND CONTRACTS — IN OTHER WORDS, ACTS AND CONTRACTS WHICH ARE IN EXCESS OF THE CHARTER POWERS OF THE CORPORATION, DIRECTORS OR STOCKHOLDERS.

§ 664. Meaning of the term ultra vires. 665. Method of treatment of the subject.

666. A stockholder may object to an ultra vires act.

667. Neither the directors nor a majority of the stockholders have power to sell all the corporate property as against the dissent of a single stockholder, unless the corporation is in a failing condition.

668. Sale of corporate property to another corporation in exchange for stock and bonds of the latter

669. Corporate creditors' rights where the corporation sells all its property to another corporation. § 670. Rights and liabilities of mortgages of a corporation that purchases property and issues stock in payment therefor.

671. Sale of partnership property to a corporation for stock of the latter.

672-677. Consolidations, leases and sales of railroads.

678. A corporation cannot be a partner in a partnership.

679. A corporation cannot be an executor or administrator.

680. Stockholder's right to prevent the corporation from undertaking a new business.

681. Miscellaneous ultra vires acts.

682. Personal liability of the directors and officers for *ultra vires* acts.

§ 664. Meaning of the term ultra vires:— The term ultra vires, as used in this treatise, means any act of a corporation which the corporation is not authorized to do, either by its express or implied powers. This term has been objected to as having no fixed and clear meaning, and to some extent the objection is reasonable. There is no other term, however, that has acquired the significance, general use and peculiar meaning that are attached to the words ultra vires; and consequently the term probably has acquired a permanent place in the vocabulary of corporation law.

1 "The contracts of corporations are said to be ultra vires when they involve some adventure or undertaking not within the scope of their charter, which is the rule of corporate action." Leslie v. Lorillard, 110 N. Y., 519 (1888). For various definitions of the words ultra vires, see Pierce on Railroads (2d ed.), p. 516; Taylor v. Chichester, etc., R'y Co., L. R., 2 Ex., 356, 378 (1867); Bissell v. Railroad Cos., 22 N. Y., 258, 293 (1860); Nat'l Pemberton Bank v. Porter, 125 Mass., 333; Whitney Arms Co. v.

Barlow, 63 N. Y., 62 (1875); Earl of Shrewsbury v. North Staffordshire R'y Co., 35 L. J. (Ch.), 166; Nassau Bank v. Jones, 95 N. Y., 115 (1884); Green's Brice's Ultra Vires (2d ed.), 35; Miners' Ditch Co. v. Zellerbach, 37 Cal., 543, 579; McPherson v. Foster, 43 Iowa, 48, 64, 65; Ashbury R. C., etc., Co. v. Rich, L. R., 7 H. L., 653, 672 (1875); 2 Kent's Com., *300 (12th ed.), note. Two difficulties have arisen in agreeing upon a definition of this term. First, the term ultra vires was often used to des-

§ 665. Method of treatment of the subject.—There has been extreme difficulty and confusion in ascertaining the dangers, effect, rights and remedies when an ultra vires act has been committed. The attempt to formulate general rules on this subject has only added to the confusion.¹ Accordingly, the plan of explanation pursued in this work is to state those acts which have been adjudged ultra vires,² and also those acts which have been adjudged to be intra vires.³ Moreover, since an ultra vires act may be objected to by the state, a stockholder, the corporation or the person contracting with the corporation, and since often one of these parties may sustain the objection where the others would not be allowed so to do, it is necessary to consider always the four questions, who brings the suit; who is sued; what act is complained of; and what conclusion was reached.

ignate not only acts beyond the express and implied powers of the corporation, but also acts which are contrary to public policy, and are yold whether done by corporations or individuals. Such acts when done by corporations are now termed "illegal" acts, and the term ultra vires is not used so as to include them. Second, the term ultra vires has been applied to acts which are beyond the powers of the directors. but within the powers of the majority of the stockholders. This use of the term, however, is now discarded, and it is used to designate acts which are beyond the powers of a majority of the stockholders as against a minority; or are beyond the powers of the stockholders acting unanimously as against the state. In Taylor v. Chichester, etc., R. R., L. R., 2 Ex., 356, 378, Blackburn, J., says: "I think it very unfortunate that the same phrase of ultra vires has been used to express both an excess of authority as against the shareholders, and the doing of an act illegal as being malum prohibitum; for the two things are substantially different; and I think the use of the same phrase for both has produced confusion."

¹For instance, the general rule that "any ambiguity in the terms of the grant must operate against the corporation and in favor of the public, and the

corporation can claim nothing that is not clearly given by the law," etc. (Perrine v. Chesapeake, etc., Co., 9 How., 172-1849), is sound law, and has been enounced in many cases; but, as a matter of fact, this principle gives little light or satisfaction to the bench, bar or layman. Each case turns largely on its own facts. Moreover, the decision turns largely on who sues, who is sued. what relief is sought, and whether the act has been performed by one side or not. General rules cannot clearly make the distinctions. The old ideas have been changed. Indeed, it is refreshing to hear from that great judge, Mr. Justice Miller, such sound sense as this: "The truth is that, with the great increase in corporations in very recent times, and in their extension to nearly all the business transactions of life, it has been found necessary to hold them responsible for acts not strictly within their corporate powers, but done iu their corporate name, and by corporation officers who were competent to exercise all the corporate powers." Salt Lake City v. Hollister, 118 U.S., 256 (1885). See, also, Penn., etc., R'y Co. v. Keokuk, etc., Co., 131 U. S., 371, 384, 389 (1889).

² This is the subject of this chapter.

³ This is the subject of the following chapter XLI.

It rarely happens that the state objects to an ultra vires act. That it has a right to object by quo warranto is undoubted.

§ 666. A stockholder may object to an ultra vires act.—That a charter constitutes a contract between the corporation and its stockholders is a principle of law that has become firmly imbedded in the jurisprudence of modern times. Upon this principle of law rests the stability, permanence and honesty of management of many corporations, particularly those of railroads, and from it arises much of the confidence, safety and protection of the stockholder himself. It was first promulgated in America, in 1820, in Livingston v. Lynch, and was applied to corporations in The Hartford & New Haven Railroad Company against Croswell,3 and in England, in 1824, in Natusch v. Irving. These cases have been followed by a long list of supporting decisions. They were the first to establish clearly the doctrine that any act or proposed act of the corporation or of the directors or of a majority of the stockholders which is not within the express or implied powers of the charter of incorporation or of association — in other words, any ultra vires act — is a breach of the contract between the corporation and each one of its stockholders, and that consequently any one or more of the stockholders may object thereto and compel the corporation to observe the terms of the contract as set forth in the charter.

§ 667. Neither the directors nor a majority of the stockholders have power to sell all the corporate property as against the dissent of a single stockholder unless the corporation is in a failing condition.— Ever since the case of Abbot v. American Hard Rubber Company 5 the law has been clearly established in this country that

¹ The cases of Att'y-Gen'l v. Utica Ins. Co., 2 Johns. Ch., 389 (1817); Att'y-Gen'l v. Bank of Niagara, Hopk. Ch., 354 (1825), clearly hold that ultra vires or illegal acts of a joint-stock corporation cannot be enjoined in a court of chancery at the instance of the state. The remedy open to the state is a writ of quo warranto or an information in the nature thereof. See, also, § 635, supra.

² 4 Johns. Ch., 373.

3 5 Hill, 383 (1843).

42 Cooper's Ch., 358, by Lord Eldon; also reported in Gow on Partnership,
398. Thus, Lord Chancellor Campbell said, in Simpson v. Westminster Palace Hotel Co., 8 H. of L. Cases, 712 (1860);
"I bow to the authority of Natusch v.

Irving. . . . The funds of a joint-stock company established for one undertaking cannot be applied to another. If an attempt to do so is made, this act is ultra vires, and, although sanctioned by all the directors and by a large majority of the shareholders, any single shareholder has a right to resist it, and a court of equity will interfere on his behalf by injunction." In Pickering v. Stephenson, L. R., 14 Eq., 322 (1872), the court said: "It is difficult to conceive any system of jurisprudence in which Natusch v. Irving would have been differently decided."

⁵ 33 Barb., 578 (1861). See, also, id., 4 Blatch., 489.

a dissenting stockholder may prevent the sale of all the corporate property by the directors or by a majority of the stockholders, where the corporation is a solvent, going concern. And even where a dissolution is the purpose in view, yet, if the corporation is a prosperous one, it is extremely doubtful whether such a sale can be made. The old common-law doctrine that a majority of the stockholders may at any time effect a voluntary dissolution of the corporation is still sustained. But if the purpose of such dissolution is not the bona fide discontinuance of the business, but is the continuance of that business by another new corporation, then the better and later rule is that a dissenting stockholder may prevent

¹ People v. Ballard, 134 N. Y., 269 (1892), reviewing the cases. A stockholder of a manufacturing company may enjoin a lease of all its property and business to another corporation for twenty-five years at a rental equal to one-half of the profits of the business. Small v. Minnesota, etc., Co., 47 N. W. Rep., 797 (Minn., 1891); Re Sovereign, etc., Ins. Co., 61 L. T. Rep., 455 (1889). See, also, Smith v. New York, etc., Co., 18 Abb. Pr., 419 and 435 (1865); Robbins v. Clay, 33 Me., 132 (1867); Hat B. Co. v. Eickmeyer, etc., 56 How, Pr., 78 (1878); Barclay v. Quicksilver M. Co., 9 Abb. Pr. (N. S.), 284 (1870); Copeland v. C. Gas Co., 61 Barb., 60 (1871); Conro v. Port Henry I. Co., 12 Barb., 127 (1851); Bird v. Bird's, etc., Co., L. R., 9 Ch., 358 (1874): Adriance v. Roome, 52 Barb., 399 (1868); Brady v. Mayor, etc., 16 How. Pr., 432 (1857); Middlesex R. R. Co. v. Boston, etc., R. R. Co., 115 Mass., 347 (1874). Cf. Dana v. Bank of U. S., 5 Watts & S. (Pa.), 247 (1843); Union Bank, etc., v. Ellicott, 6 G. & J. (Md.), 363 (1834). See, also, Sheldon, etc., Co. v. Eickemeyer, etc., Co., 90 N. Y., 607 (1882); Balliet v. Brown, 103 Pa. St., 546 (1883); Gray v. N. Y., etc., Steamship Co., 5 T. & C. (N. Y.), 224 (1875). But see Hutchinson v. Green, 1 R'y & Corp. Law Journal, 18 (Mo., 1866), and Mills v. Hurd, 29 Fed. Rep., 410 (1887), relative to unincorporated associations. A sale of all the corporate property to an individual who purchases in good faith cannot be set aside by the corporation as

ultra vires. Miners' Ditch Co. v. Zellerbach, 37 Cal., 543 (1869). That the whole property cannot be sold out, see, also, Astor v. Westchester, etc., Co., 33 Hun, 333 (1884). An injunction against transferring all the property to another corporation will not be granted where only a leasing of part of the property is con-Small v. Minn., etc., Co., templated. 10 N. Y. Supp., 456 (1890). A vendee of all the property of a corporation cannot avoid the purchase on the ground that the stockholders had not assented thereto. Stokes v. Detrick, 23 Atl. Rep., 846 (Md., 1892). A charter cannot be assigned. Only the shares of stock can be assigned. Welch v. Old Dominion, etc., Co., 10 N. Y. Supp., 174 (1890). Directors who are merely vested with the ordinary powers of executive management cannot radically affect the chartered rights of stockholders (Baker's Appeal, 16 Weekly Notes Cas., 445; 42 Leg. Int, 226); and hence have no authority to dispose of the corporate plant by lease, sale or otherwise. Martin v. Continental Railway Co., 14 Phila. Rep., 1. A secession of the majority. carrying corporate funds to a new corporation, is a fraud on the old corporation. Tomlinson v. Bricklayers', etc., 87 Ind., 308 (1882). Where all the property of the corporation is sold, together with the stock of the company, the directors cannot subsequently act as a board, they no longer being stockholders as required by the statute. Orr, etc., Co. v. Reno Water Co., 30 Pac. Rep., 695 (Nev., 1882).

the sale, even though it is made with a view to dissolution of the corporation. This is the law as laid down by the well-considered case of Kean v. Johnson. Such a dissolution is practically a fraud on dissenting stockholders. It seeks to do indirectly what cannot legally be done directly. If, however, the corporation is an unprofitable and failing enterprise, then a sale of all the corporate property with a view to dissolution may be made.

The subject of the re-organization of corporations upon foreclosure is considered elsewhere.

By the unanimous consent of the stockholders it is always legal to sell all the property of a private corporation, proper provision being made for the protection of corporate creditors. This rule does not apply, however, to railroads and other *quasi*-public corporations. The state has an interest in their continuance and they cannot sell their property except upon the express consent of the state.

Where the by-laws of a private corporation authorize a sale of all its property, such sale may be made even against the wishes of

19 N. J. Eq., 401 (1853); Ervin v. Oregon R'y & Nav. Co., 27 Fed. Rep., 635 (1886). Where before the dissolution of an insurauce company all of its assets were transferred to another responsible company which contracted to meet all obligations, the court will not necessarily set the transfer aside and appoint a receiver, but will allow the transfer to stand if fair and best. The minority are not absolutely entitled to a receivership and sale. Baltimore & O. R. R. v. Cannon, 20 Atl. Rep., 123 (Md., 1890).

²Boston, etc., R. R. Co. v. N. Y. & N. E. R. R. Co., 13 R. I., 260 (1881). See §§ 629, 630.

³ Lauman v. Lebanon Valley R. R. Co., 30 Pa. St., 42 (1858). Where the business was a losing one, a lease of all the property by the stockholders, having wide powers by the charter, was upheld. Feather v. Lee, etc., Co., L. R., 1 Eq., 318 (1865). A dissenting stockholder cannot enjoin the corporation from selling all its property where its debts are large and a mortgage is about to be foreclosed, and a sale is the only means of protecting the company, and there is no fraud involved, and a large majority of the stockholders are in favor of the sale, and

the company will have the proceeds of the sale in its treasury to continue business. Sewell v. East, etc., Co., 25 Atl. Rep., 929 (N. J., 1893). A manufacturing corporation may discontinue its operations when unprofitable for the purpose of protecting its shareholders from further loss, and may sell or lease the property. Skinner v. Smith, 134 N. Y., 240 (1892). To discontinue a failing business and proceed to sell the property and pay the debts is not a breach of trust. Rothwell v. Robinson, 47 N. W. Rep., 255 (Minn., 1890). If the corporation is financially embarrassed, a majority of the stockholders may authorize the directors to sell all its property at public auction, and a reorganization committee representing a part of the stockholders may buy it in, the price paid being a fair one. Hayden v. Official, etc., Co., 42 Fed. Rep., 875 (1890).

⁴See ch. LII, infra.

⁶ A corporation may convey its property with the consent of stockholders. State v. Western, etc., Co., 19 Pac. Rep., 349 (Kan., 1888).

6 See § 668, infra.

7 See ch. LIII, infra.

a minority of the stockholders. So, also, where the charter expressly authorizes such a sale it is legal. And in any case the right of a dissenting stockholder to object may be lost by laches.

§ 668. Sale of corporate property to another corporation in exchange for stock and bonds of the latter.—In addition to the objections to a sale of all the corporate property to another corporation, referred to in the preceding section, there often is involved the question of whether the sale may be for the bonds and stock of the vendee company. In these days of consolidations, reorganizations and mergers of corporations it frequently happens that the purchase price is paid in the stock and bonds of the purchasing company. The question then arises whether the selling company has power to take stock and bonds in payment, and whether it may compel its stockholders to accept such stock and bonds upon a distribution of the assets of such selling company. The law seems to be settled that the stock of the vendee company received by the vendor company in payment for the property cannot be forced upon dissenting stockholders of the vendor company in a distribution of its assets. They are entitled to money. Such of them as do not voluntarily join the new corporation are entitled to the value of their shares in the old corporation in cash, and may have an injunction until they are secured.4 To compel the stockholders

¹ It is legal for the by-laws to provide that the company may sell out all of its property at any time. Cotton v. The Imperial, etc., Corporation, 67 L. T. Rep., 342 (1892).

² The principle that the board of directors has no power to sell out the entire property does not apply where the statute under which it was incorporated authorized such a sale. City of St. Louis v. St. Louis, etc., Co., 70 Mo., 69, 98 (1879). In the case Re Buenos Ayres, etc., Co., 66 L. T. Rep., 408 (1892), a sale of the company's enterprise to the government upon terms which paid something to the preferred stockholders. but left nothing for the common stockholders, was sustained. Power to sell to a company does not anthorize a sale to an individual. Bird v. Bird's, etc., Sewage Co., L. R., 9 Ch., 358 (1874). In Clinch v. Financial Corp., L. R., 5 Eq., 450 (1868), the company, a business company, had power to consolidate with another company if the liabilities of the

stockholders were not increased. A stockholder enjoined a consolidation in which such liabilities would be increased. In Dougan's Case, 28 L. T. (N. S.), 60 (1873), a stockholder of an insurance company was relieved of his subscription where the company had consolidated with another insurance company without authority so to do.

³ See ch. XLIV, infra; Banks v. Judah, 8 Conn., 145 (1830), holding that long delay of a dissenting stockholder in bringing suit will bar his remedy. This, perhaps, is the first reorganization case that is to be found in the books.

⁴State v. Bailey, 16 Ind., 46 (1861); Kelley v. Mariposa Land & Mining Co., 4 Hun, 632 (1875). Cf. New Jersey Zinc Co. v. New Jersey Franklinite Co., 13 N. J. Eq., 322 (1861); S. C., 15 id., 418 (1862). Contra, Sawyer v. Dubuque, etc., Co., 42 N. W. Rep., 300 (Iowa, 1889). In the case of Farmers', etc., Co. v. Toledo, etc., Co., 54 Fed. Rep., 759 (1893), the court held that where one railroad com-

of the old corporation to accept the stock of the new corporation in payment for their interest in the old would be in effect to compel them to join the new corporation, or, what is the same thing, to compel them to consent to a consolidation. At this point another serious difficulty arises if payment is in stock. The only way to ascertain the real value of the property is by a public sale of it, and the dissenting stockholders may insist upon this where the sale is not authorized by statute. The supreme court of the United States have so decided. The majority of stockholders have no right to sell the corporate property, upon dissolution, to a new corporation for stock in the latter, and then say to the minority, "We have formed a new company to conduct the business of this old corporation, and we have fixed the value of the shares of the old corporation. We propose to take the whole of it and pay you for your shares at that valuation, unless you come into the new corporation, taking shares in it in payment of your shares in the old one."2 At the public sale, however, the majority stockholders may buy in the property.3

Frequently the statutes provide for buying out dissenting minority stockholders at the appraised value of their stock.⁴ A ques-

pany is authorized by statute to sell its stockholders in common are found. See railway property and franchises to another company, it may receive in payment therefor shares of stock in the vendee company, and its stockholders are obliged to accept payment in stock. Judge Taft, however, dissented from this conclusion. Laches may bar the stockholder's right to object. Taylor v. North Star, etc., Co., 21 Pac. Rep., 753 (Cal., 1889).

1 Ex parte Bagshaw, L. R., 4 Eq., 341 (1867); McCurdy v. Meyers, 44 Pa. St., 535 (1863); Frothingham v. Barney, 6 Hun, 366 (1876); Lauman v. Lebanon, etc., R. R. Co., 30 Pa. St., 42 (1858).

² Mason v. Pewabic Min. Co., 133 U. S., 50 (1890). Cf. Treadwell v. Salisbury Mfg. Co., 7 Gray, 392 (1856). See, also, Buford v. Keokuk Northern Line Packet Co., 3 Mo. App., 159 (1876); Black v. Delaware, etc., Canal Co., 22 N. J. Eq., 130, 415 (1871); S. C., 24 id., 455 (1873); Lauman v. Lebanon Valley R. R. Co., 30 Pa. St., 42 (1858). A different rule of course prevails where a sale, lease or consolidation is made under a statute, as in the case of railroads, even though § 662 and ch. LIII, supra.

3 A reorganization committee representing a part of the stockholders may buy in the property at a public sale by the directors, the business being financially embarrassed, and the price being a fair one. Havden v. Official, etc., Co., 42 Fed. Rep., 875 (1890). See, also, ch. LIL

4 Under the English Companies Act all the property of a company may be sold to another company, but provision is made for the protection of the minority by paying him the value of his shares. Re London, etc., Co., 62 L. T. Rep., 224 (1889). Where upon the voluntary dissolution of a corporation a reorganization scheme is carried out by which the property is turned over to a new company for its shares, and a reasonable time is fixed within which the old stockholders must exercise their option to take stock or have it sold by the liquidator, a stockholder cannot exercise his option after that time although he was ignorant of the whole matter, nor can he have the scheme set aside. Postletion may also arise as to whether the selling corporation has power to acquire the stock and bonds of another corporation. Yet, where all the stockholders of the company accepting the stock assent, no one else can object.¹

waite v. Port Philip, etc., Co., 62 L. T. Rep., 60 (1889); Weston v. New Guston Co., id., 275; S. C., 60 id., 805. Where an appraisal of the stock of a dissenting stockholder is made under a statute authorizing a consolidation and there is no market value for the stock, the award is like an unliquidated account and bears interest only after the appraisers report. Matter of Peekskill Plow Works, 6 Hun, 236 (1875).

1 Although a corporation cannot purchase or deal in stocks of other corporations unless expressly authorized by law so to do, yet it may take stock in payment for a debt. And where all the stockholders of a manufacturing corporation consent to the sale of all its property to another corporation in exchange for stock in the latter, even though the former corporation was forbidden by statute to purchase the stock of other corporations, the corporation may then sell the stock and the vendee cannot set up ultra vires on the part of the vendor. Holmes, etc., Co. v. Holmes, etc., Co., 127 N. Y., 252 (1891). unanimous consent it is legal for two companies to sell all their property to a third company, take its stock in payment and divide the stock among the stockholders, all creditors being paid. Kohl v. Lilienthal, 20 Pac. Rep., 401 (Cal., 1889). A contract whereby a corporation agrees to sell all its property to another corporation for bonds and stock of the latter company cannot be enforced, nor he the basis of damages for breach, inasmuch as one corporation has no power to buy the stock of another corporation. Easun v. Buckeye Brewing Co., 51 Fed. Rep., 156 (1892). An offer of a corporation to sell out in consideration of stock in another corporation, the latter to pay all existing debts, is not enforceable by the former company where the latter company accepted the offer on condition that the debts should not exceed a certain amount. Not even the assent of the president of the former company to the condition is sufficient. Bi-Spool, etc.. Co. v. Acme, etc., Co., 26 N. E. Rep., 991 (Mass., 1891). The stockholders of a corporation may together with the directors cause the corporate property to he sold to a new corporation in exchange for the stock of the latter. A pledgee of stock in the former corporation cannot after the sale undo the sale or hold the latter corporation liable. His remedy is against the pledgor and the first corporation. Leathers v. Janney, 6 S. Rep., 884 (La., 1889). A purchasing corporation is not bound to see that the selling corporation distributes the stock of the former legally among the stockholders of the latter corporation. Id. Where a consolidation is effected by one company buying all the stock of another company, and, just before the transaction is completed, the company whose stock is thus sold issues a dividend of interestbearing securities in order to defraud the purchasing company, the latter may by a hill in equity have such securities canceled. Bailey v. Citizens', Gas, etc., Co., 27 N. J. Eq., 196 (1876). A corporation organized to deal in the stock of a stockyard corporation and hold personal and real estate may buy competing stockyards; and may buy the stock of a contemplated competing company; also buy, guaranty and sell the bonds of such competing company; also pay money to settle suits against the firstnamed stockyard company, and to bind stockyard men not to erect competing yards for a specified term of years within a certain territory; and may sell any or all of the above prop-

§ 669. Corporate creditors' rights where the corporation sells all its property to another corporation.— Where a corporation sells all its property for cash there is no difficulty in regard to creditors, the sale being an honest one, inasmuch as the cash must be applied to the corporate debts before any distribution is made among the stockholders. But where the property is sold for stock a more difficult question arises. A creditor of the corporation then has several remedies open to him. He may subject the stock to the payment of his debt; 1 and if the stockholders have distributed the stock among themselves without paying the corporate debts, he may compel them to return the stock and apply it to his debt;2 or he may levy an attachment or execution upon the property which was transferred; or, after obtaining an unsatisfied judg-

pany. Ellerman v. Chicago, etc., S. Y. Co., 23 Atl. Rep., 287 (N. J., 1891).

¹ Corporate creditors may object to the company selling out all its property to another corporation and receiving pay in the stock of the latter corporation. Such stock may be subjected by the creditors to their debts, or the conveyance may be set aside and the company wound up as insolvent. Vance v. McNabb, etc., Co., 20 S. W. Rep., 424 (Tenn., 1892). A treasurer cannot interplead between the stockholders and a corporate creditor who is seeking to reach bonds received by the corporation in payment for its property. Stone v. Reed, 25 N. E. Rep., 49 (Mass., 1890). Where the officers of a bank use its funds to buy property which they then turn in to a corporation in payment for stock, the property is impressed with a trust and may be followed. The fact that they were officers of the corporation also is sufficient to give it notice. The bank may follow the stock or the property at their option. Farmers', etc., Bank v. Kimball, etc., Co., 47 N. W. Rep., 402 (S. D., 1890). Where a mortgagee in possession of the property leases it with other property and takes stock in payment he must account to the mortgagor for the dividends received on the stock representing the mortgaged property. The stock is impressed with a trust character. Entries

erty and right to the first-named com- on the stock ledger and corporate books are competent evidence of the issue. Chapman v. Porter, 69 N. Y., 276 (1877).

²Where the stockholders distribute the assets among themselves a creditor may follow the assets. Panhandle, etc., Bank v. Stevenson, 15 S. W. Rep., 23 (Tex., 1890). Creditors may reach stock which the corporation which becomes insolvent has distributed without a dividend. McKusick v. Seymour, etc., Co., 50 N. W. Rep., 1116 (Minn., 1892). Where a company is reorganized by a new company buying the property of the old and giving the stock of the new company to the old company in payment therefor, the transaction being carried out by one hundred and sixty thousand one hundred and sixty-five shares out of one hundred and sixty-four thousand two hundred and eleven shares, over four thousand shares not being represented, the old company cannot distribute the stock among the stockholders unless the company is dissolved. Kohl v. Lilienthal, 22 Pac. Rep., 689 (Cal., 1889). The company may distribute the assets provided all creditors are paid. Rorke v. Thomas, 56 N. Y., 559 (1874).A corporate creditor cannot maintain a bill to enjoin the declaration of a dividend out of the capital stock. Mills v. Northern R'y, L. R., 5 Ch. App., 621 (1870). Cf. ch. XXXII, supra.

3 A creditor of an insolvent corporation may attach its property which has ment against the corporation, he may file a bill in equity to set aside the sale as being in fraud of creditors; or under some circumstances he may hold liable the corporation that purchased the property from the corporation that is indebted to him.

been transferred by it to another corporation in payment for the whole capital stock of the latter corporation. Mc-Vicker v. American Opera Co., 40 Fed. Rep., 861 (1889). A judgment creditor of an insolvent corporation may levy on and sell under execution the property of the corporation which has been conveyed to a new company, under a reorganization plan to which all of the old stockholders and most of the creditors have assented. Montgomery Web Co. v. Dienelt, 19 Atl. Rep., 428 (Pa., 1890).

¹A corporate creditor seeking to reach the assets of the company which have been distributed among the stockholders, upon a sale of all the property of the company, cannot file a bill in equity for that purpose until he has first obtained judgment against the company. Swan, etc., Co. v. Frank, 148 U. S., 603 (1893); Central R. R., etc., Co. v. Pettus, 113 U. S., 116 (1885).

² Where, in a foreclosure suit and before sale, the corporation and the bondholders agree to rent the railroad to another company, and do so rent it at a rental which meets the interest but leaves nothing for the unsecured creditors, the latter may have the railroad subjected to the payment of their debts. Farmers', etc., T. Co. v. Missouri, etc., R'y, 21 Fed. Rep., 264 (1884). Where a brewery company is dissolved in order that its assets may be sold and consolidated with other breweries, a person who had a bottling contract with it may follow its assets and subject them to his claim. Schlieder v. Dielman, 10 S. Rep., 934 (La., 1892). A reorganization without foreclosure, whereby the property is leased to another corporation at a price which leaves nothing for unsecured creditors, may be attacked by the unsecured creditors. See ch. LII;

Farmers', etc., T. Co. v. Missouri, etc., R'y, 21 Fed. Rep., 264 (1884). Where a creditor of a corporation seeks to reach property which has been fraudulently conveyed away by the company, he need not make the corporation a party defendant to the suit which he brings against the party who received the property. Blanc v. Paymaster Mining Co., 30 Pac. Rep., 765 (Cal., 1892). The formation of a new corporation and a transfer to it of all the assets of the old one may also be a fraud on the creditors of the old corporation. San F., etc., R. R. v. Bee, 48 Cal., 398 (1874). It is legal for a coal corporation with the assent of all its stockholders to sell all its property to its president, and for him to pay therefor in cash and by a mortgage on the property so purchased, he also agreeing to pay all the debts of the company. Payment was made directly to the stockholders and they transferred their stock to him in addition to the transfer of the property. A subsequent creditor of the company who knew all of the facts cannot complain. Parke. etc., Co. v. Terre, etc., Co., 26 N. E. Rep., 884 (Ind., 1891).

3 Where the officers and stockholders of one corporation form another, and convey all the property of the former to it in fraud of creditors, the latter corporation will be regarded as a continuation of the former, and a court of equity will hold the assets of the latter liable for a debt of the former, though there has been no recovery of judgment for the debt. Blanc v. Paymaster Mining Co., 30 Pac. Rep., 765 (Cal., 1892). Where in the decree of sale to a reorganization company it is expressly provided that the old indebtedness is not cut off, the new company is liable for breach of warranty of title by the old company. Wood v. Dubuque, etc., R. R., 28 Fed.

Where the officers of the corporation have aided in transferring its assets to another corporation a civil action for damages for a conspiracy to defraud lies.¹ Where the purchasing company is a mere "dummy" for the selling company a creditor of the latter may sometimes disregard the identity of the purchasing company.² The general rule, however, undoubtedly is that a corporation which purchases all the property of another corporation is not liable for the debts of the latter.³

Rep., 910 (1886). Where a corporation transfers its assets to a new corporation. the latter takes the property subject to a lien in favor of the creditors of the former corporation. Persons taking the property with knowledge of this fact must account therefor. The directors of the second corporation are also liable. National Bank v. Texas, etc., Co., 12 S. W. Rep., 101 (Tex., 1889). Where a reorganized company continues and assumes payment of a liability of the old company and new advances are made thereunder the new company is liable thereon. Baker v. Harpster, 22 Pac. Rep., 415 (Kan., 1889). A corporation may be liable for the debts of another corporation whose property it takes, to the extent that such property is impressed with a trust. In this case all the property of an insolvent company was leased to another company. Chicago, etc., R'y v. Chicago Bank, 134 U. S., 276 (1890). Where railroad property purchased at foreclosure sale was transferred by the purchaser to a corporation for the bonds and stock of the latter. the New York conrt of appeals held that such corporation "paid no value, and beld the property subject to any equitable lien to which it was subject in the bands of its grantors." Vilas v. Page, 106 N.Y., 439, 465 (1887). Where the assets of a corporation are transferred to a party who agrees to pay the debts, the creditors may enforce the agreement and collect from him. Dimick v. Register, 9 S. Rep., 79 (Ala., 1891). A creditor holding an unpaid promissory note cannot by bill in equity bring in the directors to hold them liable for false

representations and also claim that the company was not duly incorporated, and also bring in a subsequent corporation that took all the assets of the first. and also bring in those persons who finally obtained such assets - all in one bill brought to collect the debt. National Bank v. Texas, etc., Co., 12 S. W. Rep., 101 (Tex., 1889). Where property is to be turned into a corporation for stock, but work is to be done by the owners on the property before it is so turned in, the corporation is not liable to third persons for such work, the deeds never having been made to it. Rathbun v. Snow, 123 N. Y., 343 (1890). See, also, on this subject, ch. LII, infra, as to the liability of a purchaser of a railroad at foreclosure sale.

¹ Russell v. Post, 138 U. S., 425 (1891). ² See §§ 6, 663a, supra.

³ Gray v. National St. Co., 115 U.S., 116 (1855). This rule of law is too well established to need many citations. A railroad corporation which purchases the property of another railroad corporation is not liable, upon the dissolution of the latter, for a tort committed by it. Chesapeake, etc., R. R. Co. v. Griest, 4 S. W. Rep., 223 (Ky., 1887). Cf. Batterson v. Cincinnati, etc., R'y, 53 Mich., 125 (1884). Informalities in a receiver's sale do not render the purchasing corporation liable to return to the old corporation the property together with improvements. Co. v. Mining Co., 116 Ill., 170 (1886). The incorporation of a reorganized company, giving it all the rights, etc., of the old company, does not give it title to a judgment obtained by the old com§ 670. Rights and liabilities of mortgagess of a corporation that purchases property and issues stock in payment therefor.— Where a corporation transfers all its property to another corporation, and the latter company immediately gives a mortgage on all the prop-

pany. Wilmington, etc., R. R. v. Downward, 14 Atl. Rep., 720 (Del., 1888). railroad corporation purchasing property of another railroad corporation at foreclosure sale is not liable for debts of latter. Hoard v. Chesapeake, etc., R'v. 123 U. S., 222 (1887). And, in general, that the new corporation is not liable for the debts of the old, see President, etc., v. Moore, 21 Miss., 157 (1849): Shaw v. Norfolk, etc., R. R., 82 Mass., 407 (1860); Pennsylvania, etc., Co.'s Appeal, 101 Pa. St., 576 (1882); Smith v. Chicago, etc., R. R., 18 Wis., 17 (1864); Neff v. Wolf, etc., Co., 50 Wis., 585 (1880); Houston, etc., R. R. v. Shirley, 54 Tex., 125 (1880); Commercial Bank v. Lockwood, 2 Harr. (Del.), 8 (1835): Menasha v. Milwaukee, etc., R. R., 52 Wis., 414 (1881); Lake Erie, etc., R. R. v. Griffin, 92 Ind., 487 (1883); Gilman v. Sheboygan, etc., R. R., 37 Wis., 317 (1875); Sappington v. Little Rock, etc., R. R., 37 Ark., 23 (1881); Cook v. Detroit, etc., R. R., 43 Mich., 349 (1880). Sometimes, however, under the terms of a consolidation of companies, the new consolidated company is liable for the debts of the old. Indianola R. R. v. Fryer, 56 Tex., 609 (1882); Louisville, etc., R. R. Co. v. Boney, 20 N. E. Rep., 432 (Ind., 1889); Indianapolis R. R. v. Jones, 24 Ind., 465 (1868); Columbus, etc., R. R. v. Powell, 40 id., 37 (1872); Montgomery, etc., R. R. v. Boring, 51 Ga., 582 (1874); Thompson v. Abbott, 61 Mo., 176 (1875), where the property of the old was given by the legislature to the new corporation — a municipal case. See, also, Rome, etc., R. R. v. Ontario, etc., R. R., 16 Hun, 445 (1879). In some cases the creditors of the old company may follow its property into the hands. of a new company to which the property is sold by an ordinary sale. Marshall v. Western, etc., R. R., 92 N. C.,

322 (1885); Railroad v. Rollins, 82 id., 523 (1880); Young v. Rollins, 85 id., 485 (1881), involving a receiver. The new company may enforce the right of the old one to indemnity. Miller v. Lancaster, 5 Coldw, (Tenn.), 514 (1868). Or may settle a suit against the old one. Paine v. Lake Erie, etc., R. R., 31 Ind., 283 (1869). In general, see Slatterly v. St. Louis, etc., Co., 4 S. W. Rep., 79 (Mo., 1887). A new corporation taking assets of an old corporation is liable to creditors of the latter to the extent of property so taken. Brum v. Merchants', etc., Ins., Co., 16 Fed. Rep., 140 (1883); Hibernia Ins. Co. v. New Orleans, etc., Co., 13 Fed. Rep., 516 (1882); Same v. St. Louis, etc., Co., 10 Fed. Rep., 596 (1881). For a case where the stockholders of the new corporation give a bond to pay the debts of the old one, see Planters' Ins. Co. v. Wicks, 4 S. W. Rep., 172 (Tenn., 1887). Where the corporation sells all its assets, and the purchasing corporation gives its bonds to the stockholders of the former, such bonds belong to the corporate creditors. Peters v. Fort Madison, etc., Co., 34 N. W. Rep., 190 (Iowa, 1887). Where an insolvent corporation transfers its assets to a new corporation, which agrees to pay the debts of the former, the liability of the latter may be enforced by creditors of the former corporation. Island, etc., Bank v. Sachtleben, 3 S. W. Rep., 733 (Tex., 1887). A mere device by which corporate property is sold under an execution, is purchased by a person interested in the corporation and then transferred to a new corporation having the same stockholders as the old one, is void as against creditors of the first corporation. They may hold the new corporation liable to the extent of the value of the property so conveyed. Hancock v. Holbrook, 3 S. Rep., 351 (La., 1888). An erty, a judgment creditor of the former company may cause the sale and the mortgage to be set aside as a fraud upon his rights, and the property may be subjected to the payment of his debt.¹

Where a corporation issues stock for property it is not a bona fide purchaser of that property.² But a claim against one company, which is assumed by another company, upon the latter company buying out the former, is not to be paid out of the assets of the latter company in preference to a mortage upon all of its property.³

Where property is sold to the corporation for shares of stock, and the corporation issues a mortgage on the property and refuses to deliver the stock, the claim of the vendor for damages does not have priority over the mortgage.⁴

Where a stockholder of a vendor corporation sets aside the sale of the railroad as *ultra vires*, a mortgage given by the vendee corporation is void. The bondholders are however entitled to enforce payment from any other property owned by the vendee.⁵

unsecured creditor of an old corporation is prior in lien to one who with knowledge takes a lien on property after it has been conveyed to a new corporation. Blair v. St. Louis, etc., R. R. Co.. 24 Fed. Rep., 148 (1885). A creditor of an old corporation may follow its property into the hands of a consolidated company to which it was transferred and stock therefor issued to the old stockholders. Martin v. Zellerbach, 38 Cal., 300 (1869). See, also, § 206; 6 N. Y. Supp., 459; 21 N. E. Rep., 364.

¹ A receiver will be appointed. Cole v. Millerton, etc., Co., 133 N. Y., 164 (1892). A corporate creditor may attack a transfer of all the corporate property to another corporation even though the latter agrees to pay the debts of the former. A trustee of a mortgage given by the vendee company on the property is not bona fide when the officers of the two companies are the same and the trustee knew thereof. The bondholders are chargeable with notice of facts known to the trustee. Cole v. Millerton, etc., Co., 59 Hun, 217 (1891). Bondholders who took with notice that the property was received by the corporation from another corporation in payment for stock, and that the latter corporation was in debt, cannot hold as against such

creditors. Blair v. St. Louis, etc., R'v. 22 Fed. Rep., 37 (1884). Where a corporation conveys all its property to another corporation in payment for its stock, the latter corporation agreeing to pay all the debts of the former, a mortgagee of the latter company takes precedence over the judgment of a creditor of the former company, such judgment being subsequent to the mortgage. Blair v. St. Louis, etc., R. R., 25 Fed. Rep., 684 (1885). But contra, if the mortgagee took with actual knowledge. Id., 24 id. 148 (1885). A creditor of a corporation owning an uncompleted railroad cannot claim a lien thereon prior to that of the mortgage of a subsequent corporation which purchased the road, when there never was any record evidence of any lien and the subsequent corporation had no actual notice of the claim. Blair v. St. Louis, etc., R. R., 27 Fed. Rep., 176 (1886).

² Rogers v. New York, etc., Land Co., 134 N. Y., 197 (1892). Cf. § 727, infra, on notice.

³ Fogg v. Blair, 133 U. S., 534 (1890).

⁴Farmers, etc., Co. v. Toledo, etc., Co., 54 Fed. Rep., 759 (1893).

⁵ City of Knoxville v. Knoxville, etc., R. R., 22 Fed. Rep., 758 (1884).

A mortgage by a consolidated railroad in Indiana takes precedence over the unsecured debts of the constituent companies. By statute the consolidated company is liable for those debts, unless the articles of consolidation provide otherwise.¹

§ 671. Sale of partnership property to a corporation for stock of the latter.— The rules laid down in the preceding sections are applicable in most respects to a sale by a partnership of all its property to a corporation in exchange for stock. Such sales often are made in order to merge a solvent copartnership into a corporation. They are also made sometimes by an embarrassed or insolvent firm. In such a case the creditors of the firm may object. They may levy an attachment or execution on the property, or reach the stock, or file a bill in equity to set the sale aside, or in

1 Tysen v. Wabash R'y, 15 Fed. Rep., 763 (1883); but see Wabash, etc., Railway v. Ham, 114 U.S., 587. The case of Compton v. Railway, 45 Ohio St., 592 (1888), passed upon the same bonds, and it was held that these bonds constituted a lien on the property of the old company, and were prior in right to the mortgage bonds of the consolidated company; refusing to follow Wabash, etc., Railway v. Ham, 114 U. S., 587. General creditors of a road that is consolidated with another have no equitable lien on the bonds issued by the consolidated company. Hervey v. Ill. Mid. R'y, 28 Fed. Rep., 169 (1884).

² Booth v. Bunce, 33 N. Y., 139 (1865); San Francisco, etc., R. R. v. Bec, 48 Cal., 398 (1874).

³ Where a firm turns all its property into a corporation for stock, a firm creditor cannot reach the stock of one member of the firm in preference to other creditors of that member. Singer, etc., Co. v. Carpenter, 17 N. E. Rep., 761 (Ill., 1888). If the partnership is insolvent, then the stock issued is "watered," and the subscribers are liable as though no payment was attempted. Sayler v. Simpson, 4 R'y & Corp. L. J., 195 (Ohio, 1888).

⁴A creditor of an insolvent person may treat as void a conveyance of all his property to a corporation in exchange for its shares of stock. He may

file a bill to set aside the conveyance. Terhune v. Skinner, 19 Atl. Rep., 377 (N. J., 1889). In an action by a judgment creditor of a partnership to set aside a conveyance of all its property to a corporation in consideration of its stock, the corporation, its mortgagee, the copartners and creditors assenting to the transfer are all necessary parties. National Broadway Bank v. Yuengling, 58 Hun, 474 (1890). A judgment creditor of a failing firm may set aside an assignment of their property to a corporation formed to take over the property, even though the shares of stock have been sold. Gardner v. C. B. Keogh, etc., Co., 63 Hun, 519 (1892). Creditors of a firm that is transformed into a corporation may pursue the firm's assets so transferred. Williams v. Colby, 6 N. Y. Supp., 459 (1889). Where partnership assets are transferred to a corporation in payment for its stock, and the corporation pays part of the debts of the partnership and becomes insolvent, a member of the partnership who individually gave security for some of the partnership debts cannot claim a lien on the corporate assets in priority to corporate oreditors. Warner v. Stebbins, 47 N. W. Rep., 102 (Mich., 1890). It is a disposal of property for the purpose of hindering and delaying creditors within the meaning of the second section of the statute of frauds for an incertain cases hold the purchasing company liable for the debt.¹ The remedies of the creditors are ample.

A solvent copartnership may by consent of the whole firm merge itself into a corporation, proper provision being made for the payment of creditors.²

Where a person who holds property which belongs to another person sells the property for stock in a corporation, the latter person may claim the stock.³

solvent firm to mortgage all their property to a trustee and take the bonds secured by that mortgage, even though they take the bonds to turn over to their creditors. But the act is voidable only as to those creditors who object and contest the matter. National Bank, etc., v. Sprague, 21 N. J. Eq., 530 (1870).

1 Where a person sells all his business to a corporation for stock, there is a strong presumption that the corporation assumed the debts of the business. Breman, etc., Bank v. Branch, etc., Co., 16 S. W. Rep., 209 (Mo., 1891). Under the facts in the case of Breman, etc., Bank v. Branch, etc., Co., 16 S. W. Rep., 209 (Mo., 1891), it was held that a corporation organized by a business man, and to which he had conveyed all his property, was liable on his note, although it had not assumed any of his debts. See, also, Fort Worth, etc., Co. v. Hettson, 16 S. W. Rep., 551 (Tex., 1891). Where a partnership turns itself into a corporation, the latter is not a bona fide holder of notes owned by the former. McElwee, etc., Co. v. Trowbridge, 62 Hun, 471 (1891). A corporation taking all the assets of a partnership under an agreement of the partners that it would pay the liabilities to the extent of the assets cannot be made liable on a debt due one of the partners until it is ascertained that the assets exceed the liabilities and until it has agreed to pay the liabilities. Adams v. Empire, etc., Co., 4 N. Y. Supp., 738 (1889). As regards the power of the corporation to assume the obligations of the copartnership, see McClellan v. Detroit, etc., Works, 56 Mich., 579 (1885).

² Partners who merge their partner- (1887).

ship into a corporation and take stock in payment thereby waive liens which existed in the partnership. Francklyn v. Sprague, 121 U.S., 215 (1887). A solveut mercantile firm may transfer all their assets to a new corporation in payment for stock and then pledge the stock to certain of their creditors. Coaldale Coal Co. v. Nat'l, etc., Bank, 21 Atl. Rep., 811 (Pa., 1891). Where a person sells goods to a corporation and agrees to take payment in stock, he must take the stock at par, even though its actual and market value is much less than par. Tilkey v. Augusta, etc., R. R., 10 S. E. Rep., 448 (Ga., 1889). Where two members of a firm give notice of a dissolution of the firm and then transfer all the assets to a newly-formed corporation, the court will place all the property in the hands of the third member of the firm for the purpose of winding it up. Macdonald v. Trojan, etc., Co., 10 N. Y. Supp., 91 (1890). Where by agreement a partnership is merged into a corporation and then one partner is refused his part of the stock, he may sue for an accounting and payment in cash. Crosby Lumber Co. v. Smith, 51 Fed. Rep., 63 (1892). Under a partnership agreement providing for incorporation, part of the partners may incorporate, transfer the property to the corporation and compel the other partners to pay in to the corporation the amounts of money contemplated by the partnership agreement before the stock is issued to them. Hennessy v. Griggs, 44 N. W. Rep., 1010 (N. D., 1890).

³ Chapman v. Porter, 69 N. Y., 276 (1877); Matter of Gilbert, 104 id., 212 (1887). §§ 672-677. Consolidations, leases and sales of railroads.—This subject is considered elsewhere.

§ 678. A corporation cannot be a partner in a partnership.— This is an old principle of law, but it is subject to exceptions. It is held to be an ultra vires act, because the stockholders are entitled to have their directors conduct the business without sharing that power with a partner.² If a partnership has been formed with an individual, the latter cannot throw the business into statutory insolvent proceedings: 3 and the corporation cannot avoid the pavment of a liability which the partnership has incurred: 4 nor can an obligation to the corporation be repudiated on that ground. If the corporation has but one stockholder he may make it a partner in a partnership. Sometimes the relationship is held to be that of principal and agent instead of partnership.7 There have been many dicta to the effect that a corporation cannot be a partner.8 The question has arisen indirectly in many cases involving railroad traffic and pooling contracts,9 and in still other cases where illegal combinations in restraint of trade have been made; 10 but there are very few authorities bearing directly on the question.

§ 679. A corporation cannot be an executor or an administrator. The duties of the office are personal and incapable of being delegated to an agent. Since a corporation acts only through agents, it cannot assume the duties of an executor. The charter of the

¹ See §§ 892-896.

² "It is a violation of law for corporations to enter into a partnership," and their charters may be forfeited for the offense. People v. North River S. Rep. Co., 121 N. Y., 582, 623 (1890).

 3 Whittenton Mills v. Upton, 76 Mass., 582 (1858).

⁴Catskill Bank v. Gray, 14 Barb., 471 (1851). Contra, Gunn v. Central R. R. & B. Co., 74 Ga., 509 (1885), where a railroad was held not liable for injuries to a passenger sustained while traveling upon a boat operated by the road and an individual as partners. But see Block v. Fitchburg R. R., 139 Mass., 308 (1885). A corporation and a person to whom it has agreed to sell its property may be liable as partners to creditors of the former. Cleveland, etc., Co. v. Courier Co., 34 N. W. Rep., 556 (Mich., 1887).

⁵ French v. Donohue, 29 Minn., 111 (1882). Corporation may enforce an ac-

counting in a partnership of which it is a member. Standard Oil Co. v. Scofield, 16 Abb. N. C., 372 (1885).

⁶ Allen v. Woonsocket Co., 11 R. I., 288 (1876).

⁷ Marine Bank v. Ogden, 29 Ill., 245 (1862). In the case of Holmes v. Old Colony R. R. Co., 71 Mass., 58 (1858), where the corporation shared in the profits only, no partnership was held to exist.

⁸ New York, etc., Canal Co. v. Fulton Bank, 7 Wend., 412 (1831). *Cf.* 1 Lindley on Partn., p. 86.

⁹See ch. LIII, infra.

10 Ch. XXIX, supra.

11 Georgetown College v. Brown, 34 Md., 450 (1871), where it was also held that a corporation will not be allowed, as in England, to designate a person to administer with the will annexed. See, also, Matter of Thompson, 31 Barb., 334 (1861).

corporation may, however, expressly authorize it to act as executor or trustee.

The old rule that corporations could not take property in trust for the use of others is now obsolete.1 They cannot, however, take property in trust where they could not take the same property absolutely.

If a corporation be incompetent to act as trustee, the devise or grant will not thereby become void; a court of equity will appoint a proper trustee to carry out and execute the trust.2

§ 680. Stockholder's right to prevent the corporation from undertaking a new business.—It is ultra vires of a corporation to undertake to carry on a business which is not fairly within the scope of the business described in its charter. When such an attempt is made on the part of the directors or a majority of the stockholders, a dissenting stockholder may insist upon the corporate business being confined to the limits of the corporate charter; and he may enjoin or set aside any acts which do not conform to those limits. Thus, a corporation formed to manufacture iron cannot go into the flour and mill business.3

§ 681. Miscellaneous ultra vires acts.—It has been held that a stockholder in a hotel company cannot enjoin the managers from leasing a part of the property for other purposes, there being sufficient accommodation left for the hotel.4 But any misapplication or waste of the property of a corporation may be remedied by a member thereof.5

It is illegal for the directors or a majority of the stockholders to give away the assets of the corporation for the promotion of other enterprises. The stockholder may enjoin any act on the part of

¹ Vidal v. Girard's Ex'rs, 2 How., 127, 187 (1844), where Mr. Justice Story said: "Where a corporation has legal capacity to take real and personal estate, then it may take and hold it upon trust in the same manner and to the same extent as a private individual may do:" Chapin v. School District, etc., 35 N. H., 445 (1857), holding that a corporation may be trustee of a charity if consistent with the object of its creation. See, also, § 692, infra; Phillips Academy v. King, 12 Mass., 546 (1815), holding that a corporation aggregate, may be a trustee; Perry on Trusts, § 42 et seq.; Robertson v. Bullions, 11 N. Y., 243 (1854), a religious society. Matter of Howe, 1 Paige, 214 (1828), holds that while corporations cannot be trustees in rectors. It is an illegal gift. See § 657,

matters in which they have no interest. yet if property be devised or granted to a corporation upon trust, partly for , itself and partly for another, it may execute the trust. One mission society corporation may take property in trust for another mission society corporation. Sheldon v. Chappell, 47 Hun, 59 (1888).

² Vidal v. Girard's Ex'rs, 2 How., 127 187 (1844); Chapin v. School District, 35 N. H., 445 (1857).

3 Cherokee Iron Co. v. Jones, 52 Ga.,

⁴ Simpson v. Westminster, etc., H. Co., 8 H. L. C., 712 (1860).

⁵ Armstrong v. Church Society, 13 Grant Ch. (U. C.), 552 (1867).

6 Back pay cannot be voted to the di-

the state which is in violation of the charter which it granted to the corporation. It was to enjoin a tax by the state under such circumstances that the case of Dodge v. Woolsey arose. But it has been held that a stockholder cannot enjoin his corporation from paying money to a rival company to induce the latter to discontinue business.

Although a national bank buys bonds which it has no power to buy and agrees to sell them back to the vendor at a certain price, yet it cannot set up the plea of *ultra vires* when it is sued by the vendor for refusal to sell them back.³

A corporation is liable on its agreement to give a percentage of its profits to a manufacturer of certain machinery, even though other corporations have also agreed to do the same.

A savings bank and trust company cannot be held liable for losses on speculations in cotton, although it represented that its orders were for responsible customers.⁵

The contract of a railroad company not to oppose the passage of a law giving land to another corporation, the land to be divided subsequently, is illegal and not enforceable.⁶

After a land company has purchased a stock of goods and sold them, it cannot defeat an action for the price of the sale to it by the defense of *ultra vires*. The contract has been executed.⁷

A corporation receiving goods ultra vires to sell on commission

supra. But directors may compromise corporate claims. Frankfort Bank v. Johnson, 24 Me., 490 (1844), and ch. XLV, infra. Directors cannot legally pay out money which is not owed. Salem Bank v. Gloucester Bank, 17 Mass., 1, 29 (1820). Directors should not use corporate funds to sue for a libel on themselves as directors, but where the stockholders were informed of the payment it will not be disturbed. Studdert v. Grosvenor, 55 L. T., 171. The money of a city cannot be used to buy a gold chain for the mayor. Attorney-General v. Mayor, etc., 26 L. T. Rep. (N. S.), 392 (1872). Nor to give extra pay to a clerk. Ex parte Millish, 8 id., 47 (1863). Nor can lodge funds be given to outside charitable purposes. Polar Star Lodge v. Polar Star Lodge, 13 La. Ann., 53 (1861). Where a stockholders' meeting has recommended that a week's extra pay as a gratuity to the workmen of a

manufacturing corporation be given, and the directors give it, a dissenting stockholder cannot hold the directors liable therefor. Hampson v. Price's, etc., Co., 45 L. J. (Ch.), 437 (1876); Clarke v. Imperial Gaslight & C. Co., 4 B. & Ad., 315 (1832), upholding a grant of an annuity to a disabled clerk. A bank may make a gift to the children of a deceased superintendent. Henderson v. Bank, 59 L. T. Rep., 856 (1888).

¹ 18 How., 331 (1855).

²Leslie v. Lorillard, 110 N. Y., 519 (1888).

³ Logan County Bank v. Townsend, 139 U. S., 67 (1891).

⁴ Good v. Doland, 121 N. Y., 1 (1890).

Jemison v. Citizens', etc., Bank, 122
 N. Y., 135 (1890); S. C., 44 Hun, 412.

⁶ Chippewa, etc., R'y v. Chicago, etc., R'y, 44 N. W. Rep., 17 (Wis., 1889).

⁷ Sherman, etc., Co. v. Morris, 23 Pac. Rep., 569 (Kan., 1890). is nevertheless liable for breach of contract as to the price of the sale.1

A bank sued as bailee for a loss of the special deposit cannot set up ultra vires.²

A bank cashier cannot buy boots and shoes for another person in the name of the bank.³

A party with whom an iron company contracts to deliver ice cannot recover damages for a breach of the contract.

A warehouse company will not be allowed to set up ultra vires as a defense to notes given by it in payment for grain, the charter of the company having authorized such purchases, although probably illegally so.⁵

A land company must pay for services rendered in organizing other companies to rent and locate on the land of the former.

Many examples and illustrations of *ultra vires* acts and *intra vires* acts are given in the notes hereto.

¹Union H. Co. v. Plume, etc., Co., 20 Atl. Rep., 455 (Coun., 1889).

² First Nat'l Bank v. Strong, 27 N. E. Rep., 903 (Ill., 1891).

³ North, etc., Co. v. Stebbins, 48 N. W. Rep., 833 (S. D., 1891).

⁴Simmons v. Troy Iron-works, 9 S. Rep., 160 (Ala., 1891).

⁵ Carson, etc., Bank v. Carson, etc., Co., 51 N. W. Rep., 641 (Mich., 1892).

⁶ Schurr v. N. Y., etc., Co., 18 N. Y. Supp., 454 (1892).

7 An educational institution may donate money to the construction of a railroad. Louisville, etc., R. R. v. Literary, etc., 15 S. W. Rep., 1065 (Ky., 1891). A town site corporation may give away certain lots and give a sum of money to a party who in consideration thereof agrees to remove a barn, etc., to another location. Sherman, etc., Co. v. Russell, 26 Pac. Rep., 715 (Kan., 1891); Same v. Fletcher, id., 951. When the corporation sues on a contract assigned to it, its want of power to take the assignment must be proved by the defendant. Warder, etc., Co. v. Jack, 48 N. W. Rep., 729 (Iowa, 1891). Having enjoyed the benefits of a contract a corporation cannot refuse payment of the amount due on the plea of ultra vires. So held where a brewing company took a lease of a saloon. Heims, etc., Co. v. Flannery, 27 N. E. Rep., 286 (III., 1891). cemetery company may sell a large number of its lots, although the vendee intends to resell them. Palmer v. Cypress, etc., Cem., 122 N. Y. 429 (1890). A corporation organized to act as a broker in buying and selling grain is subject to the same rule as regards gambling contracts that individuals are. Peck v. Doran, etc., Co., 57 Hun, 343 (1890). The organization of a company to carry on the lottery business in foreign countries was held legal in Macuee v. Persian, etc., Corp., 62 L. T. Rep., 894 (1890). A private party seeking to enjoin a corporation from using public property which the city has leased to such corporation cannot set up that the lessee corporation is acting ultra vires. Only the state or the stockholders can raise that objection. Belcher's, etc., Co. v. St. Louis, etc., Co., 13 S. W. Rep., 822 (Mo., 1890). As regards the charter or corporate power to confer a degree, see Townsend v. Gray, 19 Atl. Rep., 635 (Vt., 1890). Where a lime and limestone corporation engages in the mercantile business, it is not liable for the price of goods sold and delivered to it. Chewacla, etc., Works v. Dismukes, 6 S. Rep., 122 (Ala., 1889). Where an insurance company

Out of the various cases set forth in this chapter a few general rules may be clearly drawn and stated. First, there is no clearly defined principle of law that determines whether a particular act is ultra vires or intra vires. The courts are becoming more liberal,

has issued a policy which is not authorized by its charter, the policy cannot be enforced by the party who is insured. The court said in a dictum that his remedy is a suit in disaffirmance and for an accounting. Miller v. American, etc., Co., 21 S. W. Rep., 39 (Tenn., 1893). While it is true that a stockholder may enjoin his company from proceeding with its business, if the objects thereof have become unattainable or illegal, vet an unconstitutional statute in Indiana forbidding the piping of natural gas to places outside of the state does not justify the suit of a stockholder in a New Jersey construction company to enjoin his company from proceeding to construct a pipe line from Indiana to Chicago. Benedict v. Columbus, etc., Co., 23 Atl. Rep., 485 (N. J., 1892). A subscriber or donator of money to a factory cannot prevent its moving away if it is a losing enterprise. Ayres v. Dutton, 49 N. W. Rep., 897 (Mich., 1891).

Where a river packet company purchases grain and pays partly therefor, it may recover back the money paid but not damages for refusal of vendor to deliver. Northwestern, etc., Packet Co. v. Shaw, 37 Wis., 655 (1875). A corporation and stockholders agreed to turn over to defendant and others the control, but the latter were to account for rafts built. Held, they could not set up ultra vires. Each of defendants is liable for all as to accounting. Rider Life Raft Co. v. Roach, 97 N. Y., 378 (1884). lock company sued for the price of locks sold to it by a company incorporated to manufacture fire-arms cannot defeat the suit by setting up that the latter corporation had no power to manufacture such articles. Whitney Arms Co. v. Barlow, 63 N. Y., 62 (1875). One director may enjoin other directors from using corporate funds to buy liabilities of insolvent competing concern for the purpose of suing thereon, and from paying money to prevent the rival concern getting its work done. Colles v. Iron City. etc., Co., 11 Hun. 397 (1877). A manufacturing corporation selling a store with a guaranty of the continued patronage of its employees, or else a fixed sum as indemnity, is liable thereon. De Graff v. American, etc., Thread Co., 21 N. Y., 123 (1860). A smelting corporation may purchase smelting works. Moss v. Averill, 10 N. Y., 449 (1853). Persons who with a corporation jointly purchase property cannot defend against the price by alleging that it was ullra vires of the corporation to purchase. State of Indiana v. Woram, 6 Hill 33 (1843). Where a stockholder institutes a suit to remedy a wrong to the corporation, and while it is pending new directors are elected and they proceed to carry on the suit at the corporate expense, any dissenting stockholder may enjoin such use of the corporate funds. To allow it would be to prejudge the suit. Kernaghan v. Williams, L. R., 6 Eq., 228 (1868). A manufacturing corporation borrowing bonds in order to use them as collateral to a loan is liable to the owner for their return. Beckwith v. Rochester Iron, etc., Co., 12 Weekly Dig. (N. Y.), 528 (1881). A bank which buys in a manufactory on an execution sale, in order to protect itself, may carry on the business and is liable for debts incurred thereby. Reynolds v. Simpson, 74 Ga., 454 (1885). It is ultra vires for a bank to allow an overdraft. Market, etc., Bank v. Stump, 2 Mo. App., 545 (1876); Vandall v. South Francisco Dock Co., 40 Cal., 83 (1870), holding that a corporation empowered to buy, improve. etc., real estate may appropriate a portion of its funds to a railroad in consideration of lower rates and more frequent and many acts which fifty years ago would have been held to be ultra vires would now be held to be intra vires. The courts have gradually enlarged the implied powers of ordinary corporations until now such corporations may do almost anything that an in-

trains. A bank which has bought in property on a foreclosure sale, with a secret agreement that it will bold the property in trust for certain purposes. cannot repudiate the trust on the ground that it is ultra vires. Whitney v. Leominster Sav. Bank, 141 Mass., 85 (1886). A suit by a copper trading company for damages against a person who had refused to accept iron which he had agreed to purchase of the plaintiff fails. Copper Miners v. Fox, 16 Q. B., 229 (1851). Stockholders may enjoin the company from discounting paper in a manner contrary to its charter, i. e., without the paper being passed on by the directors. May enjoin on the ground that the charter is endangered. Manderson v. Commercial Bank, 28 Pa. St., 379 (1857). person who has taken from a corporation an exclusive right to manufacture under a patent, and has so manufactured, cannot defeat an action for the royalties agreed upon for the goods already manufactured by alleging that the contract was ultra vires. Hall Mfg. Co. v. American R'y, etc., Co., 48 Mich., 331 (1882).

A building corporation being sued for breach of its contract to keep property insured cannot set up that it had no power to insure. Chicago Bldg. Soc. v. Crowell, 65 Ill., 453 (1872). A coal mining and transporting corporation may purchase and use a steamboat for transporting coal. Callaway, etc., Co. v. Clark, 32 Mo., 305 (1862). A corporation with power to own land and promote settlement may build saw-mills and erect a hotel. Watts' Appeal, 78 Pa. St., 370 (1875). In Dupee v. Boston Waterpower Co., 114 Mass., 37 (1873), the sale by the company of surplus land, receiving in payment stock of the corporation itself, was upheld as against a dissenting stockholder's action. A ferry company having a surplus boat may rent it. Brown v. Winnisimmet Co., 93 Mass., 326 (1865). A company formed to work a patent may purchase it. Leifchild's Case, L. R., 1 Eq., 231 (1865). Brokers employed by directors to sell property of the corporation cannot recover damages from the directors for a failure of sale, due to the vendee alleging that the directors had no power to sell, it being proved by the directors that they did have such power. Wilson v. Miers, 10 C. B. (N. S.), 348 (1861). Notes given by a lumber manufacturing corporation to pay for stock in a bank cannot be enforced. Sumner v. Marcy, 3 W. & M., 105 (1847). A manufacturing company is liable for goods purchased by a store owned by it. Dauchy v. Brown, 24 Vt., 197 (1852); Seawright v. Payne, 6 Lea (Tenn.), 283 (1880), where an iron furnace company ran a store. A corporation is presumed to bave power to purchase a patent whose use pertains to the business indicated by the name of the corporation. Dorsey Harvester Rake Co. v. Marsh, 6 Fisher's Pat. Cas., 387 (1873). A company engaged in manufacturing and selling glass may purchase glass in order to keep up its stock. Lyndeborough Glass Co. v. Mass. Glass Co., 111 Mass., 315 (1873); Pacific R. R. Co. v. Seeley, 45 Mo., 212 (1870), where a contract to convey land to a company in consideration of a certain location of a railroad was held unenforceable as against public policy. See, also, § 650, supra. A manufacturing corporation which runs a store and sells goods may collect for goods thus sold, though the sales were made by its undisclosed agent. Slater Woolen Co. v. Lamb, 143 Mass., 420 (1886); Chester Glass Co. v. Dewey, 16 Mass., 93 (1819). Contract by packet company to pay for harbor improvements is ultra vires and not endividual may do, provided the stockholders and creditors do not object. In the case of railroads the courts are more strict. The public are interested in the acts and operations of railroads. Hence the courts will not allow railroads to sell, lease or mortgage their property, or engage in any other business, unless the public assent through the legislature. But as to the ordinary private corporation the rules of ultra vires have been greatly relaxed.

forceable. Abbott v. Balt., etc., Co., 1 Md. Ch., 542 (1850). In the early and important case of Robinson v. Smith, 3 Paige Ch., 222 (1832), Chancellor Walworth sustained a stockholder's action to hold the corporate directors liable for corporate funds lost by speculation in the stocks of other corporations. See, also, Combination Trust Co. v. Weed, 2 Fed. Rep., 24 (1880); Hardon v. Newton, 14 Blatch., 376 (1878); Smith v. Rathbun, 23 Hun, 150 (1880); Laud Credit Co. v. Lord Fermov, 17 W. R., 562 (1869), where the directors used corporate funds to "rig the market," i. e., to purchase and thereby sustain the market price of the stock. A bank may establish a savings department and may pay interest on the savings deposits, and may assign in trust certain securities to secure such deposits. Ward v. Johnson, 95 Ill., 215 (1880). It is within the power of a bank to receive special deposits of bonds, etc.. for safe-keeping, gratuitously and for mere accommodation, and the bank is liable for their loss by gross negligence. Pattison v. Syracuse Nat'l Bank, 80 N. Y., 82 (1880). A national bank purchasing bonds and agreeing to return them for the same price cannot refuse To return them on the ground that the purchase was ultra vires. Logan, etc., Bank v. Townsend, 3 S. W. Rep., 122 (Ky., 1887). A receiver of a savings bank may enforce a bond given to it by an individual agreeing to pay to the bank a certain sum, if it would continue business, which the bank did. Hurd v. Green, 17 Hun, 327 (1879); Simpson v. Westminster, etc., Co., 8 H. L. Cas., 712 (1850), where a lease by a hotel company of part of its building during its completion was held valid; Lafond v. Deems,

81 N. Y., 507 (1880), where a voluntary benevolent association having been compelled to hire more room than it needed was held to have power to fit up and let the portion not required: Temple Grove Seminary v. Cramer, 98 N. Y., 121 (1885). holding that a seminary of learning may let its building as a boarding-house during the summer vacation: Gruber v. Washington & J. R. R. Co., 92 N. C., 1 (1885), where it seemed to the court that a lumber company in providing transportation for its product could, as incidental to its own business, carry the goods of others and also passengers; City Hotel, etc., v. Dickinson, 6 Grav. 586 (1856), holding that a hotel company may let a part of its building for shops. A stockholder may enjoin his company from doing acts forbidden by statute, since the charter is endangered. Manderson v. Commercial Bank, 28 Pa. St., 379 (1857), where the bank was loaning usuriously and without the action of the directors. See, also, Sparhawk v. Union, etc., R'y, 54 Pa. St., 401, 452 (1867). A person having sold and partly delivered an article to a corporation which the corporation had no right to purchase may refuse to complete delivery, and may sue for the part delivered. Day v. Spiral, etc., Co., 57 Mich., 146 (1885). A mining company is not liable. for the price of goods which it purchases to carry on an ultra vires mercantile business. Chewacla, etc., v. Dismukes, 6 S. Rep., 122 (Ala., 1889). Stockholders cannot enjoin an intra vires act on the ground that it was promised that the corporation would not enter into that act. Converse v. Hood, 21 N. E. Rep., 878 (Mass., 1889).

¹ See § 3, supra.

Second, the decision in any particular case turns largely on the questions of who is complaining; against whom the complaint is made; and what relief is sought. The stockholder's action is looked upon most favorably if he is not guilty of delay. But an action by the state to enjoin the act or to forfeit franchises is an unusual, extraordinary and somewhat harsh remedy, and is not favored by the courts. So, also, an action by the corporation itself or by the party contracted with to repudiate an ultra vires act is not favored by the courts. Such an action is an attempt by a party to evade the contract by means of principles of law which both parties have violated. The court is not swift to grant relief in such cases.

Third, if a contract or act is ultra vires, and has not yet been performed, either the corporation or the party contracted with may refuse to complete the contract. No damages can be collected for such refusal. So, also, if the contract has been partly performed, and the unperformed part is separable from the rest, either party may refuse to complete. But where one party has completely performed and carried out its part of the contract, the other party cannot retain the benefits of such performance and refuse to perform also.¹

§ 682. Personal liability of the directors and officers for ultra vires acts.—There can be no doubt that, if the directors or officers of a company do acts clearly beyond their power whereby loss ensues to the company, or dispose of its property or pay away its money without authority, they will be required to make good the loss out of their private estates.² Directors and officers have been

1 Speaking of ultra vires acts, the New York court of appeals say: "As artificial creations, they have no powers or faculties except those with which they were endowed when created; and when, as is frequently the case, they act in excess of their powers, the question will be, Is the act prohibited as prejudicial to some public interest? or is it an act not unlawful in that sense, but prejudicial to the stockholders? The rule, however, is well settled that the plea of ultra vires should not prevail when it would not advance justice, but on the contrary would accomplish legal wrong." Leslie v. Lorillard, 110 N. Y., 519 (1888). See, also, discussion in Camden, etc., R. R. Co. v. Mays, etc., R. R. Co., 4 Central kins, 3 Wend., 130.

Rep., 801 (N. J., 1886); Oregon, etc., R'y Co. v. Oregonian, etc., R'y Co., 130 U. S., 1 (1889); Railway Companies v. Keokuk, etc., Co., 131 U. S., 371, 384, 389 (1889). "Every public grant of property, or of privileges or franchises, if ambiguous, is to be construed against the grantee and in favor of the public," and especially so as regards corporations organized under general laws. Central Trans. Co. v. Pullman's Car Co., 139 U. S., 24, 49 (1891).

² North, etc., Ass'n v. Childs et al., 52 N. W. Rep., 600 (Wis., 1892), citing Thomp. Liab. Off., 375; Discount Co. v. Brown, L. R., 8 Eq., 381; Flitcroft's Case, 21 Ch. Div., 519; Insurance Co. v. Jenkins, 3 Wend., 130. held personally liable for libel on the part of the company; for infringement of trade-mark; for loaning money in violation of the charter; for exacting illegal rebates from a railroad; for false representations; for borrowing in excess of the company's power; for accepting bills without authority; or contracting for the corporation when he had no authority so to do. They are liable for maintaining a nuisance, and for commencing business before being authorized so to do.

But directors are not liable for honest mistakes as to the legal extent of their authority, in or are they liable to the company for

¹ See § 698. infra.

²The directors of a corporation may be included as parties defendant in a bill against the corporation for infringement of a trade-mark. They may be held liable so far as they took part in the infringement. Armstrong v. Savannah, etc., Works, 53 Fed. Rep., 124 (1892).

³ See § 690, infra. A stockholder in a bank may sue to compel the president to restore \$45,000 which he caused the bank to loan without security, the money being used to pay a debt due to the president himself. Wickersham v. Chittenden, 28 Pac. Rep., 788 (Cal., 1892).

⁴ Where a corporation secures a rebate

. 4 Where a corporation secures a rebate from a railroad company, not only on shipments made by it but on shipments made by other parties, the active agents of such corporation receiving such moneys may be held personally liable to other shippers for such money. The court said that inasmuch as the company "was organized by the promoters, the defendants, simply for the purpose of consummating the illegal agreement, and shielding themselves from the consequences of receiving the illegal exactions made under it, the act of incorporating can be of no avail to them as a defense." Brundred v. Rice, 32 N. E. Rep., 169 (Ohio, 1892).

⁶ See chs. IX and XX. A stockholder may hold the directors liable for false representations inducing him to loan money to the company where they told him that the company was solvent when in fact it was insolvent, and they knew it so to be. Kinkler v. Jurica, 19 S. W.

Rep., 359 (Tex., 1892). A director may buy stock from a stockholder at less than its real value, and there is no fraud in the fact that the director knew the real value while the stockholder did not. Crowell v. Jackson, 23 Atl. Rep., 426 (N. J., 1891). A stockholder cannot hold a director liable for the stock becoming worthless by reason of the fact that the director and others sold their stock, amounting to three-fourths of the stock, to the Cotton Seed Oil Trust, and that the trust then dissolved the corporation by a three-fourths vote as allowed by statute, although the director as such voted for the dissolution. Trisconi v. Winship, 9 S. Rep., 29 (La., 1891).

⁶See ch. XLVI.

7 Td.

⁸ An officer who signs the corporate name to a contract to bear part of the expense of a suit is personally liable therefor if he had no authority so to do. Solomon v. Pennoyer, 50 N. W. Rep., 644 (Mich., 1891). Officers as such agents incur no personal liability when avowedly contracting on behalf of the company. Beeson v. Lang, 85 Pa. St., 198.

9 See § 698, infra.

10 Where the directors commence business before ten per cent of the capital is paid in as required by statute, the directors are personally liable as agents transacting business without authority from the principal. Farmers', etc., Co. v. Floyd, 26 N. E. Rep., 110 (Ohio, 1890).

¹¹ Beattie v. Lord Ebury, L. R., 7 Ch., 777, and 7 H. L., 102.

an ultra vires act which the company has ratified. They may be liable where the corporation is but a "dummy," organized for a fraudulent purpose.² But one director is not liable for the others.²

A receiver may hold liable a director, where upon the consolidation of two companies large sums are used out of the corporate funds to effect the consolidation and the company becomes insolvent.⁴

When a contract is made for the corporation, and this fact appears in the contract, but the officer or agent signs the contract not in the corporate name but in his own name, he is generally not liable on such contract; but in some instances he has been held liable.⁵ Where an officer or agent of a corporation has been in-

1 "When the directors and officers of a corporation engage in ultra vires transactions, and thus cause damage to the corporation, they may be jointly and severally liable for such damage; and when sued for such damage, a subordinate officer cannot establish an absolute defense by showing that his transactions were assented to or even directed by the directors. Directors and officers of corporations are agents of the corporat tion for which they act, and for their unauthorized transactions they may be liable to their principal just as the agent of an individual may be liable for the damage caused to his principal by his unauthorized acts. But when the officers of a corporation engage in an ultra vires business for the benefit of a corporation, and the corporation has the actual benefit thereof, and when the business is so carried on with the acquiescence of the stockholders that it actually, although illegally, becomes the business of the corporation, it cannot maintain an action against such officers for any damages it has suffered in such business. In other words, a corporation engaged in an ultra vires business cannot sue, for damages suffered therein, the agents it employs to carry on the business. The agent of the corporation in such a case would be protected just as the agent of the copartnership would be protected who did business with the express or implied consent of the co-

partners which was not authorized by the articles of copartnership." Holmes, etc., v. Willard, 125 N. Y., 75, 79, 81 (1890). ² See § 662a.

² Although the directors of a company are the agents of the company, and although, as a member of the company, each of the directors is liable for the acts of its agents on the same ground as other members, still, unless a director has done something to make his codirectors his agents in some other sense than this, he is no more liable for their acts than any other shareholder. this respect directors are like promoters, each being answerable for his own acts and for the acts of the others so far as he has made them his agents, but no further. Brown v. Byers, 16 M. & W., 252; Heraud v. Leaf, 5 C. B., 157; Bramah v. Roberts, 3 Bing. N. C., 963; Lord Londesborough's Case, 4 De G., M. & G., 411; Walker's Case, 8 De G., M. & G., 607. See, also, Weir v. Barnett, 3 Ex. D., 32 and 238; Cargill v. Bower, 10 Ch. D., 502.

⁴ Pierson v. Cronk, 13 N. Y. Supp., 845 (1890). Where an insolvent insurance company buys out a solvent company, and certain individuals guaranty that the obligations of the latter company will be fulfilled, and the latter company is "wrecked," the guarantors are liable. Mason v. Cronk, 125 N. Y., 496 (1891).

⁵ See ch. XLIII; § 724, infra.

strumental in causing the corporation to commit trespass or any other tort, then such director or officer is personally liable therefor.¹

Where the corporation has power to do a certain act, but does not authorize a person or officer to do that act, then the person or officer doing such act is liable personally therefor. He is liable as an unauthorized agent.²

If the corporation had no charter power to do the act in question, a more difficult question arises. In England it seems that the officer or agent is not liable to the third person.³ In America

1 This subject belongs more properly to treatises on agency and on torts. An agent is liable for aiding the corporation in perpetrating a breach of trust. Attorney-Gen'l v. Corporation, 7 Beav., 176 (1844). The president of an insurance company which has not complied with the law authorizing its organization is liable to policy-holders for false representations to them by the insurance agents that the company had so complied. Belding v. Floyd. 17 Hun. 208 (1879). The president of a corporation obtaining credit for the corporation by false representations is liable personally therefor and is liable to arrest. Phillips v. Wortendyke, 31 Hun. 192 (1883). A stockholder who is also general manager of a newspaper corporation is not liable criminally for its criminal advertisement of an illegal lottery, unless he had actual knowledge or notice thereof. People v. England, 27 Hun, 139 (1882). See, also, Green's Brice's Ultra Vires, p. 765. An officer is liable who directs a negro to be excluded from the company's omnibus. Peck v. Cooper, 112 Ill., 192 (1884); 54 Am. Rep., 231. Or who takes part in an assault. Brokaw v. N. J., etc., Co., 32 N. J. L., 328 (1867); Hewitt v. Swift, 85 Mass., 420 (1862); Moore v. Fitchburg R. R. Co., 70 Mass., 465 (1855). Or who carries on a malicious prosecution. Hussey v. King, 3 S. E. Rep., 923 (N. C., 1887). Or causes the company to infringe on a patent. St. Louis, etc., Co. v. Quinby, 5 Bann. & A. Pat. Cas., 275 (1880); Goodyear v. Phelps, 3 Blatch.,

91 (1853); Smith v. Standard, etc., Co., 19 Fed. Rep., 826 (1883); Nichols v. Pearce, 7 Blatch., 5 (1869).

² If two directors without authority order a bank to honor the checks of the manager of their corporation and he overdraws, they are personally liable for the overdrafts. Cherry v. Colonial Bank, L. R., 3 P. C., 24 (1869). But see Beattie v. Lord Ebury, L. R., 7 H. L., 102 (1874); aff'g L. R., 7 Ch., 777, and rev'g L. R., 7 Ch., 788, n. When the president of the bank without authority from the directors sells \$6,000 of the bank's paper for \$5,500, he is liable to the bank for \$500 - the real loss. First Nat'l Bank v. Lucas, 31 N. W. Rep., 805 (Neb., 1887). But a corporate agent executing a security in the corporate name without authority is not guilty of forgery under the New York statute. Mann v. People, 15 Hun, 155 (1878); aff'd, 75 N. Y., 484. But he is liable in a civil action. See, also, Underhill v. Gibson, 2 N. H., 552 (1821); Weare v. Gove, 44 N. H., 196 (1862). As to the liability of officers for trespass, etc., see, also, Thompson on The Liability of Officers, etc., p. 489.

³ Eaglesfield v. Londonderry, L. R., 4 Ch. D., 693 (1875). But see West, etc., Bank v. Kitson, L. R., 13 Q. B. D., 360 (1884), where a note was issued; Nicholls v. Diamond, 23 L. J., N. S. (Ex.), 1 (1853), where an acceptance was made. The secretary is not liable for a representation as to the power of the company to issue debentures which had been issued. Rashdall v. Ford, L. R., 2 he is liable to the company for money so lost.¹ Although the certificate of incorporation fixes the amount of debts which the corporation may incur, yet the directors are not liable for an excess of that amount.²

Eq., 754 (1866). Directors issuing debentures in excess of the amount allowed by statute are personally liable thereon. Weeks v. Propert, L. R., 8 C. P., 427 (1873). As to liability of directors to the company for losses due to their ultra vires acts, see Re Faure, etc., Co., 59 L. T. Rep., 919 (1888). See 6 R'y & Corp. L. J., 78.

¹ Austin v. Daniels, 4 Denio, 299 (1847), where stock was purchased by the company. See, also, Franklin, etc., Ins. Co. v. Jenkins, 3 Wend., 130 (1829), and cases in chs. XXXIX, XL and XLII.

² Frost, etc., Co. v. Foster, 41 N. W. Rep., 212 (Iowa, 1889). Cf. §§ 685-688, infra.

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CHAPTER XLL

INTRA VIRES ACTS AND CONTRACTS -- IN OTHER WORDS, ACTS AND CONTRACTS WHICH ARE WITHIN THE CHARTER POWERS OF THE CORPORATION, DIRECTORS OR STOCKHOLDERS.

§ 683. Intra vires acts as distinguished [§ 691. Assignments for the benefit of from ultra vires acts.

684. The discretion of the directors or the majority of the stock-holders as to acts intra vires cannot be questioned by single stockholders unless fraud is involved.

685-689. Borrowing money, issuing bills, notes and acceptances, coupon bonds, debentures and mortgages.

690. Loans generally cannot be made by corporations - Statutes -Mortgages - Usury.

creditors may be made by cor-

porations — Preferences. 692. Land may be purchased by a corporation and may be mortgaged.

693. Power of eminent domain.

694-697. Foreign corporations may make contracts, etc. -- Corpora-

tions created by two states.
698. Torts committed by the corporation - Indictments.

699. Name of the corporation.

700. Statutes applicable to "persons" apply to corporations.

700a. By-laws.

700b. Expulsion of members.

§ 683. Intra vires acts as distinguished from ultra vires acts.— An ultra vires act, as already explained, is an act beyond the express and implied powers of the corporation. An intra vires act, on the contrary, is one which is within the express or implied powers either of the board of directors or of the majority of the stockholders in meeting assembled. The intra vires acts are frequently spoken of as matters concerning the "internal management" of the corporation. Much confusion has arisen concerning these acts, owing to a failure to recognize clearly the fact that an act is intra vires of a corporation if it can be legally carried out either by the directors or by the majority of the stockholders. Thus, a stockholder frequently brings suit to enjoin or set aside an act which the majority have power to do, but which the directors have done without power. It is clear that a dissenting stockholder has no right to carry such a matter into the courts unless the majority are with him, since if the majority approve of the directors' acts, this amounts to a ratification of the same.

In short, there are three classes of corporate acts herein. the stockholder may bring suit to remedy an act which is ultra vires, or beyond the powers of both the majority of the stockholders and of the directors. Second, as to acts within the power of the majority, but beyond the power of the directors, a stockholder may sue to enjoin or set them aside when the directors have performed them and the majority refuse to confirm their action. As to such acts the stockholder cannot sue if the majority confirm the directors in their performance. Third, as to acts within the powers of the directors and performed by them, or within the powers of the majority and performed by the majority, the stockholders cannot complain that they are ultra vires. The second and third classes of acts are intra vires of the corporation. They are matters of internal arrangement or management, and cannot be controlled or objected to by a single stockholder. The question of what intra vires acts are to be performed by the directors, and what ones can be exercised only by the majority of the stockholders in meeting assembled, has been considered elsewhere.

§ 684. The discretion of the directors or the majority of the stock-holders as to acts intra vires cannot be questioned by single stock-holders unless fraud is involved. — This proposition of law is clearly, firmly and very properly established beyond any question. Were

¹Exeter & C. R'v Co. v. Buller, 11 Jur., Part I, 527, 532 (1847), holding, also, that where such an action has been instituted it will not be defeated by the fact that subsequently the directors obtain control of a majority of the votes. But there must be clear proof that the majority refuse to confirm. Thus, in Bagshaw v. Eastern Union R'y Co., 7 Hare, 114 (1849), the court says that Foss v. Harbottle, 2 Hare, 495 (1843), decides "that if the act, though it be the act of the directors only, be one which a general meeting of the company could sanction, a bill by some of the shareholders, on behalf of themselves and others, to impeach that act cannot be sustained, because a general meeting of the company might immediately confirm and give validity to the act of which the bill complains." See, also, McDougall v. Gardiner, L. R., 1 Ch. D., 13 (1875), and § 662.

- ² See note sub.
- ³ See ch. XLIII.
- 4"Questions of policy of management, of expediency of contracts or action, of adequacy of consideration not grossly disproportionate, of lawful appropriation of corporate funds to advance corporate interests, are left solely to the honest decision of the directors, if

their powers are without limitation and free from restraint. To hold otherwise would be to substitute the judgment and discretion of others in the place of those determined on by the scheme of incorporation." Ellerman v. Chicago Junction R'vs & Union S. Y. Co. et al.. 23 Atl. Rep., 287 (N. J., 1891). Thus, in Bloxam v. Metropolitan R'y Co., L. R., 3 Ch., 337 (1868), the court says: "The matters of internal arrangement which are beyond the province of the court were properly admitted to be such as are within the scope of the company's powers." And in Camblos v. Phil. & R. R. R. Co., 4 Brews., 563 (U. S. C. Ct., 1873), the court said: "So long as those who manage the corporation keep within the limits of their charter, and commit or propose to commit no breach of their trust, he has no right to complain." In the case of Beecher v. Wells, etc., Co., 1 Fed. Rep., 276 (1880), it was said: "A court of equity will not interfere with the internal policy of a corporation unless it is manifest that the proposed act is ultra vires." In Bach v. Pacific, etc., Co., 12 Abb. Pr. (N. S.), 373 (1872), the court said: "No case can be found where the general management of corporate property has been subject to the restrictions of judicial power,

the rule otherwise there would be no safety or possibility of carrying on business through corporations. There would be suits instituted by dissatisfied stockholders on slight provocation, and sometimes for the very purpose of embarrassing the transaction of business. A partner in a copartnership may prevent action which he disapproves, but corporations are formed very largely to avoid that very danger and disadvantage. The corporate directors, so long as they act within their powers, may use their own discretion as to what ought to be done. Such also is the rule with the majority of the stockholders in meeting assembled. An act intra vires and without fraud is an act of internal management, and a minority of the stockholders are powerless to prevent, control, change or question that act. Thus, a stockholder has no remedy for the mere inefficiency of a director, except at the election of the corporation. Having once been elected, a director is entitled to retain his position even though he is grossly inefficient, and he cannot be removed from his position. But where there are violent internal dissensions in a corporation, and two sets of officers are attempting to act, and the corporate property is endangered, a court of equity will interfere to the extent of preserving the corporate property by a temporary receiver.2 A court of equity cannot, however, restrain the corporation from proceeding with business and

unless, indeed, in the case of a clear violation of express law, or a wide departure from chartered powers." this case the stockholder objected to the securities in which the corporate funds were being invested. In Walker v. Mad River, etc., R'y Co., 8 Ohio, 38 (1837), it was said by the court: "When acts requiring judgment, science and professional skill are confided to the discretion of the officers of a corporation, the exercise of that discretion will not be lightly disturbed." See, also, Tuscalossa Mfg. Co. v. Cox, 68 Ala., 71 (1880). In Ramsey v. Erie R'y Co., 7 Abh. Pr. (N. S.), 156 (1869), it is said: "When directors are only unwise, or merely extravagant or improvident, or slightly negligent, or merely misjudge in the performance of their duties, the remedy of stockholders is to elect other persons directors in their places." In Bailey v. Birkenhead, etc., R'y Co., 12 Beav., 433 (1849), where a stockholder sought to restrain a call as being unnecessary, the

court refused to entertain the suit, and said that it was not for the court "to take upon itself to determine a question which might well and ought to be determined by the shareholders themselves at general meetings." See, also, Edwards v. Shrewshury, etc., R'y Co., 2 De G. & Sm., 537 (1848),

1 See § 711, infra.

²Trade Auxiliary Co. v. Vickens, L. R., 16 Eq., 303 (1873); Featherston v. Cooke, id., 298, the court saying: "The court will not interfere with the internal affairs of joint-stock companies unless they are in a condition in which there is no properly constituted governing body, or there are such dissensions in the governing body that it is impossible to carry on the business with advantage to the parties interested. In such a case the court will interfere, but only for a limited time, and to as small an extent as possible." See, also, Lawrence v. Greenwich, etc., Co., 1 Paige, 587 (1829).

using its funds for that purpose, even though a minority of the stockholders can show that sound business discretion and judgment would dictate a different policy.¹

§§ 685-689. Borrowing money, issuing bills, notes and acceptances, coupon bonds, debentures and mortgages.—These subjects are fully considered elsewhere.²

§ 690. Loans by a corporation, and statutes forbidding loans or forbidding the taking of notes or mortgages.— A corporation cannot make loans of money unless its regular business ordinarily involves loaning. In most cases the business of a corporation is to invest and use its capital, and not to loan it out. Accordingly, it is well settled that only where the business of the corporation is such as usually involves loaning does the corporation have the right to loan its funds. If not prohibited by statute they may receive and sell or assign notes or acceptances in the way of business. But

¹ Fountain Ferry, etc., Co. v. Jewell, 8 B. Monr. (Ky.), 140 (1847), the court saying: "The question of expediency, of practicability, of extravagance, or of prudent economy, must be left to be decided by the managers and the corporators." A stockholder may object to corporate acts and contracts which are fraudulent or ultra vires or mala in se. But all other acts he can correct only by the election of new directors. Leslie v. Lorillard, 110 N. Y., 519 (1888).

² See ch. XLVI, infra.

3 1 Daniell's Negotiable Inst., § 384. It is legal, however, for a loan and trust company to loan money and take a mortgage as security. Farmers' L. & T. Co. v. Perry, 3 Sand. Ch., 339 (1846); Farmers', etc., Co. v. Clowes, 3 N. Y., 470 (1850). A plank-road company may loan its funds to a contractor who is constructing the road. Dictum in Madison, etc., Co. v. Watertown, etc., Co., 5 Wis., 173 (1856). A benevolent association may loan its funds. Western Boatmen's Benev. Assoc. v. Kribben, 48 Mo., 37 (1871). A national bank may purchase notes as well as discount them. Nat'l Pemberton Bank v. Porter, 125 Mass., 333 (1878); Attleborough Nat'l Bank v. Rogers, 125 Mass., 339 (1878). The discounting of a note by a cement corporation contrary to law, done through the president, is presumed to have been his act and not that of the corporation. Lawrenceville, etc., Co. v. Parker, 10 N. Y. Supp., 831 (1890). The fact that a manufacturing company extended its business so as to include iron pipe as well as brass, and loaned money. which loans, however, the president was willing to take up, and had owned government bonds, is not sufficient to entitle a stockholder who has acquiesced therein to demand that all profits be paid out in dividends. McNab v. McNab. etc., Co., 62 Hun, 18 (1891). A deposit by a bank in a bank renders the latter liable therefor, though the deposit is made to enable the president of the latter to use it. Eastern, etc., Bank v. Vermont Nat'l Bank, 22 Fed. Rep., 186 (1884).

⁴ White's Bank v. Toledo Ins. Co., 12 Ohio St., 601 (1861); Western Cottage Organ Co. v. Reddish, 51 Iowa, 55 (1879); Pratt v. Short, 79 N. Y., 437 (1880); Clark v. Titcomb, 42 Barb., 122 (1849); Bulkley v. Briggs, 30 Mo., 452 (1860), where it was held that a corporation, though prohibited from dealing in commercial paper, could receive and sell notes given for the sale of its lands; McIutyre v. Preston, 10 Ill., 48 (1848). And a note received by a corporation will be presumed to have been taken in the course of business. Lucas v. Pit-

unless specially authorized they cannot make a business of discounting, nor engage in a banking business.²

A person who borrows money from a corporation cannot defeat an action for the money by alleging that the corporation had no authority to make the loan. He must pay back the money borrowed.

Although a statute or charter forbids a corporation from loaning more than a certain amount of money, yet if it actually has loaned more than that amount the borrower cannot avoid payment of any part of the loan.⁴ Although a statute requires a bank to loan on

ney, 27 N. J. L., 221 (1858); Hardy v. Merriweather. 14 Ind., 203 (1860); Frye v. Tucker, 24 Ill., 180 (1860); Potter v. Bank of Ithaca, 5 Hill, 490; 7 id., 530 (1844); Suydam v. Morris Canal & B. Co., 6 Hill, 217 (1843); Talman v. Rochester City Bank, 18 Barb., 123 (1854); Gee v. Alabama L. & T. Co., 13 Ala., 579 (1848); Bates v. Bank of State of Ala., 2 Ala., 462 (1841): Smith v. Mississippi & Ala, R. R. Co., 6 Sm. & M., 179 (1846); Portland Bank v. Stone, 7 Mass., 433 (1811); Northampton Bank v. Allen, 10 Mass., 284 (1813); Fleckner v. Bank of United States, 8 Wheat., 338 (1823); Rees v. Conococheague Bank, 5 Rand., 329 (1827); Payne v. Baldwin, 3 S. & M., 661; rev'd in 6 How., 332; Akin v. Blanchard, 32 Barb., 527 (1860). Insurance company cannot purchase note for purposes of set-off. Set-off defeated. Straus v. Eagle Ins. Co., 5 Ohio St., 59 (1855).

¹ New York F. J. Co. v. Sturges, 2 Cow., 664 (1824). In Mitchell v. Rome R. R. Co., 17 Ga., 174 (1855), it was held that where power is given to "make contracts" a note taken by a corporation is *prima facie* evidence of an authorized contract.

² State v. Granville Alexandrian Soc., 11 Ohio, 1 (1841); State v. Washington Social Lib. Co., 11 Ohio, 96 (1841); Re Ohio Life Ins. & T. Co., 9 Ohio, 292 (1839); Blair v. Perpetual Ins. Co., 10 Mo., 559 (1847); Sumner v. Marcy, 3 Woodb. & M., 105 (1847). See, also. Central R. R. Co. v. Collins, 40 Ga., 582 (1869), and Duncan v. Maryland Svgs. Inst., 10 Gill & J., 299 (1838).

³Steam Navigation Co. v. Weed, 17 Barb., 382, 384 (1853): Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal., 620 (1863): Mott v. United States Trust Co., 19 Barb., 568 (1854); Poock v. Lafayette Bldg. Assoc., 71 Ind., 357 (1880), the court saving: "The law may have its reproaches, but this is not one of them." A person making a note to a corporation cannot defeat it by the defense that the company had no power to loan money. Bond v. Terrell, etc., Co., 18 S. W. Rep., 691 (Tex., 1891). In Alabama the borrower of the money from the corporation may escape payment. Grand Lodge of Ala. v. Waddill, 36 Ala., 313 (1860); Chambers v. Falkner, 65 Ala., 448 (1880), where Masonic lodges had loaned money. See, also, dictum in Beach v. Fulton Bank, 3 Wend., 574 (1829), where an insurance company made a loan; also the decision in Life, etc., Ins. Co. v. Mechanic, etc., Co., 7 Wend., 31 (1831), denying the right of an insurance company to recover an unsecured loan where its charter authorized loans on bond and mortgage. See, also, New York Firemen Ins. Co. v. Ely, 5 Conn., 560 (1825), where, however, the loan was expressly prohibited. In Waddill v. Alabama, etc., R. R. Co., 35 Ala., 323 (1859), an unauthorized loan by a railroad was enforced on the ground that the railroad president made the loan without authority from the direct-

⁴Gold Mining Co. v. National Bank, 96 U. S., 640 (1877). See, also, Silver Lake Bank v. North, 4 Johns. Ch., 370 (1820); National Bank v. Matthews, 98 bond and mortgage, yet it may recover loans made on drafts or notes.1

A statute which prohibits corporations from discounting notes or bills, unless expressly authorized so to do, prevents the corporation from collecting a note taken in violation thereof;² but this does

U. S., 621 (1878). One who borrows from a national bank cannot plead in defense to a suit for the money that the bank violated the prohibition against loaning more than one-tenth of its capital to any one person. Gold Mining «Co. v. National Bank, supra; Bly v. Second National Bank, 79 Pa. St., 453 (1875): Allen v. First National Bank, 23 Ohio St., 97 (1872); Stewart v. National Bank, 2 Abb. (U. S.), 424 (1869), holding that though the loan may be recovered the franchise of the bank may be for-To same effect. Shoemaker v. Mechanics' National Bank, 2 Abb. (U.S.). 416 (1869); and Union Gold, etc., Co. v. Rocky Mountain, etc., Bank, 1 Colo., 531 (1872); Elder Bank v. Ottawa, 12 Kan., 238 (1873), holding that a borrower cannot restrain a national bank from negotiating such securities nor compel their return: O'Hare v. Second National Bank, 77 Pa. St., 96 (1874), holding that an accidental excess does not make the loan void. Although the statute forbids loans to directors, yet a loan so made is collectible and securities pledged by the director are subject to the loan, though they were fraudulently obtained by him from others. Bowditch v. N. E., etc., Ins. Co., 141 Mass., 292 (1886). Where the 'president causes the corporation to loan him money in direct violation of the statute, he may be sued for the conversion thereof, although his collateral security has been sold and the whole transaction ratified by the directors. A. C. Nellis Co. v. Nellis, 62 Hun, 63 (1891). Where directors loan money in violation of the statute they are liable personally therefor. Thompson Greeley, 17 S. W. Rep., 962 (Mo., 1891). The case Williams v. McKay, 18 Atl. Rep., 824 (N. J., 1889), is very full, explicit and clear in its adjudication and

distribution of losses on the president, treasurer, manager, officers, finance committee, secretary and directors of a savings bank, where those officers, etc., had made instruments contrary to the by-laws, charter and statutes.

¹ Allen v. Freedman's Sav. Co., 14 Fla., 418 (1874); Mott v. U. S. Trust Co., 19 Barb., 568 (1855); Little v. O'Brien, 9 Mass., 423 (1812); Mutual Life Ins. Co. v. Wilcox, 8 Biss., 203 (1878); Davis, etc., Co. v. Best, 30 Hun, 638 (1883). A loan for two years, instead of one as allowed by statute, is nevertheless enforceable. Germantown Ins. Co. v. Dhein, 43 Wis., 420 (1877). A loan is collectible though for a longer time than allowed, and without the required security, and in excess of the amount allowed by statute. Bond v. Central Bank, 2 Ga., 92 (1847). A director who loaus corporate funds in violation of the statute is personally liable for the amount. Dodd v. Wilkinson, 9 Atl. Rep., 685 (N. J., 1887): Williams v. McDonald, 7 id., 866 (N. J., 1886). Treasurer and manager turning in to the corporation a mortgage not. worth double the debt owned by him to the corporation is liable for any loss. Williams v. Riley, 34 N. J. Eq., 398-(1881).

² N. Y., etc., Trust Co. v. Helmer, 77 N. Y., 64 (1879), applying the New York act against unauthorized banking; Tracy v. Talmage, 14 N. Y., 162 (1856); Talmage v. Pell, 7 N. Y., 328 (1852); Weed v. Snow, 3 McLean, 265 (1843); Leavitt v. Palmer, 3 N. Y., 19 (1849) (a certificate of deposit), and Hayden v. Davis, 3 McLean, 276 (1843) (an acceptance); Swift v. Beers, 3 Denio, 70 (1846); Tylee v. Yates, 3 Earb., 222 (1848), holding also that an assignment of securities for their payment is also void and transfers no title to the assignees;

not prevent the corporation from collecting the amount due. It may disregard the note and sue on the loan itself.¹

White v. Franklin Bank, 22 Pick., 181 (1839), holding that while a time deposit is within the prohibition the money may be recovered in an action brought before the time has expired. See, also, Slark v. Highgate Archway Co., 5 Taunt., 792 (1814); Wigan v. Fowler, 1 Starkie, 373 (1816): Broughton v. Manchester & S. Water-works, 3 B. & Ald., 1 (1819): Dockery v. Miller, 9 Humph., 731 (1849); Ohio Life Ins. & T. Co. v. Merchants' Ins. & T. Co., 11 Humph., 1 (1850); Root v. Wallace, 4 McLean, 8 (1845), holding that an indorsee may recover from the indorser of a note void for this illegality the consideration paid for it: State v. Urbana Mut. Ins. Co., 14 Ohio, 6 (1846), holding that receiving a deposit of money is not a violation of a charter restriction upon the exercise of banking powers: New York Firemen's Ins. Co. v. Ely, 5 Conn., 560 (1825). where a corporation was not allowed to recover upon a note because its charter prohibited it from doing a banking business; Farmers' Loan & T. Co. v. Perry, 3 Sandf. Ch., 339 (1846), and Green v. Seymour, 3 Sandf. Ch., 285 (1846), where the same principle was applied to mortgages issued in violation of statutory prohibition; Safford v. Wyckoff, 4 Hill, 442 (1842), holding also that if the form and appearance of the notes indicate that they were intended to be circulated as money, one who takes them being thereby put upon his inquiry is not a bona fide holder and cannot recover upon them. To same effect, Attorney-General v. Life & Fire Ins. Co., 9 Paige, 470 (1842); Mumford v. American L. I. Co., 4 N. Y., 463 (1851), holding that a certificate of deposit is not included in such a prohibition; Leavitt v. Yates, 4 Edw. Ch., 134 (1843), holding also that a trust deed given to secure such notes was also void; Hazleton Coal Co. v. Megarel, 4 Pa. St., 328 (1846). holding that the statute cannot be

avoided by issuing a document which is in effect though not in form a note; Barry v. Merchants' Exchange Co., 1 Sandf. Ch., 280 (1844); Utica Ins. Co. v. Scott, 19 Johns., 1 (1821); Branch Bank of Montgomery v. Crocheron, 5 Ala., 250 (1843), holding that the bills of a corporation which is prohibited from issuing them cannot be rendered legal by being issued by a bank under a contract with the corporation: Sackett's Harbor Bank v. Codd, 18 N. Y., 240 (1858), holding that a statute prohibiting the circulation of foreign bank notes does not prevent their sale and delivery for any other purpose. Payment of a debt by a draft which is prohibited by statute is not payment, the draft not having been paid. Davis v. Bank of River Raisin, 4 McLean, 387 (1848). Charter provision that no director or officer should borrow from the bank does not apply to loans to a firm of which the director is a member. Fisher v. Murdock, 13 Hun. 485 (1878). A deposit made with a corporation which is prohibited by statute from doing a banking business is presumed to have been a loan and in any case is recoverable back in an action for money had and received. Chapman v_{\bullet} Comstock, 58 Hun, 325 (1890).

¹ Oneida Bank v. Ontario Bank, 21 N. Y., 490 (1860); Pratt v. Short, 79 N. Y., 437 (1880), reviewing N. Y. cases; Pratt v. Eaton, 79 N. Y., 449 (1880): Davis, etc., Co. v. Best, 30 Hun, 638 (1883); Mills v. Western Bank, 10 Cush., 22 (1852); Webb v. Com'r of Herne Bay, L. R., 5 Q. B., 642 (1870). Compare Faneuil Hall Bank v. Bank of Brighton. 16 Gray, 534 (1860), and Western Bank v. Mills, 7 Cush., 539 (1851); Utica Ins. Co. v. Kip, 8 Cow., 20 (1827); Same v. Caldwell, 3 Wend., 296 (1829), and Same v. Bloodgood, 4 Wend., 652 (1830); Planters' Bank v. Union Bank, 16 Wall., 483 (1872), holding that when an illegal contract has been fully executed the But where the statute prohibits not only the enforcement of the note, but also the enforcement of any contract, express or implied, growing out of the transaction, then the corporation loses the money loaned. Any corporation unless expressly prohibited has power to take a mortgage as security for a debt contracted in the course of its business?

money constituting the price for it may be looked upon as a legal consideration for an express or implied promise. same effect. Cook v. Sherman, 20 Fed. Rep., 167 (1882); Workingman's Banking Co, v. Rautenberg, 103 Ill., 460 (1882), holding that a note given by a director for a loan in excess of the amount limited by charter is void so far as to release a guarantor upon it; Farmington Savings Bank v. Fall. 71 Me., 49 (1880). holding that prohibition against lending money on the security of names only is merely directory, and a note so secured may be collected. To same effect, National Pemberton Bank v. Porter, 125 Mass., 333 (1878): United States Trust Co. v. Brady, 20 Barb., 119 (1855); Vanatta v. State Bank, 9 Ohio St., 27 (1858); Union Mutual F. I. Co. v. Keyser, 32 N. H., 313 (1855), where a note given for insurance upon property in one class when by law it was insurable only in another class was held valid; McFarlin v. Triton Ins. Co., 4 Denio, 392 (1847), where a bond own by an insurance company was held to have been taken as an instrument in default of proof of consideration; Marion Savings Bank v. Dunkin, 54 Ala., 471 (1875), holding that an accommodation drawer of a bill who did not at the time know it was discounted by a bank in violation of law may defend by showing that the bank was not properly organized; Brown v. Killan, 11 Ind., 449 (1858), holding that notes in similitude of bank-notes are void, even the issuers not being liable upon them, but any consideration paid for them may be recovered back; White v. Franklin Bank, 22 Pick., 181 (1839), holding that money deposited in a savings bank in violation of a statute may

be recovered: Lester v. Howard Bank, 33 Md., 558 (1870), where a director who borrowed money from a bank in violation of its charter was held liable for the money; Philadelphia, etc., Co. v. Towner, 13 Conn., 249 (1839), where the original debt was validly incurred, but a subsequent note taken by the corporation was illegal: Pratt v. Eaton. 79 N. Y., 449 (1880), where notes secured by a mortgage were held void but the mortgage valid; People v. Brewster, 4 Wend., 498 (1830), holding that prohibiting the carrying on of a banking business does not prevent lending money upon notes if it is not done as a business: Otis v. Harrison, 36 Barb., 210 (1862); Barton v. Port Jackson, etc., Co.. 17 Barb., 397 (1854),

¹ New Hope, etc., Co. v. Poughkeepsie, etc., Co., 25 Wend., 648 (1841).

² State v. Rice, 65 Ala., 83 (1880); National Bank v. Insurance Co., 41 Ohio St., 1 (1884); Baird v. Bank of Washington, 11 S. & R., 411 (1824), holding that a power to take mortgages in the course of business confers the power to commute debts really due for land; Bank of Michigan v. Niles, 1 Dong., 401 (1844), holding that power to hold lands and take mortgages for business purposes does not confer the right to deal in lands; National Trust Co. v. Murphy. 30 N. J. Eq., 408 (1879), holding that a corporation not authorized to take land as original investment may take a mortgage on land in a foreign state as additional security; Clark v. Farrington, 11 Wis., 306 (1860). Sections 5136 and 5137 of the United States Revised Statutes do not prevent a national bank from enforcing the collection of a note secured by a mortgage of land by a

CH. XLI.]

Although a corporation is prohibited by its charter from taking a real estate mortgage as security for a debt, nevertheless the mortgage after it has been taken may be enforced by the corporation. The penalty is that the state may forfeit the corporate charter for misuser.1 The laws concerning usury are enforced against corporations as fully as against individuals,2 and where their charters

foreclosure of the mortgage. National Bank v. Matthews, 98 U.S., 621 (1878): Palmer v. Lawrence, 3 Sandf., 161 (1849); Lathrop v. Commercial Bank, 8 Dana (Ky.), 114 (1839); Mapes v. Scott, 94 Ill., 379 (1880), holding that national banks may take conveyances of land in payment of pre-existing debts. A national bank may enforce a mortgage securing future indebtedness. National Bank v. Whitney, 103 U.S., 99; Simons v. First National Bank, 93 N. Y., 269 (1883). The case of United States Mortgage Co. v. Grass, 93 Ill., 483 (1879), to the effect that foreign corporations for loaning on mortgages could not take mortgages in Illinois, inasmuch as no domestic corporation could be organized for that purpose, was overruled by Stevens v. Pratt, 101 Ill., 206 (1881), aud Commercial, etc., Co. v. Scammon, 102 Ill., 46 (1882). A foreign corporation may foreclose a mortgage. American. etc., Ins. Co. v. Owen, 81 Mass., 491 (1860). ¹ National Bank v. Whitney, 103 U.S., 99 (1880), reversing Crocker v. Whitnev, 71 N. Y., 161 (1878), holding that where a national bank takes a mortgage to secure future advances it can be objected to only by the government. National Bank v. Matthews, 98 U. S., 621 (1878), reversing Matthews v. Skinner, 62 Mo., 329 (1876), holding that a bank holding a deed of trust upon real estate as security for a note contrary to the act may sell the land in order to collect the note; followed in Winter v. Little, 94 Pa. St., 64 (1880); Thornton v. National Exchange Bank, 71 Mo., 221 (1879), holding that the only penalty for violations of that act is forfeiture of charter, to be invoked only by the United States. To same effect, Graham

v. National Bank, 32 N. J. Eq., 804 (1880); Oldham v. Bank, 85 N. C., 240 (1881), and Grand Gulf Bank v. Archer, 8 Sm. & M., 151 (1847). For a contrary decision, see Green v. Seymour, 3 Saud. Ch., 285 (1846); Bard v. Chamberlain, id., 31 (1845)

²McLean v. Lafavette Bank, 3 Mc-Lean, 587 (1845); New York Fireman's Ins. Co. v. Sturges, 2 Cowen, 664 (1824); Grand Gulf Bank v. Archer, 8 Sm. & M., 151 (1847); Parkins v. Watson, 2 Bax. /Tenn.), 173 (1872), holding that a bank may discount on same terms as an individual, and should suffer same forfeit for usury: Tyng v. Commercial, etc., Co., 58 N. Y., 308 (1875), holding that general usury laws apply to corporations. Charter privileges to a building association to take larger interest than is allowed to others under the usury law are unconstitutional in Kentucky. There are no public services rendered by the association. Gordon v. Winchester, etc., Assoc., 12 Bush (Ky.), 110 (1876); Dunkle v. Renick, 6 Ohio St., 527 (1856), holding that a note of a third party given by a debtor to a bank in good faith for an existing debt is not usurious; Morse on Banking (3d ed.), § 72, etc. -A corporation limited to "legal interest" may take legal interest as allowed by the laws of the state where the money is loaned. It is not confined to the rate prescribed by the laws of the state in which it is incorporated. United States Mortg. Co. v. Sperry, 138 U.S., 313 (1891). In some states the excess of interest is forfeited; in other states the whole interest is forfeited; and in still other states the whole debt is forfeited. See Stimson's American Statute Law, § 4832.

forbid them from exacting more than a specified rate of interest they are bound by the restriction.¹

§ 691. Corporations may make assignments for the benefit of corporate creditors — Preferences.— Corporations, unless restricted by their charters or by general statutes, may make assignments for the benefit of creditors to the same extent that individuals may.²

¹ Bank of United States v. Owens, 2 Pet., 527 (1829), where notes given for more than the rate fixed by the charter of a bank were declared void; Planters' Bank v. Sharp, 4 Sm. & M., 75 (1844). But here it was held that taking a greater amount of interest than that allowed by the charter rendered the corporation liable under the general usury laws, and that the contract was not void. On this point see Rock River Bank v. Sherwood, 10 Wis., 174 (1860); Commercial Bank v. Nolan, 8 Miss., 508 (1843); Grand Gulf Bank v. Archer, 8 Sm. & M., 151 (1847); Bauk of Chillicothe v. Swayne, 8 Ohio, 257 (1838), where a contract for more than the specified rate was held void. To same effect, Creed v. Commercial Bank, 11 Ohio, 489 (1842); Spalding v. Bank of Muskinghan, 12 Ohio, 544 (1841), holding also that taking a commission is only a method of avoiding the statute, and Miami Exporting Co. v. Clark, 13 Ohio, 1 (1844), where the same ruling was made in regard to charging for exchange; Morse on Banking (3d ed.), § 52,

² In Minnesota the board of directors of an insolvent corporation may order an assignment for the benefit of creditors. Tripp υ Northwestern Nat'l Bank, 43 N. W. Rep., 60 (Minn., 1889). A resolution of the board of directors authorizing the assignment for the benefit of creditors is sufficient. Tripp υ Northwestern, etc., Bank, 48 N. W. Rep., 4 (Minn., 1891). The directors may make an assignment of the corporate assets for the benefit of creditors. Whiting υ. Hovey, 13 Ont. App. Cas., 7 (1886). The president who makes an assignment of the company's assets for the benefit of

creditors under a resolution of the board of directors cannot afterwards attack In re George, etc., Co., 48 N. W. Rep., 864 (Mich., 1891). A corporation may assign for the benefit of creditors. Nyman v. Berry, 29 Pac. Rep., 557 (Wash., 1892). An assignment by a corporation for the benefit of creditors does not displace existing attachments. First. etc., Bank v. North, etc., Co., 18 S. W. Rep., 400 (Tenn., 1891). An assignment for the benefit of creditors may be made by a corporation. A foreign corporation may make such an assignment. It is legal, although the foreign corporation has not complied with the law relative to filing a copy of its charter and appointing a resident agent. The assignment is properly made by the directors and not by a meeting of the stockholders. Where the assignment is made to a director and there are indications of fraud, it is for the jury to say whether there was fraud. Wright v. Lee, 51 N. W. Rep., 706 (S. D., 1892). See, also, Wilkinson v. Bauerle, 7 Atl. Rep., 514 (N. J., 1886); De Ruyter v. St. Peter's Ch., 3 N. Y., 238 (1850), holding that a religious as well as a trading corporation may make an assignment for the benefit of creditors at common law: Hutchinson v. Green, 1 S. W. Rep., 853 (Mo., 1886); Haxtum v. Bishop. 3 Wend., 13 (1829); Hill v. Reed, 16 Barb., 281 (1853), by an insurance company: Chamberlain v. Bromberg, 3 S. Rep., 434 (Ala., 1888); State v. Bank of Maryland, 6 Gill & J., 205, 219 (1834); Bergen v. Porpoise, etc., Co., 8 Atl. Rep., 523 (N. J., 1887); McCallie v. Walton, 37 Ga., 611 (1868); Lewis v. Glenn, 6 S. E. Rep., 866 (Va., 1888);

In making the assignment the corporation may make preferences for one or more creditors over others, or of one class of creditors over other classes.¹ The question whether directors may prefer

Flint v. Clinton Co., 12 N. H., 430, 435 (1841): Pope v. Brandon, 2 Stew. (Ala.), 401 (1830), holding also that it was not necessary that the creditors should sign the assignment: nor was the deed void because the trustee was the president of the assigning bank, who in that capacity executed the deed as a grantor; Allen v. Moutgomery R. R. Co., 11 Ala., 437, 451 (1847); Lamb v. Cecil, 25 W. Va., 288 (1884): Lamb v. Pannell, id., 298 (1884); Ardesco, etc., v. North American, etc., 66 Pa. St., 375: Covert v. Rogers, 38 Mich., 363 (1878), holding that the assignee may be one of the stockholders. In this case he was a former treasurer, who had resigned. Stockholders caunot prevent directors making an assignment for the benefit of corporate creditors, though their term of office expires in four days, the corporation being insolvent. Hutchinson v. Green, 1 S. W. Rep., 853 (Mo., 1886). In Wisconsin it is held that a trust deed executed by an insolvent corporation, giving the trustee power to take charge of the business and carry it on, is void as intended to defeat and delay corporate creditors. First Nat'l Bank, etc., v. McDonald, etc., Co., 28 N. W. Rep., 225 (Wis., 1886). An assignment by a railroad assigns its income only. Arthur v. Commercial, etc., Bank, 17 Miss., 394, 430 (1848). The assignment may be made by a meeting of the hoard of directors, as in any other corporate business. De Camp v. Alward, 52 Ind., 468 (1876); State v. Commercial Bank, 21 Miss., 569 (1850); Sargent v. Webster, 54 Mass., 497 (1847), holding also that the assignment may be to a steckholder to pay a debt of the corporation to him, and the remainder to go to the corporate treasurer for the benefit of other creditors. See. also. Graham v. Railroad Co., 102 U. S., 148 (1880); Sheldon, etc., Co. v. Eickemeyer,

etc., Co., 90 N. Y., 607 (1882); Shockley v. Fisher, 75 Mo., 498 (1882), construing a statute authorizing an assignment "by a debtor to any person in trust for his creditors" to include corporations. and holding that the right exists at common law, citing 2 Kent, Com., 398. and note. A deed in trust by a corporation of all its property, made with consent of nearly all its creditors, to trustees to continue the business, is void as to non-consenting creditors. man v. Sprague Manuf. Co., 12 Atl. Rep., 240 (Conn., 1888); De Wolf v. Manuf. Co., 49 Conn., 282. In the case of Consolidated, etc., Co. v. Kansas, etc., Co., 45 Fed. Rep., 7 (1891), the court went very far when it said: "My opinion is that the courts of chancery ought to reach out for the attainment of a sound public policy, which asserts that when a business corporation becomes so insolvent that it cannot further prosecute its business, and to avoid an assignment or surrender for the benefit of all its creditors, it must, to avoid attachments or executions, make a disposition of its property to appease the demands of its creditors, the trustees, eo instanti, should be held to be trustees of the assets of the company for the equal benefit of all its creditors. But it is not essential to go so far in this case."

Bergen v. Porpoise, etc., Co., 8 Atl. Rep., 523 (N. J., 1887); Pyles v. Riverside, etc., Co., 2 S. E. Rep., 909 (W. Va., 1887); Arthur v. Commercial, etc., 17 Miss., 394; Savings Bank v. Bates, 8 Conn., 505; Hopkins v. Gallatin, etc., 4 Humph., 403; Wilkinson v. Bauerle, 7 Atl. Rep., 514 (N. J., 1886); Vail v. Jameson, 7 Atl. Rep., 520 (N. J., 1886); Palmer et al. v. George W. Hutchison Grocery Co. et al., 11 S. Rep., 789 (Miss., 1892); Rollins v. Shaver, etc., Co., 45 N. W. Rep., 1037 (Iowa, 1890); Gould v. Little Rock, etc., R'y, 52 Fed. Rep., 680 (1892);

themselves is discussed elsewhere. A preference by the directors to themselves is generally held to be fraudulent.

In New York and some other states statutes prevent corporations from assigning property in contemplation of insolvency for the benefit of creditors.² A similar restriction is imposed by the National Bank Act.³

Blalock v. Kernersville, etc., Co., 14 S. E. Rep., 501 (N. C., 1892); Coats v. Donnell, 94 N. Y., 168 (1883), holding also that a statute prohibiting preferences by corporations does not apply to foreign corporations; Ringo v. Biscoe, 13 Ark., 563 (1853): Ex parte Conway, 4 Ark., 302, 352 (1842); Dana v. Bank of the United States, 5 Watts & S., 223 (1843), holding that the board of directors has the power to make an assignment in trust for the benefit of preferred creditors without the authority or consent of the stockholders: Warner v. Mower, 11 Vt., 385, 390 (1839); Smith v. Skeary, 47 Conn., 47 (1879); Reichwald v. Commercial Hotel Co., 106 Ill., 439 (1883); Planters' Bank v. Whittle. 78 Va., 737 (1884). The following cases bear upon this principle of law, but do not conflict with it: Robins v. Embry, Sm. & M. Ch. (Miss.), 207, 258 (1843); Bodley v. Goodrich, 7 How., 276 (1849); Barings v. Dabney, 19 Wall., 1 (1873); affirming Dabney v. State, etc., 3 S. C., 124 (1870); Buell v. Buckingham, 16 Iowa, 284 (1864); Catlin v. Eagle Bank, 6 Conn., 233 (1826); Richards v. New Hampshire Ins. Co., 43 N. H., 263 (1861); Hightower v. Mustian, 8 Ga., 506 (1850); Warr v. Bank of West Tennessee, 4 Coldw., 471 (1867): Union Bank, etc., v. Ellicott. 6 Gill & J., 363. In a prominent case it was held that it could assign all its property in trust for the benefit of creditors without the consent of the stockholders. Dana v. United States Bank, 5 Watts & S., 223, 247 (1843). few courts have refused to accept this proposition. Bank Commissioners & Bank of Brest, Harring, Ch., 106 (1840): Rollins v. Clay, 33 Me., 132 (1851). Corporate creditors cannot object to a sale of all the corporate property to one of the creditors in payment of her debt. even though she be the wife of the president and chief stockholder, Ragland v. McFall. 27 N. E. Rep., 75 (III., 1891). In Washington an insolvent corporation cannot create preferences. Tompson v. Huron Lumber Co., 30 Pac. Rep., 741 (Wash., 1892). In Texas it is held that an insolvent corporation cannot prefer certain creditors, and that equity will prevent unjust preferences. Long v. Daugherty, 12 S. W. Rep., 29 (Tex., 1889).

¹ See § 661, supra.

² Sibell v. Remsen, 33 N. Y., 95 (1865); National S. & L. Bank, etc., v. Mechanics', etc., 89 N. Y., 467 (1882); Harris v. Thompson, 15 Barb., 62 (1853); Atkin-

the preference intended by the act is such as is given to secure or pay a pre-existing debt, and does not prevent the borrowing of money upon security; Robinson v. National Bank, etc., 81 N. Y., 385 (1880), holding that the act applies only to such banks as are insolvent or are about to become so; Venango Nat Bank v. Taylor, 56 Pa. St., 14 (1867), holding that the act relates to legal as well as voluntary transfers of property by banks.

⁸U. S. Rev. Stat., § 5242, construed in Irons v. Manufacturers' Nat. Bank, etc., 6 Biss., 301 (1875), where the phrase "act of insolvency" was held to mean any act which would be an act of insolvency by an individual banker; National Bank v. Colby, 21 Wall., 609 (1874); Case v. Citizens' Bank, etc., 2 Woods, 23 (1873); National, etc., Bank v. Mechanics', etc., Bank, 89 N. Y., 467 (1882); Casey v. La Societe de Credit Mobilier, 2 Woods, 77 (1874), holding that

§ 692. At common law, in America, a corporation may purchase land.¹— The power of a foreign corporation to purchase land is considered elsewhere.²

The English statutes of mortmain are not in force in this country. The only limitation upon the right of corporations to hold real property is that the purchase must be a natural incident of the business specified in the charter.³ A different rule prevails in Penn-

son v. Rochester, etc., Co., 114 N. Y., 168 (1889); Coats v. Donnell, 94 N. Y., 168 (1883), holding that this statute does not apply to foreign corporations: Paulding v. Chrome Steel Co., 94 N. Y., 334 (1884), holding that in order to come within the statute the act of assignment must have been done because of existing or in contemplation of insolvency; Dutcher v. Importers & Traders, etc., 59 N. Y., 5 (1874), holding that payment by the officers of a bank, who knew of its insolvency, of a check of a depositor who has no such knowledge is not within the meaning of the statute: Smith v. New York, etc., Co., 18 Abb. Pr., 419 (1860); Smith v. Danzig, 64 How, Pr., 320 (1883); Loring v. U. S., etc., Co., 36 Barb., 329 (1862); Heroy v. Kerr, 8 Bosw., 194 (1861). A New York corporation cannot make an assignment in Rhode Island. Pierce v. Crompton, 13 R. I., 312 (1881). A chattel mortgage made in contempt of court and in violation of the statutes against preferences by a corporation is void. Bissell v. Besson, 22 Atl. Rep., 1077 (N. J., 1890), A statutory prohibition against preferences by an insolvent corporation does not prevent the giving of collateral for debt when contracted. Armstrong v. Chemical Nat'l Bank, 41 Fed. Rep., 234 (1890). As to the New York statute against preferences to officers or stockholders. see § 661, supra.

¹Richardson v. Mass., etc., Assoc., 131 Mass., 174 (1881); Kelly v. People's Transp. Co., 3 Oreg., 189 (1870); Page v. Heineberg, 40 Vt., 81 (1868); Central Gold Mining Co. v. Platt, 3 Daly, 263 (1870), to the effect that the holding may be upon special trust; Nicoll v.

New York & E. R. Co., 12 N. Y., 121, 127 (1854): Barry v. Merchants' Exchange Co., 1 Sandf. Ch., 280 (1844); Sherwood v. American Bible Soc., 1 Keves, 561 (1864); Steamboat Co. v. McCutcheon, 13 Pa. St., 13 (1850); Riley v. Rochester. 9 N. Y., 64 (1853); Downing v. Marshall, 23 N. Y., 366 (1861); State v. Commissioners, 23 N. J. L., 512 (1852); State v. Collectors, 25 N. J. L., 315 (1855); First Parish v. Cole. 3 Pick., 232 (1825); Old Colony R. R. Corporation v. Evans, 72 Mass., 25 (1856), where the company purchased a gravel pit to transport and sell the gravel. And see Smith v. Sheeley, 12 Wall., 358 (1870). A corporation is presumed, in the absence of any showing to the contrary, to have the right to purchase and hold land. Stockton, etc., Bank v. Staples, 32 Pac. Rep., 936 (Cal., 1893). The usual conveyance gives to the corporation the fee. Asheville, etc., v. Aston, 92 N. C., 578 (1885); Nicoll v. New York & E. R. Co., 12 N. Y., 121 (1854); Turnpike Co. v. Illinois. 96 U.S., 63 (1877); School District, etc., v. Everett, 52 Mich., 314 (1883). In a suit hy a railroad to quiet title to its land, the defendants cannot question the power of the railroad to hold land. Russell v. Texas, etc., R'y, 5 S. W. Rep., 686 (Tex., 1887).

²See § 695, infra.

⁸ 2 Kent's Com. (12th ed.), 356; Moore's Heirs v. Moore, 4 Dana (Ky.), 354 (1836); Lathrop v. Commercial Bank, 8 id., 114, 121 (1839); Potter v. Thornton, 7 R. I., 252 (1862); Perin v. Carey, 24 How., 465 (1860); McCarter v. Orphan, etc., Soc., 9 Cowen, 437, 451 (1827); Page v. Heineberg, 40 Vt., 81 (1868). See, also, Odell v. Odell, 10 sylvania. In that state the mortmain laws are held to still exist, and the state itself has enacted a statute restricting the right.

The amount of land which a corporation may purchase can only

Allen, 1: Downing v. Marshall, 23 N. Y., 366, 392 (1861); First Parish v. Cole, 3 Pick., 232, 239 (1825); Richardson v. Mass., etc., Assoc., 131 Mass., 174 (1881). One who agrees to sell land to a corporation is not bound to see that it is required for the purposes of the corporation. Eastern Counties R'y Co. v. Hawkes, 5 H. of L. Cas., 331 (1855). And if acting in good faith and without knowledge of an intention to misapply the corporate funds, he may enforce specific performance of the contract. Frequently the charter places some limitations or grants some privileges herein. A charter power to hold land for business purposes and to secure debts does not authorize the purchase of land for the purpose of selling it again. Bank of Michigan v. Niles, Walker (Mich.), 99 (1842); Pacific R. R. Co. v. Seely, 45 Mo., 212 (1870), where a railroad was held to have no power to acquire land for speculation: Land v. Coffman, 50 Mo., 243 (1872); Rennselear & S. R. R. Co. v. Davis, 43 N. Y., 137 (1870). Under such an express power the corporation cannot purchase merely for the convenience of the corporation. nor for purposes foreign to its objects. State v. Commissioners, etc., 23 N. J. L., 510 (1852); State v. Collectors, etc., 25 N. J. L., 315 (1855); First Parish, etc., v. Cole, 3 Pick., 232 (1825). But the purchase is presumed to be for purposes mentioned in the charter. Chatauqua County Bank v. Risley, 19 N. Y., 369 (1859): Ex parte Peru Iron Co., 7 Cowen, 540 (1827); Moss v. Rossie, etc., Co., 5 Hill, 137 (1843); Alward v. Holmes, 10 Abb. N. C., 96 (1886), where a foreign bank had purchased. A railroad, instead of condemning a right of way, may purchase the fee. Nicoll v. N. Y., etc., R. R. Co., 12 N. Y., 121 (1854). ¹This arose from the fact that the judges of the supreme court appointed to examine and report to the legislature such of the English statutes as were in force in that state, reported that the statutes of mortmain were "so far in force that all conveyances . . . made to a body corporate, or for the use of a body corporate, are void, unless sanctioned by charter or act of assembly." The report may be found in 3 Binney, 595, 626 (1808). See, also, Methodist Church v. Remington, 1 Watts, 218; Miller v. Porter, 53 Pa. St., 292 (1866). The statute of April 6, 1833, made all purchases of land by or for corporations, without the license of the commonwealth, subject to forfeiture. Under this act it has been held that a foreign corporation may purchase and hold real estate in Pennsylvania, subject to being divested by the direct action of the state. Runyan v. Lessee of Coster, 14 Pet., 122 (1840). To same effect, Leazure v. Hillegas, 7 Serg. & R., 313 (1821); Hickory, etc., Co. v. Buffalo, etc., R. R. Co., 32 Fed. Rep., 22 (1887). A similar statute passed April 26, 1855, was construed to the same effect in Hickory Farm Oil Co. v. Buffalo, N. Y. & P. R. Co., 32 Fed. Rep., 23 (1887), after having been declared a mortmain act in Slate Co. v. Savings Bank, 8 Weekly Notes Cas., 430. A person sued in Pennsylvania on a debt to a foreign corporation cannot set up that the corporation is illegally bolding land in the state. Grant v. Henry, etc., Coal Co., 80 Pa. St., 208 (1876). Where a foreign corporation cannot directly own land in a state, it cannot own land indirectly by owning a majority of the stock of a domestic corporation which owns the land. The state may escheat the land. Commonwealth v. N. Y., L. E. & W. R. R., 7 Atl. Rep., 756 (Pa., 1887). But under the statutes of Pennsylvania it is legal for a railroad company to own all the stock of a mining company which owns land, and

be questioned by the state in a direct proceeding for that purpose. The objection cannot be made by others.1 A stockholder, how-

such land does not escheat. Commonwealth v. N. Y., etc., R. R., 21 Atl. Rep., 528 (Pa., 1891). See, also, § 695.

¹ Land v. Coffman, 50 Mo., 243 (1872), holding, also, that a deed voluntarily made to the corporation of real property in excess of the amount allowed by its charter will pass a good title; National Water, etc., Co. v. Clarkin, 14 Cal., 544, 552 (1860), Field, C. J., saying: "It would lead to infinite inconveniences and embarrassments if, in suits by corporations to recover possession of their property, inquiries were permitted as to the necessity of such property for the purposes of their incorporation, and the title made to rest upon the existence of that necessity." A grantor of property to a railroad company for picnic purposes cannot avoid his deed and its obligations by claiming that the purchase by the company was ultra vires. Shelby v. Chicago, etc., Co., 32 N. E. Rep., 438 (Ill., 1892). The state alone can object to a foreign corporation holding more than five thousand acres of land in the state as prescribed by the statutes. American Mortg. Co. v. Tennille, 13 S. E. Rep., 158 (Ga., 1891). Where a Connecticut company owning land in South Dakota sells it to a Minnesota corporation organized to speculate in land, a subsequent deed by the former company to an individual is not good. Only the state can question the power of the Minnesota corporation to The constitutional provision take title. of South Dakota relative to land does not change this rule. Gilbert v. Hole, 49 N. W. Rep., 1 (S. D., 1891). There are many other cases in which it is held that the state alone can raise this objection. National Bank v. Matthews, 98 U. S., 621, 628 (1878), and cases cited; Cornell v. Springs Co., 100 U. S., 55 (1879); Myers v. Croft, 13 Wall., 291 (1871); Southern Pacific, etc., v. Orton, 6 Sawy., 157, 181 (1879), and cases cited: (63)

S. C., 32 Fed. Rep., 457; Shewalter v. Pierron, 55 Mo., 218 (1874); Chambers v. City of St. Louis, 29 Mo., 576 (1860); McIndoe v. City of St. Louis, 10 Mo., 576 (1847): Health Com'rs v. Mauran, 5 Denio, 389 (1848): Silver Lake Bank v. North, 4 Johns. Ch., 370 (1820); Leazuro v. Hillegas, 7 Serg. & Rawle, 313 (1821); Goundie v. Northampton Water Co., 7 Pa. St., 233 (1847): Steamboat Co. v. McCutcheon, 17 Pa. St., 13 (1850); Kelly v. People's Trans. Co., 3 Oreg., 189 (1870); Morgan & Raynor v. Donovan, 58 Ala., 241 (1877). But in this case it was said that in a suit to enforce a contract of purchase which remained executory, or to recover for its breach, the question of ultra vires would be material. The Banks v. Poitiaux, 3 Rand. (Va.), 136, 147 (1825): Barrow v. Nashville, etc., T. C., 9 Humph. (Tenn.), 304 (1848), holding that the fact that a corporation uses real estate for purposes beyond its powers furnishes no ground to the vendor for a rescission of the contract of sale: Runyan v. Carter, 14 Pet., 122, 129 (1840); Chicago, B. & Q. R. Co. v. Lewis, 53 Iowa, 101 (1880); Mapes v. Scott, 94 Ill., 379 (1880), in which the rule was applied to national banks; Alexander v. Tolleston Club, 110 Ill., 65 (1884); Smith v. Sheeley, 12 Wall., 358 (1870); De Camp v. Dobbins, 29 N. J. Eq., 36 (1878), which case was affirmed in 31 N. J. Eq., 671 (1879), where it was however held that an heir-at-law may object that a corporation cannot hold land in trust in excess of its statutory powers. See this report for a well-considered opinion. citing cases, and notes by the reporter. Bone v. Canal Co. (Pa.), 5 Atl. Rep., 751; Railroad Co. v. Lewis (Iowa), 4 N. W. Rep., 842; Land Co. v. Bushnell (Neb.), 8 N. W. Rep., 389; Jones v. Habersham, 107 U. S., 174; S. C., 2 Sup. Ct. Rep., 336 (1883); Barnes v. Stoddard (Ill.), 7 N. E. Rep., 477, in which the rule was applied to a foreign corporation; Hickory Farm ever, may object.¹ A deed of land to a foreign corporation in Colorado is valid, although the corporation has not filed a copy of its charter as required by the statutes. The grantor cannot complain.² Whenever a corporation can take the legal title to land it can take the beneficial interest in it, but if it cannot hold a legal title it cannot hold as cestui que trust.³

Where several persons, in order to evade section 2331 of the United States Revised Statutes, which limits to twenty acres the amount of placer-mining ground that a single person may locate, agree that "dummies" shall be used as locators, and the "dummies" shall transfer the land to one person who shall hold it for all of the principal parties, and all this is done, the person thus ob-

Oil Co. v. Buffalo, N. Y. & P. R. Co., 32 Fed. Rep., 22 (1887), to the same effect: Spear v. Crawford, 14 Wend., 20 (1835), where a stockholder was held liable on his statutory liability to a corporate creditor who had sold land to the corporation. If a bank buys land and then finds it is ultra vires, and sells its contract to a third person, it may collect from the latter moneys paid on the purchase. Crutcher's Adm'r v. Bedford, 8 Humph. (Tenn.), 405 (1847). A railroad company cannot refuse to complete a purchase of lands which, prima facie, it could use for railroad purposes. It cannot claim that the purchase was ultra vires. Eastern Counties R'y Co. v. Hawkes, 5 H. L. C., 331 (1855). A turnpike company may take a lease of land for storing purposes. Crawford v. Longstreet, 43 N. J. L., 325 (1881). An agreement of a company to buy land if a certain bill passes is legal and binding. Taylor v. Chichester, etc., R'y Co., L. R., 4 H. L., 628 (1870), reversing S. C., L. R., 2 Exch., 356 (1867). Contra, Coleman v. San Rafael T. R. Co., 49 Cal., 517 (1875), holding in an action to quiet title that a bond to convey to a corporation for purposes beyond its requirements is void; Thweatt v. Bank of Hopkinsville. 81 Ky., 1 (1883), where an execution sale to a bank was held to be void at the suit of the execution debtor; Riley v. City of Rochester, 9 N. Y., 64 (1883), holding in an action of trespass that a conveyance

to a municipal corporation of land beyond its limits for the purposes of a street is void.

¹ In re Kent Benefit, etc., Soc., 1 Dr. & Sm., 417 (1861), where stockholders were not required to refund to directors moneys paid by the latter ultra vires for land; Grimes v. Harrison, 26 Beav., 435 (1859), where the directors were compelled to make good the funds of the corporation used ultra vires to purchase land.

² Fritts v. Palmer, 132 U. S., 282 (1889). ³ Coleman v. San Rafael T. R. Co., 49 Cal., 517, 522 (1875). In this case a bond to an individual to convey land in trust for the stockholders of a corporation with power to sell under direction of its board of trustees was held to constitute the corporation a cestui que trust. Vidal v. Girard's Ex'rs, 2 How., 127, 187 (1844). holding, also, that if the trust be repugnant to or inconsistent with the purposes of the corporation a new trustee may be substituted, but no ground is furnished to declare the trust void. See, also, De Camp v. Dobbins, 29 N. J. Eq., 36 (1878); affirmed, 31 N. J. Eq., 671 (1879); Clemens v. Clemens, 37 N. Y., 59 (1867); Chamberlain v. Chamberlain, 43 N. Y., 424 (1871); Harris v. American Bible Soc., 2 Abb. App. Cas., 316 (1867), but here the corporation had express power to hold in trust; Downing a Marshall, 23 N. Y., 366 (1861).

taining title cannot be compelled by the others to divide. The contract is illegal and the court will not aid any party.

Lands held by officers or persons for the benefit of a corporation cannot be demanded by the corporation if it had no original corporate power to acquire them.²

Quo warranto does not lie to oust a corporation from the possession of land. Quo warranto lies only to oust a company from the franchises it claims, and not to divest it of property.³

It is well settled that corporations may, without special authority, dispose of land as they may deem expedient, and may mortgage lands in the course of legitimate business.

Under the English statute of wills a devise of land to certain bodies corporate is unlawful. Similar statutes have been enacted quite generally in America.

¹ Mitchell v. Cline, 84 Cal., 409 (1890). See, also, Case v. Kelly, 133 U.S., 21 (1890). Where land is entered in the names of individuals in order to evade a statute against corporations, and then they deed to the corporations, the state may set aside the grants. Wichita, etc., Co. v. State, 16 S. W. Rep., 649 (Tex., 1891): A corporation taking out patents to land in the names of its employees and then taking a conveyance from them holds the land subject to forfeiture by the government. United States v. Trinidad Coal Co., 137 U.S., 160 (1890). A corporation which engages in the business of buying and selling real estate through a trustee does not forfeit its title to land acquired by such trustee, although contrary to Compiled Laws of Utah of 1888, section 2272, which provides that a corporation "shall not have power to enter into as a business the buying and selling of real estate," bnt affixed no penalty for its violation. Fisk v. Patton, 27 Pac. Rep., 1 (Utah, Even a domestic corporation cannot obtain a patent to a mining claim under the federal statutes, unless all of its stockholders are citizens of the United States, and are severally and individually qualified and competent to make the location. Thomas v. Chisholm, 21 Pac. Rep., 1019 (Colo., 1889).

² Case v. Kelly, 133 U.S., 21 (1890).

³ State v. Pittsburgh, etc., Co., 33 N. E. Rep., 1051 (Ohio, 1893).

4 White Water, etc., v. Vallette, 21 How., 414, 424 (1858); Barry v. Merchants' Exchange Co., 1 Sandf. Ch., 280 (1844); Dupee v. Boston Water P. Co., 114 Mass., 37 (1873); Burton's Appeal, 57 Pa. St., 213 (1868); Miners' Ditch Co. v. Zellerbach, 37 Cal., 543 (1869): Widow of Reynolds v. Commissioners, etc., 5 Ohio, 204 (1831); Town of Newark v. Elliott, 5 Ohio St., 113 (1855); De Ruyter v. Trustees, etc., 3 Barb., 119 (1848); aff'd, 3 N. Y., 238; Buell v. Buckingham, 16 Iowa, 284 (1864), holding, also, that the sale may be by directors having general powers to make contracts; Aurora, etc., v. Paddock, 80 Ill., 263 (1875). And see Binney's Appeal, 2 Bland's Ch., 99, 142 (1829); Railroad Co. v. Howard, 7 Wall., 393 (1868), in which a sale by a corporation without authority but with the consent of all the parties interested in the subject-matter of it was held valid; Edward v. Fairbanks, 27 La. Ann., 449 (1875); Rutland & B. R. Co. v. Proctor, 29 Vt., 93 (1856), holding, also, that a purchaser from a corporation cannot defeat an action for the purchase-money by the defense that the corporation had no power to acquire the property.

⁵ See § 689, supra.

⁶ McCartee v. Orphan Asylum Soc., 9

An educational corporation authorized to accept property to a certain amount cannot take a bequest of property after it already has property equal to the amount limited by its charter.¹

A bequest to a corporation to be hereafter created is valid.² A corporation may take the title to land in fee although the duration of the corporation itself is limited.³

Cow., 437 (1827): Downing v. Marshall. 23 N. Y., 366, 384 (1861), but holding that a charter provision enabling a corporation to take land "by purchase or otherwise" is an express authority within the meaning of the statute of wills. See, also, Kerr v. Dougherty, 79 N. Y., 328 (1880), overthrowing a bequest by a resident of another state to a New York corporation which was forbidden to take by bequest; State v. Bates, 2 Harr. (Del.), 18 (1835), where a devise of money arising from the sale of land was held to be in effect a devise of land; but the contrary view of such a devise was taken in American Bible Soc. v. Noble, 11 Rich, Eq., 156 (1859). In Massachusetts it has been held that a town or parish may take and hold a devise for the use of schools. First Parish v. Cole, 3 Pick., 232 (1825). to the rule governing bequests to charitable corporations in New York, see Wetmore v. Parker, 52 N. Y., 450 (1873). A foreign charitable corporation cannot take New York land by devise unless the New York statute permits. White v. Howard, 46 N. Y., 144 (1871). Cf. Same v. Same, 38 Conn., 342. And concerning the common-law restrictions on the power of charitable corporations to sell land, see Madison, etc., Church v. Baptist Church, etc., 46 N. Y., 131 (1871). See, also, § 695, infra, as to foreign corporations.

¹ Cornell University v. Fiske, 136 U. S., 152 (1890). Where land is willed to a corporation, the heirs cannot defeat the devise by claiming that the corporation already has all the land that the statutes allow. Only the state can raise that question. Hamsher v. Hamsher, 23 N. E. Rep., 1123 (Ill., 1890). In Jones v. Habersham, 107 U. S., 174 (1882), where

the limit was on the income and the gift increased it beyond the limit, the court held that only the state could object. Where the limitation upon the capacity of a corporation to hold laud is based upon a vearly value, the vearly value at the time it is acquired is intended, and the title is not affected by a subsequent increase in its value above the amount limited. Bogardus v. Trinity Church, 4 Sandf. Cb., 634 (1847); Humbert v. Trinity Church, 24 Wend., 587, 629 (1840). And see Harvard College v. Boston, 104 Mass., 470 (1870). In McGraw v. Cornell University, 45 Hun, 354 (1887). a will giving to the defendant more property than its charter allowed was overthrown by the heirs of the testatrix. Affirmed, 111 N. Y., 66 (1888). See, also, Church of Redemption v. Grace Church, 68 N. Y., 570 (1877); Bogardus v. Trinity Church, 4 Sandf. Ch., 633 (1847). Rainey v. Laing, 58 Barb., 453 (1871).

² Russell v. Allen, 107 U. S., 163 (1882); Burrill v. Boardman, 43 N. Y., 254 (1870). A bequest to a company to be incorporated within the time allowed by statute is valid. People v. Simonson, 126 N. Y., 299 (1891).

³ Nicoll v. New York & E. R. Co., 12 N. Y., 121 (1854); Rives v. Dudley, 3 Jones' Eq., 126 (1856); Asheville, etc., v. Aston, 92 N. C., 578 (1885). A deed of property to a railroad for fifty years or so long as its charter continued, which by charter is fifty years, passes the land to a corporation which by legislative enactment succeeds to the rights of the first corporation. Davis v. Memphis, etc., R. R., 6 S. Rep., 140 (Ala., 1889). A dissolution after it has conveyed real estate does not impair the title of the grantees. People v. Mauran, 5 Denio, 389 (1848).

Where a deed is made by or to a *de facto* corporation, the corporate existence cannot be questioned by any of the parties.¹

A deed to an unincorporated association is void. The land owned by such an association is generally vested in trustees for its benefit.²

§ 693. Power of eminent domain.—This subject is considered elsewhere.

§ 694. Foreign corporations.— The corporations of one state may exercise any or all of their powers in another state, unless the latter state by its statutes, decisions or policy forbids. This right of a corporation to act and contract in any state is due to the spirit of comity between the states. It is constitutional, however, for a state to refuse to allow that privilege.⁴

Foreign corporations must exercise their powers and franchises in accordance with the laws of the state where they do business, and in consonance with the principle of its general policy.⁵ A state

⁴These principles of law have often been enunciated by the courts. See §§ 237-239, supra, and notes. also, Bank of Augusta v. Earle, 13 Pet., 519 (1839); Western Union Tel. Co. v. Mazer, 28 Ohio St., 521 (1876); Newburg Petroleum Co. v. Weare, 27 Ohio St., 343 (1875): Paul v. Virginia, 8 Wall., 168 (1868); affirmed in Ducat v. Chicago, etc., 10 Wall., 410 (1870); Mathews v. Theological Seminary, 2 Brews., 541 (1868); Land Grant R'y & T. Co. v. Coffey County, 6 Kan., 245 (1870); Ducat v. Chicago, 48 Ill., 172 (1868); Williams v. Cresswell, 51 Miss., 817 (1876); Hadlev v. Freedman's, etc., Bank, 2 Tenn. Ch., 122 (1874); Liverpool Ins. Co. v. Massachusetts, 10 Wall., 566 (1870); S. C., 100 Mass., 531; Kennebec Co. v. Augusta Ins., etc., Co., 6 Gray, 204 (1856); Day v. Ogdensburg, etc., R. R. Co., 107 N. Y., 129 (1887), where a domestic corporation leased a railroad in another state; Kerchner v. Gettys, 18 S. C., 521; Mutual, etc., Ins. Co. v. Davis, 12 N. Y., 569 (1855). See, also, Cooley, Con. Law, p. 183; Wharton, Conflict Laws, § 48. In Diamond Match Co. v. Powers, 51 Mich., 145 (1883), the

court refused to mandamus the defendant, a register of deeds, to allow the plaintiff, a foreign corporation, to make abstracts of all the land in the county, there heing no evidence of the corporate powers of the plaintiff. A foreign corporation may make a loan in Missouri. Ferguson v. Soden, 19 S. W. Rep., 727 (Mo., 1892). An English corporation is of course an alien corporation. Eureka, etc., Co. v. Richmond, etc., Co., 2 Fed. Rep., 829 (1880).

⁵ Runyon v. Coster, 14 Pet., 122 (1840); Re Comstock, 3 Sawyer, 218 (1874); Phœnix Ins. Co. v. Commonwealth, 5 Bush, 68 (1868); Gill v. Kentucky & Col. G. & S. M. Co., 7 Bush, 635 (1870); Martin v. Mobile & O. R. R. Co., 7 Bush. 116 (1870); Milnor v. New York & N. H. R. R. Co., 53 N. Y., 363 (1873); Frazier v. Wilcox, 4 Rob. (La.), 518 (1843); Bard v. Poole, 12 N. Y., 495 (1855); Diamond Match Co. v. Powers, 51 Mich., 145 (1883), holding that a state will not grant to a foreign corporation privileges which its charter may not permit it to exercise; Pierce v. Crompton, 13 R. I., 312 (1881); Stevens v. Pratt, 101 Ill., 206 (1882), holding that the general policy of a state restricting foreign corporations must be expressed in some affirmative way; Blair v. Perpetual Ins. Co.,

¹ See § 637, supra.

 $^{^2}$ See \S 504, supra.

³ See ch. LIII. infra.

legislature may exclude foreign corporations from doing business within its borders; 1 or impose such terms, conditions and restrictions as it may see fit.2

The validity and enforceability of a contract by a foreign corporation are determined not by its charter, but by the law prevailing where the contract is made.³

10 Mo., 564 (1847); 2 Kent, Com., 284, 285. Foreign corporations doing business in a state which prescribes statutory provisions for that business cannot in contracts do away with the application to it of these provisions. Fletcher v. New York, etc., Ins., Co., 13 Fed. Rep., 526 (1882). The same rule applies to an insurance corporation chartered by congress. It must conform to state restrictions. Daly v. National, etc., Ins. Co., 64 Ind., 1 (1878).

¹Slaughter v. Commonwealth, 13 Gratt., 767 (1856); Doyle v. Continental Life Ins. Co., 94 U. S., 535 (1876); Fire Department v. Noble, 3 E. D. Smith, 440 (1854); People v. Fire Asso. of Phila., 92 N. Y., 311 (1883); Atterbury v. Knox, 4 B. Mon. (Ky.), 91, (1843), where foreign corporations were forbidden from banking.

² Paul v. Virginia, 8 Wall., 168 (1868), affirmed in Ducat v. Chicago, 10 Wall., 4, 110 (1870); Doyle v. Continental Life Ins. Co., 94 U.S., 535 (1876); Lafavette Ins. Co. v. French, 18 How., 404 (1855), holding that a corporation doing business in such state is presumed to assent to its rules; State v. Lathrop, 10 La. Ann., 398 (1855); State v. Fosdick, 21 La. Ann., 434 (1869); State v. American Express Co., 7 Biss., 230 (1876); Fire Department v. Noble, 3 E. D. Smith, 440 (1854); Smith v. Alvord, 63 Barb., 415 (1866); Merrick v. Van Santvoord, 34 N. Y., 208 (1866); Lamb v. Lamb, 13 Bank, Reg., 17 (1876); Farmers', etc., Ins. Co. v. Harrah, 47 Ind., 236 (1874); Cincinnati Mutual, etc., Co. v. Rosenthal, 55 Ill., 85 (1879), holding that a charter power to transact business in other states does not exempt them from local restrictions; People v. Howard, 50

Mich., 239 (1883); People v. Fire Asso. of Phila., 92 N. Y., 311 (1883); Goldsmith v. Home Ins. Co., 62 Ga., 379 (1879), where a statute imposing upon foreign corporations the same license taxes as their own states impose was held constitutional; Home Ins. Co. v. Davis, 29 Mich., 238 (1874); Slanghter v. Commonwealth, 13 Gratt., 767 (1835); American Union Tel. Co. v. Western Union Tel. Co., 67 Ala., 26 (1880); Matthews v. Theological Seminary, 2 Brews., 541 (1868); Commonwealth v. Milton, 12 B. Mon., 212 (1851); Tioga R. R. Co. v. Blossburg, etc., R. R. Co., 20 Wall., 137 (1873), prohibiting foreign corporations from setting up the statute of limitations. In New York, by statute, all corporations, foreign and domestic, are forbidden to set up usury as a defense. A railroad company, by going into another state and having and operating a road there, subjects itself to the legislation of that state. Stone v. Ill. Cent. R. R. Co., 116 U. S., 347 (1885). Foreign corporations may be compelled to pay a license fee before doing business. Pembina, etc., Co. v. Penn. 124 U. S., 181 (1888). Quo warranto lies against foreign corporations doing business in a state contrary to its statute. State v. Fidelity, etc., Co., 41 N. W. Rep., 108 (Minn., 1888).

³ A charter provision prohibiting the corporation from selling its bonds below par does not invalidate the bonds when sold to a bona fide purchaser in another state. Ellsworth v. St. Louis, etc., R. R. Co., 98 N. Y., 553 (1885). See, also, Philadelphia Loan Co. v. Towner, 13 Conn., 249 (1839); Nichols v. Mase, 94 N. Y., 160 (1883), holding that the holder of bonds issued by a foreign cor-

§ 695. In the exercise of comity between the states and territories, corporations created in one of them may acquire, hold and transfer real property in another the same as individuals.

poration valid upon their face is not bound to show that the provisions of the statute which authorized their issue have been complied with; Bard v. Poole, 12 N. Y., 495 (1855), holding that a corporation prohibited by its charter from contracting for interest over a certain rate may, however, contract for a greater rate in another state under whose laws it is legal. To same effect, Knox v. Bank of U. S., 26 Miss., 655 (1854), and Bank of U.S. v. Owens. 2 Pet., 528 (1829); American Life Ins. Co. v. Dobbin, Hill & Denio (Lalor's Supp.), 252 (1843), where, construing the New York restraining act, it was held that a foreign corporation could purchase and sell promissory notes but not bills of exchange; Bank of Chillicothe v. Dodge, 8 Barb., 233 (1850), holding that money paid by a foreign corporation in violation of a local law is recoverable by it. For cases under a statute of Missouri, see Bank of Louisville v. Young, 37 Mo., 398 (1866); Connecticut Mut. Life Ins. Co. v. Albert, 39 Mo., 181 (1866); Long v. Long, 79 Mo., 646 (1883). But corporate creditors and stockholders are subject to provisions and regulations contained in the charter. Canada Southern R'y Co. v. Gebhard, 109 U.S., 536 (1883), where a statutory recapitalization was held to be valid; Hitchcock v. U. S. Bank, 7 Ala., 435 (1845), holding that the corporation can exercise only the powers given to it by its charter. A foreign corporation may toke any interest allowed by the place of the contract, though such interest is usurious by its charter. Hitchcock v. U. S. Bank, 7 Ala., 386 (1845).

¹ Cowell v. Springs Co., 100 U. S., 55 (1879); Runyan v. Lessee of Coster, 14 Pet., 122, 130 (1840); Christian Union v. Yount, 101 U. S., 352 (1879); Barnes v. Suddard, 117 Ill., 237 (1886); New Haven Land Co. v. Tilton, 19 Fed. Rep.,

73 (1884); Lathrop v. Commercial Bank, 8 Dana, 114 (1839); American Bible Soc. v. Marshall, 15 Ohio St., 537 (1864); State v. Boston, C. & M. R. Co., 25 Vt., 433 (1853): Claremont Bridge v. Royal, 42 Vt., 730, 736 (1870); Lumbard v. Aldrich. 8 N. H., 31 (1835); Cincinnati, U. & F. W. R. Co., 28 Ind., 502 (1867); Silver Lake Bank v. North, 4 Johns. Ch., 370 (1820), holding that a corporation of another state may file a bill for the sale of land in New York under a mortgage taken to secure a debt: Columbus Buggy Co. v. Graves, 108 Ill., 459 (1884); Black v. Delaware & R. C. Co., 22 N. J. Eq., 130, 422 (1871), the chancellor saying "that a foreign corporation may own property in this state and transact business, and make contracts in it to be performed here, is too well settled to discuss;" Northern Transportation Co. v. Chicago, 7 Biss., 45, 52 (1874); Lebanon Savings Bank v. Hollenback, 29 Minn., 322 (1882); New York Dry Dock Co. v. Hicks, 5 McLean, 111 (1850); Whitman Gold & S. M. Co. v. Baker, 3 Nev., 386 (1867); Metropolitan Bank v. Godfrey, 23 Ill., 579 (1860), holding also that foreign corporations can only acquire and hold lands upon the terms and conditions and in the way authorized by the law of their creation. They may loan money on real estate mortgages. See § 689, supra. Cf. Northwestern Mutual L. I. Co. v. Overholt, 4 Dill., 287 (1878); Morris Canal & B. Co. v. Townsend, 24 Barb., 658 (1857), where a statute authorizing a foreign corporation to appropriate land on payment of a just compensation to its owners was beld valid (affirmed as to this point, Matter of Townsend, 39 N. Y., 171 - 1868); Stewart v. Lehigh Valley R. R. Co., 38 N. J. L., 505 (1875); National Trust Co. v. Murphy, 30 N. J. Eq., 408 (1879); Sherwood v. American Bible Soc., 1 Keyes, 561 (1864); Elston v. PigThis right of foreign corporations to acquire and hold real estate is, however, subject to the statutory laws of the state where the land is situated, and also to its public policy and the general policy of its statutes relating to domestic corporations.¹

gott. 94 Ind., 14 (1883), to the effect that it may hold land purchased at a judicial sale under a decree in its favor. alien corporation may purchase and hold land in Missouri. Missouri, etc., Co. v. Reinhard, 21 S. W. Rep., 488 (1893). Although an alien cannot own real cstate, yet he may own stock in a corporation which owns real estate. Princeton, etc., Co. v. First, etc., Bauk, 19 Pac. Rep., 210 (Mont., 1888). Foreign corporations holding land, see Central Law Journal, vol. 35, No. 9. By statute of New York passed May 24, 1887 (Gen. Stat. N. Y., 1887, ch. 458), corporations organized in any other state of the United States, doing business in New York, are empowered to purchase and hold such real estate in that state as is necessary for their use and corporate purposes in the transaction of their business in the state, and to convey the same in like manner with the corporations organized in New York. the recent act of congress prohibiting foreign corporations from owning land in the territories, see Potter v. Rio, etc., Co., 17 Pac. Rep., 609 (N. M., 1888).

¹ Christian Union v. Yount, 101 U. S., 352 (1879); Carroll v. East St. Louis, 67 Ill., 568 (1873), where a corporation chartered by Connecticut for the sole purpose of buying and selling land was held not competent to acquire land in Illinois, because such business was contrary to the general policy of the state and tended to create perpetuities; United States Trust Co. v. Lee, 73 Ill., 142 (1874), in which the court denied the right of a foreign corporation to hold real estate in Illinois beyond what is necessary to the transaction of its business or the collection of its debts, either for its own benefit or in trust for others; United States Mortgage Co. v. Gross, 7 Cent. L. J., 226 (1878), in which the Illinois rule

was explained so as not to exclude foreign corporations empowered to loan money on real estate securities; Thompson v. Waters, 25 Mich., 214 (1872); Holbert v. St. Louis, K. C. & N. R. Co., 45 Iowa, 23 (1876), holding that statutes authorizing railroads to take land for their right of way do not apply to foreign corporations: Farmers' Loan & T. Co. v. McKinney, 6 McLean, 1 (1853): Farmers' Loan & T. Co. v. Harmony F. & M. T. Co., 51 Barb., 33 (1868); White v. Howard, 46 N. Y., 144 (1871); Hollis v. Drew Theological Sem., 95 N. Y., 166 (1884), holding that foreign corporations are subject to the New York statute which declares invalid a devise or bequest in a will executed less than two months before the death of the testator. In the case of In re Prime's Estate. 136 N. Y., 347 (1893), the court said: "A general law of the state prohibiting corporations from exercising particular powers will operate upon foreign corporations, not because the act binds such corporations ex proprio vigore, but for the reason that their exercise of such powers here would violate the public policy of the state, indicated by the general restraint imposed upon our own corporations." For the decisions in Pennsylvania on its statutes and policy excluding foreign corporations from holding land, see § 692. Where land is claimed by a foreign corporation the courts of the state in which the land is situated will construe its charter and determine whether it authorizes the corporation to hold the real estate. Boyce v. St. Louis, 29 Barb., 650 (1859); White v. Howard, 38 Conn., 342 (1871); Commonwealth v. New York, L. E. & W. R. R. Co., 1 R'y & Corp. L. J., 108 (Pa., 1887), holding that a foreign corporation not authorized to hold real estate cannot avoid its disability by holding stock A state may restrict the right of foreign corporations to take and hold real property within its borders.¹

§ 696. Restrictions by a state on foreign corporations must not conflict with provisions of the federal constitution. Thus, the restriction must not interfere with commerce,² or with the jurisdiction of the federal courts,³ or with the removal of causes from state to United States courts.⁴ Corporations are not "citizens" entitled to the privileges and immunities of citizens in the several states within the meaning of article 4, section 2, of the constitution of the United States.⁵

in a domestic corporation which owns land. And in construing such foreign charters the court will consider the decisions of the courts of the state granting them though it will not be bound thereby. Thompson v. Waters, 25 Mich., 214 (1872); Boyce v. St. Louis, 29 Barb., 650 (1859). The right of a corporation to hold realty is determined not alone by its charter but by the statutes of the state where the land is. A corporate deed in a chain of title is presumed good, Tarpey v. Deseret Salt Co., 17 Pac. Rep., 631 (Utah, 1888). If a foreign corporation is not authorized to hold real estate it cannot take land in another state by devise. Boyce v. St. Louis, 29 Barb., 650 (1859); Starkweather v. American Bible Soc., 72 Ill., 50 (1874). See, also, § 692. On the other hand, if by its charter, either expressly or impliedly, a corporation may take lands by devise, a provision of law in its own state prohibiting corporations from taking by devise unless expressly authorized to do so will not prevent its taking by devise in another state. American Bible Soc. v. Marshall, 15 Ohio St., 537 (1864); Thompson v. Swoope, 24 Pa. St., 474 (1855): Chamberlain v. Chamberlain. 23 N. Y., 424 (1871), but here the bequest was of personal property. To same effect, Sherwood v. American Bible Soc., 4 Abb. App. Cas., 227 (1864). A devise of land to a foreign corporation is void unless authorized by the law of the state where it lies, even though such foreign corporation is duly authorized by its charter to take it. White v. How-

ard, 46 N. Y., 144 (1871), followed in United States v. Fox, 94 U. S., 315 (1876), declaring void a devise of land in New York to the government of the United States.

¹Runyon v. Coster, 14 Pet., 122 (1840); Thompson v. Waters, 25 Mich., 214 (1872); United States v. Fox, 94 U. S., 315 (1876).

² Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S., 1 (1877); Telegraph Co. v. Texas, 105 U. S., 460 (1881); Rae v. Grand Trunk R. R. Co., 14 Fed. Rep., 401 (1882). See, also, § 672c.

³ Baltimore & O. R. R. Co. v. Cary, 28 Ohio St., 208 (1876); Moore v. Chicago & St. P. R. R. Co., 21 Fed. Rep., 817 (1884). See, also, ch. XLV.

⁴Barron v. Burnside, 121 U. S., 186 (1886); Doyle v. Continental Life Ins. Co., 94 U. S., 535 (1876); Insurauce Co. v. Morse, 20 Wall., 445 (1874); Shelby v. Hoffman, 7 Ohio St., 451 (1857); Hartford Fire Ins. Co. v. Doyle, 6 Biss., 461 (1875). A statute requiring foreign corporations to agree not to remove suits in the federal courts is void. Rece v. Newport, etc., Co., 9 S. E. Rep., 212 (W. Va., 1889).

⁵ Paul v. Virginia, 8 Wall., 168 (1868), holding that a statute requiring foreign insurance companies to obtain a license hefore doing business is not in conflict with that clause; Western Union Tel. Co. v. Mayer, 28 Ohio St., 521 (1876); Tatem v. Wright, 23 N. J. L., 444 (1852); Warren Mfg. Co. v. Ætna Ins. Co., 2 Paine, C. C., 501 (1832); Fire Department v. Noble, 3 E. D. Smith, 440 (1854);

§ 697. A requirement that a foreign corporation shall duly execute a power of attorney appointing an agent upon whom service of process may be made, or obtain a certificate from a state officer, is valid. Before complying with it the corporation is usually forbidden to contract or sue in the state. It was formerly held that contracts made before complying with the requirement were void; but the later doctrine is that they are not void though not enforceable until compliance, and that the corporation cannot defeat its obligations by such a defense. Some states have gone much farther than this and have declared void and unenforceable the

Ducat v. Chicago, 48 Ill., 172 (1868); Cincinnati Mutual, etc., Co. v. Rosenthal, 55 Ill., 85 (1879); Pierce v. Crompton, 13 R. L. 312 (1881).

1 Re Comstock, 3 Sawyer, 218 (1874); Bank of British Col. v. Page, 6 Oreg., 431 (1877); Semple v. Bank of British Col., 5 Sawyer, 88 (1878); Oregon & W. T. & I. Co. v. Rathbun, 5 Sawyer, 32 (1877), but here a note made in Oregon but payable in Scotland was treated as if made in Scotland: American Button, etc., Co. v. Moore, 2 Dak., 280 (1880), holding under a similar statute that the foreign corporation could sue in the courts of the state but could not transact business. To same effect, Utley v. Clark-Gardner L. M. Co., 4 Col., 369 (1878); Columbus Ins. Co. v. Walsh, 18 Mo., 224 (1853); Union Central L. L. Co. v. Thomas, 46 Ind., 44 (1874); Farmers' & Mer. Ins. Co. v. Harrah, 47 Ind., 236 (1874); Smith v. Little, 67 Ind., 549 (1879), holding that the statute referred only to actions upon contract and not to suits in replevin; Beard v. Union & A. Pub. Co., 71 Ala., 60 (1881), holding that soliciting subscriptions for a foreign newspaper is not "doing business" within the meaning of such a statute; New England F. & M. I. Co. v. Robinson, 25 Ind., 536 (1865), holding, however, that a contract is not void as to a citizen; Morgan v. White, 101 Ind., 413 (1884), holding that requiring an agent to file his authority to act does not apply to a general agent appointing local agents; American Ins. Co. v. Butler, 70 Ind., 1 (1880), holding that a failure of

the state officer to furnish the proper certificate after the corporation has substantially complied with the statute does not affect its contracts; Ætna Ins. Co. v. Harvey, 11 Wis., 394 (1860).

² Walter A. Wood Mowing Co. v. Caldwell, 54 Ind., 270 (1876); Singer Mfg. Co. v. Brown, 64 Ind., 548 (1878); Elston v. Piggott, 94 Ind., 14 (1883), holding that advantage of the failure to comply can only be taken by answer in abatement, and that a foreclosure and title under sale cannot be questioned on that ground: American Ins. Co. v. Butler, 70 Ind., 1 (1880); Behler v. German Mut. F. Ins. Co., 68 Ind., 347 (1879); National Mut. Ins. Co. v. Pursell, 10 Allen. 232 (1865); Hagerman v. Empire Slate Co., 97 Pa. St., 534 (1881), holding that a foreign corporation cannot take advantage of its own neglect to file the power of attorney; and that service upon an acting agent will suffice in such case; American Ins. Co. v. Wellman, 69 Ind., 413 (1879); American, etc., Co. v. East, etc., R. R. Co., 37 Fed. Rep., 242 (1889). Stockholders dealing with their corporations cannot defeat their contracts by alleging that it was a foreign corporation and had not complied with the state laws. Kilgore v. Smith, 15 Atl. Rep., 698 (Pa., 1888).

³Swan v. Watertown Ins. Co., 96 Pa. St., 37 (1880), holding that a foreign corporation doing business in the state cannot set up its failure to comply with the provisions of the statute relating to such companies to defeat an action on contract.

contracts of foreign corporations which have not complied with the state laws in reference to filing certificates, appointing a local agent and keeping an office in the state. The courts endeavor to alleviate the harshness of the statutes as much as possible but do not always succeed. Various decisions on different statutes are given in the notes below.¹

1 Failure to file the certificate is a question that cannot be raised for the first time in the higher court. Dahl v. Montana Copper Co., 132 U. S., 264 (1889); Cooper Mfg. Co. v. Ferguson, 113 U. S., 727 (1885), holding that a single act without the purpose of doing others in a state does not bring a foreign corporation within the statute of the state forbidding it to transact business there without complying with certain requirements: Northwestern Mut. L. I. Co. v. Overholt, 4 Dill., 288 (1978), where the requirement not being made a condition precedent to doing business, a foreign corporation which had not complied with it was held to have power to take a mortgage upon real estate. A statute that no suit shall be brought by a foreign corporation which shall not have filed a statement concerning its business does not prevent the federal courts from exercising jurisdiction. Barling v. Bank of British N. A., 50 Fed. Rep., 260 (1892). A statute compelling a foreign corporation to file its charter before doing business in the state may have the effect of making it a domestic corporation. James v. St. Louis, etc., R'v, 46 Fed. Rep., 47 (1891). The Montana statute requiring foreign corporations to file their charter in the state before doing business there does not apply to a foreign trust company which purchases bonds of a domestic corporation and takes a mortgage to secure them. Gilchrist v. Helena, etc., Co., 47 Fed. Rep., 593 (1891).

A corporate agent who employs labor and buys goods in the state for a foreign corporation which has not complied with the law prohibiting such corporations to do business in the state until a resident office and agent have been

named is personally liable for such labor and goods. Lasher v. Stimson, 23 Atl. Rep., 552 (Pa., 1892). The objection that the foreign corporation has not filed the statement as required by statute must be clearly raised in order to be available. Campbell, etc., Co. v. Hering, 20 Atl. Rep., 1061 (Pa., 1891). Although the statute requires foreign corporations doing business in the state to file a power of attorney authorizing the commissioner of corporations to accept service for them, yet a corporation not doing so may sue on one of the contracts. Rogers, etc., Corp. v. Simmons, 29 N. E. Rep., 580 (Mass., 1892). A foreign corporation for mining and various other purposes cannot file its certificate under the Michigan statute authorizing foreign corporations for mining purposes to file such certificate and have all the rights of domestic corporations. Isle Royale, etc., Corp. v. Sec'y of State, 43 N. W. Rep., 14 (Mich., 1889). Where the statute requires foreign corporations to file a statement of their condition before doing business, a foreign corporation cannot enforce a contract until it does so. Wood, etc., Co. v. Coldwell, 54 Ind., 271 (1876). But it may recover from an agent money paid to him for it. U. S. Ex. Co. v. Lucas, 36 Ind., 361 (1871). See § 696. Although the statutes require a foreign corporation before doing any business in the state to file certain paper and makes it a misdemeanor not to do so, yet this does not render contracts void although such statute is not complied with. Dearborn, etc., Co. v. Augustine, 31 Pac. Rep., 327 (Wash., 1892). Parties who have contracted with a foreign corporation and received the benefits of the contract cannot when sued upon the contract set up

In Alabama particularly there has been a large number of decisions on this subject.¹

that the company has not complied with the statutory requisites in regard to doing business in the state. burn, etc., Co. v. Bartlett, 54 N. W. Rep., 544 (N. Dak., 1893). The Arkansas provision requiring foreign corporations to file certificates, etc., and rendering void contracts made by a foreign corporation not complying therewith, does not apply to a sale of a sewing machine made in Ohio and shipped to Arkansas. this being interstate commerce. Gunn v. White, etc., Co., 20 S. W. Rep., 591 (Ark., 1892). The statute relative to foreign corporations doing business in the state is not applicable to loans made out of the state and the securities delivered and money paid out of the state. Scruggs v. Scottish, etc., Co., 16 S. W. Rep., 563 (Ark., 1891). A foreign corporation may sue on contracts made out of the state, although it has not complied with the law as to contracts made in the state. White, etc., Co. v. Southwestern, etc., Assoc., 18 S. W. Rep., 1055 (Ark., 1892). As against a milling company that solicits business and sells goods through commercial agents, the statute of Texas prohibiting a foreign corporation from transacting business in the state without filing its articles of incorporation with the secretary of state is void as being an interference with interstate commerce. Bateman v. Western, etc., Co., 20 S. W. Rep., 931 (Tex., 1892). A foreign corporation purchasing a piece of machinery in the state may be held liable therefor, although it bas not filed the certificate. Colorado, etc., Works v. Sierra, etc., Co., 25 Pac. Rep., 325 (Colo., 1890). A bondsman for a corporate agent cannot escape liability by alleging that the corporation has not complied with the law relative to foreign corporations. Singer, etc., Co. v. Hardee, 16 Pac. Rep., 605 (New Mex., 1888).

¹ In the case of Dundee, etc., Co. v.

Nixon, 10 S. Rep., 311 (Ala., 1891), an alien corporation failed in its suit on a note because it had no known place of business or authorized agent in Alabama as required by the constitution and statutes of the state. The note was dated in that state. A purchase of brick in another state to be delivered in the state is an act of interstate commerce, and a foreign corporation making the sale need not comply with the state laws. A foreign corporation may bring suit in the state without complying with the state law in regard to having a place of business and an agent in the state. Cook v. Rome Brick Co., 12 S. Rep., 918 (Ala., 1893). Where a foreign corporation not complying with the statute sells chattels, the sale is void and the corporation may reclaim its property. Boulden v. Estey, etc., Co., 9 S. Rep., 283 (Ala., 1891). The statute against foreign corporations doing business in the state unless they conform to certain requisites does not apply to interstate traffic such as selling goods to be shipped in, having been sold out of the state. Ware v. Hamilton, etc., Co., 9 S. Rep., 136 (Ala., 1891). The objection as to the failure to file the certificate cannot be raised for the first time on appeal. Guin v. New England, etc., Co., 8 S. Rep., 388 (Ala., 1890). A mortgagor to a foreign insurance company cannot demur to a bill for foreclosure on the ground that the taking of the mortgage was ultra vires and no certificate was filed. Boulware v. Davis, 8 S. Rep., 84 (Ala., 1890). A mortgage taken by a foreign corporation in Alabama which has no known place of business or authorized agent in the state as required by the constitution of the state is void and not enforceable. Farrior v. New England, etc., Co., 7 S. Rep., 200 (Ala., 1890). A foreign corporation suing in Alabama to enforce a mortgage made in that state must allege that it has a known Restrictions upon foreign insurance companies are strictly enforced. A state may require a foreign corporation to pay a license fee before doing business within its borders. And in nearly all particulars foreign corporations must bend to the will of the state.

place of business and an authorized agent in the state. Christian v. American, etc., Co., 7 S. Rep., 427 (Ala., 1890). Au agent suing a person for a commission on a loan made by the latter with a foreign corporation which has not filed its certificate as required by statute cannot recover. Dudley v. Collier, 6 S. Rep., 304 (Ala., 1889).

¹ Cincinnati Mutual, etc., Co. v. Rosenthal, 55 Ill., 85 (1879), holding that a premium note given to a foreign company which had not obtained a certificate from the state auditor as required was void in its hands. To same effect, Hoffman v. Banks, 41 Ind., 1 (1872), and Roche v. Ladd, 1 Allen, 441 (1861); Ætna Ins. Co. v. Harvey, 11 Wis., 394 (1860), where filing statement of condition with secretary of state was required; Lycoming Fire Ins. Co. v. Wheelock, 55 Vt., 526 (1883); Charter Oak Ins. Co. v. Sawyer, 44 Wis., 387 (1878), but holding that they may sue for or secure debts due from residents without complying with such statutes; Williams v. Cheney, 3 Gray, 215 (1855), but holding that a premium note void for this reason is valid in the hands of a bona fide holder for value without notice; Jones v. Smith, 3, Gray, 500 (1855), holding that the payee of a premium note must prove compliance by the insurance company with the statute: Ehrman v. Teutonia Ins. Co., 1 McCrary, 123 (1880), holding that if the statute merely imposes penalties for non-compliance with such requirements, the contracts of a foreign corporation not complying are not void. To same effect as Ehrman, etc., King v. National M. & E. Co., 4 Mont., 1 (1881); Clark v. Middleton, 19 Mo., 53 (1853), holding that the failure of an agency to file a statement was not to make void a promise to pay premium notes given to the foreign

insurance company: Brooklyn Life Ins. Co. v. Bledsoe, 52 Ala., 538 (1875), holding that a foreign corporation cannot avail itself of its own failure to comply; Union Mut. L. I. Co. v. McMillan. 24 Ohio St., 67 (1873), holding that neglect to comply does not make void a policy issued by a foreign company nor excuse the holder from paying premiums; Enreka Ins. Co. v. Parks, 1 Cin. Super. Ct. 574 (1871), holding that a company which issues a policy on property in another state from its home office is not subject to the restricting statute of that state, though it has paid a commission for obtaining the insurance to a resident thereof; Mut. Ben. Life, etc., v. Bales, 92 Pa. St., 354 (1879), holding that it cannot recover from sureties upon an agent's bond unless it has complied with a statute requiring the agents to be commissioned. To same effect, Thorne v. Travelers' Ins. Co., 80 Pa. St., 15 (1875); but in U. S. Life Ins. Co. v. Adams, 7 Biss., 30 (1873), it was held that compliance with a restraining act is not essential to the validity of an agent's bond. Lamb v. Bowser, 7 Biss., 315 (1876), holding that a policy of insurance is not void because the company has not complied with the statute. Cf. Isle, etc., Co. v. Sec'y of State, 43 N. W. Rep., 14 (Mich., 1889). As a defense to a note, see Dudley v. Collier, 6 S. Rep., 304 (Ala., 1889). See, also, § 694. notes; Charter Oak, etc., Ins. Co. v. Sawyer, 44 Wis., 394 (1860), holding that it may sue or take security for a debt without complying with the local act. To same effect, Columbus Ins. Co. v. Walsh, 18 Mo., 229 (1853). See, also, People v. Howard, 50 Mich., 239 (1883). ² Walker v. City of Springfield, 94 Ill.,

² Walker v. City of Springfield, 94 Ill., 364 (1880); Pembina, etc., Co. v. Penn, 124 U. S., 181 (1888).

A foreign corporation may sue or be sued in the courts of a state whenever jurisdiction is legally obtained.¹

§ 698. Torts committed by corporations—Indictment.—After much discussion the general rule is now firmly established that corporations cannot make defense to actions in tort by claiming that the acts by which the wrongs have been committed are not within the corporate powers conferred upon them.²

¹This question is fully discussed in §\$ 757, 758, infra.

² National Bank v. Graham, 100 U. S., 609, 703 (1879), where a bank was held in damages for the loss, occasioned by the gross negligence of its agents, of a special deposit which it had received with the knowledge and acquiescence of its officers and directors: Baltimore & P. R. Co. v. Fifth Bapt. Ch., 108 U. S., 317 (1882), for maintaining a nuisance: Philadelphia, W. & B. R. Co. v. Quigley. 21 How., 202, 210 (1858), for libel published by the board of directors, Campbell, J., saving: "For acts done by the agents of a corporation, either in contractu or in delicto, in the course of its business and of their employment, the corporation is responsible as an individual under similar circumstances." This rule was directly affirmed and applied to a municipal corporation in Salt Lake City v. Hollister, 118 U.S., 256 (1885). See New York & New Hampshire R. Co. v. Schuyler, 34 N. Y., 30 (1865); State v. Morris & E. R. Co., 23 N. J. L., 360, 367 (1852), and cases cited; Brokaw v. New Jersey R. & T. Co., 32 N. J. L., 328 (1867), an action for assault and battery (ejecting a passenger); Ramsden v. Boston & A. R. R. Co., 104 Mass., 117 (1870), assault and battery (seizing property for fare); Peebles v. Patapsco Guano Co., 77 N. C., 233 (1877), a case of deceit and fraudulent representations made by agents; Chicago & I. R. R. Co. v. Davis, 86 Ill., 20 (1877), trespass, see sub; Vinas v. Merchants' M. I. Co., 27 La. Ann., 367 (1875), slander and libel sanctioned by a corporation; Western Union v. Eyser, 2 Col., 141 (1873), injury to person; Goodspeed v. East Had-

dam Bank, 22 Conn., 529 (1853), vexatious suit: South & N. A. R. Co. v. Chappell, 61 Ala., 527 (1878), injury to person: Havs v. Houston & G. N. R. Co., 46 Tex., 272 (1876), expulsion from train: Fishkill Savings, etc., v. National Bank, etc., 80 N. Y., 162 (1880), conversion of bonds by cashier; Ranger u Great Western R'v Co., 5 H. L. C., 71, 86 (1854); Lewis v. Meier, 14 Fed. Rep., 311 (1882); Philadelphia & R. R. R. Co. v. Derby, 14 How., 468 (1852), injury to person in a collision caused by the negligence of employees: Hussey v. King. 3 S. E. Rep., 923 (N. C., 1887), malicious prosecution and false imprisonment, the court saving: "These artificial persons have become so numerous and entered so largely into the everyday transactions of life that it has become the policy of the law to subject them, as far as practicable, to the same civil liability for wrongful acts as attach to natural persons;" Denver & R. G. R'y v. Harris, 122 U.S., 597 (1886), assault and battery; N. J. S. Co. v. Brockett, 121 U. S., 637 (1887), undue violence by employee: Fishkill Savings Inst. v. National Bank, 80 N. Y., 162, 168 (1880), involving an action for damages for the conversion of bonds by a cashier for the benefit of the bank; Baltimore & P. R R. Co. v. Fifth Bapt. Ch., 108 U.S., 317, 330 (1882); New Orleans, J. & G. N. R. Co. v. Bailey. 40 Miss., 395 (1866). A railroad which has engaged in transporting passengers. by a steamboat cannot defeat an action for negligence by asserting that the use of the steamboat by it was ultra vires. Gruber v. Washington, etc., R. R. Co., 92 N. C., 1 (1885); South Wales R'y Co. v. Redmond, 10 C. B. (N. S.), 675 (1861).

Where it is necessary to prove a fraudulent or malicious intent, it is held, by the great weight of modern authority, that the fraud or malice of the authorized agents of corporations is to be imputed to the corporations themselves.¹

Although a corporation may not strictly be guilty of deceit, yet it is held liable for damages resulting from the false and fraudulent representations of its agents.²

Contra, Gunn v. Central R. R., 74 Ga., 509 (1885), where a railroad was held not responsible for a tort (an injury to the person) committed by a firm in which it had become, though illegally, a partner.

1 National Ex. Co. v. Drew, 2 Macqueen, App., 103 (1855); New Brunswick & Can. R'v v. Convbeare, 9 H. L. Cas., 711. 740 (1862); Barwick v. English Jointstock Bank, L. R., 2 Exch., 259 (1867); Philadelphia, W. & B. R. R. v. Quiglev. 21 How., 202 (1858); Whitfield v. Southeastern R'v. El., B. & E., 115 (1858): Vance v. Erie R'y, 32 N. J. L., 334 (1867); Copley v. Grover & Baker Co., 2 Woods, 494 (1873); Goodspeed v. East Haddam Bank, 22 Conn., 530 (1853); Carter v. Howe Machine Co., 51 Md., 290 (1878); Wheless v. Second National Bank, 1 Baxter, 469 (1872); Williams v. Planters' Ins. Co., 57 Miss., 759 (1880); Iron Mountain Bank v. Mercantile Bank, 4 Mo. App., 505 (1877); Walker v. Southeastern R'y, L. R., 5 C. P., 640 (1870); Edwards v. Midland R'y, L. R., 6 Q. B. Div., 287 (1880); Jeffersonville R. R. Co. v. Rogers, 28 Md., 1, 7 (1867).

² Mackay v. Commercial Bank, etc., L. R., 5 Privy C., 394 (1874), in which a bank was held liable in damages for the act of its cashier in sending a telegram purporting to be from an individual by means of which other parties were induced to accept bills of exchange in which the bank was interested; Ranger v. Great Western R'y Co., 5 H. of L. Cas., 72, 86 (1854), Lord Chancellor Cranworth saying: "If the agents employed conduct themselves frandulently, so that if they were acting for private employers the persons for whom they

were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation;" Barwick v. English J. S. Bank, L. R., 2 Exch., 259 (1867), where a bank was held liable for false representations of its manager as to the credit of an individual; Erie City J. Wks. v. Barber, 106 Pa. St., 125 (1884), where a manufacturing company was held in damages for the deceit of its agent in knowingly selling a defective boiler and representing it as sound and safe: Peebles v. Patapsco Guano Co., 77 N. C., 233 (1877), involving representations of an agent that a spurious article was genuine; Cragie v. Hadley, 99 N. Y., 131 (1885), where an officer of a bank receiving a deposit after he knew the bank was insolvent and its paper protested, it was held to be a deceit which justified a rescission of the contract and a recovery of the deposit; New York & N. H. R. Co. v. Schuyler, 34 N. Y., 30 (1865), involving an issue of false certificates of stock; Butler v. Watkins, 13 Wall., 456 (1871), where an agent of a corporation, by pretending to negotiate for the purchase of a patent, succeeded in keeping the patented article out of the market. The corporation was held liable in damages; Candy v. Globe Rubber Co., 37 N. J. Eq., 175 (1883), where a sale to a corporation made upon false representations of its officers as to its solvency and prosperity was rescinded; Fogg v. Griffin, 2 Allen, 1 (1861), where in an action upon premium notes a defense that they had been procured through false and fraudulent representations by an agent of the company and

A corporation may be held liable in damages for a libel; for assault and battery committed by its officers, agents or servants in executing the rules and regulations or orders of the corporation; 2

of the amount of capital stock paid in was held good. See, also, Etting v. Bank of the U. S., 11 Wheat., 59 (1826); Lamm v. Port Deposit Homestead, etc., 49 Md., 293 (1878); Carter v. Howe Machine Co., 51 Md., 290 (1878); Western Bank, etc., v. Addie, L. R., 1 Sc. App., 145 (1867), and §§ 139, 140, 157, supra.

¹ Philadelphia, W. & B. R. Co. v. Quigley, 21 How., 202 (1858), in which the court held that the publication of a libelous letter received in evidence by a committee of investigation in a bound volume of its transactions, by authority of the board of directors of a railroad company, constituted a sufficient ground for an action for libel against the corporation: Van Aernam v. Bleistein, 102 N. Y., 355 (1886); Howe Machine Co. v. Sonder, 58 Ga., 64 (1877), where the publication of libelous matter was caused by an agent within the scope of his authority; Maynard v. Fireman's Fund I. Co., 34 Cal., 49: 47 Cal., 207 (1867): Johnson v. St. Louis Dispatch Co., 2 Mo. App., 565 (1876) Fogg v. Boston, etc., R. R. Co., 20 N. E. Rep., 109 (Mass., 1889); Van Aernam v. McCune, 32 Hun, 316 (1894), holding that a jointstock association under the New York statute is liable to an action for libel; Payne v. Western & A. R. R. Co., 13 Lea (Tenn.), 507 (1884); Evening Journal Asso. v. McDermott, 44 N. J. L., 430 (1882); Detroit Daily Post Co. v. Mc-Arthur, 16 Mich., 447 (1868); Aldrich v. Press Printing Co., 9 Minn., 133 (1864); Hewitt v. Pioneer-Press Co., 23 Minn., 178 (1876); Vinas v. Merchants' Mutual Ins. Co., 27 La. Ann., 367 (1875); Whitfield v. Southeastern R'y Co., El., B. & E., 115 (1858); Tench v. Great Western R'y Co., 32 U. C., Q. B., 452 (1872). In Brennan v. Tracy, 2 Mo. App., 540 (1876), it was said that a corporation may be subjected to a criminal libel. A railroad may be held liable for a libel of its division agent in reporting causes of discharge of employees to other agents. Bacon v. Mich. C. R. R., 33 N. W. Rep., 181 (Mich., 1887). Corporation is not liable for a slander by its president as to the right of a person to sell goods. Perkins v. Maysville, etc., Assoc., 10 S. W. Rep., 659 (Ky., 1889). A corporation was held liable for a libel in Missouri. etc., R'y Co. v. Richmond, 11 S. W. Rep., 555 (Texas, 1889). Stockholders and officers are not liable for a libel published by the corporation unless they aided or advised its publication or their duties were such that the law would charge them as agents in the publication or circulation. Belo v. Fuller, 19 S. W. Rep., 616 (Texas, 1892).

² Brokaw v. New Jersey R. & T. Co., 32 N. J. L., 328 (1867), for ejecting a passenger from a train, and in such action an individual may be joined as a defendant with the corporation: Denver & R. G. R'y v. Harris, 122 U. S., 597 (1886): Hewett v. Swift. 3 Allen, 420 (1862). for using undue force in removing a minor from a freight depot under an order of the president directing employees to keep boys out of the depot: Denver, etc., R'v v. Harris, 122 U. S., 597 (1887), where forcible possession was taken of a railroad; Ramsden v. Boston & A. R. R. Co., 104 Mass., 117 (1870), involving an assault by a conductor in seizing property to secure payment of fare. And see Frost v. Domestic Sewing M. Co., 133 Mass., 563 (1882); Jackson v. Second Ave. R. R. Co., 47 N. Y., 274 (1872), holding that if an illegal fare be demanded by a conductor any force used in ejecting a passenger renders the railway company liable for an assault and battery; Pennsylvania R. R. Co. v. Vandiver, 42 Pa. St., 365 (1862), for ejecting a passenger and thereby causing his death; Moore v. Fitchburg R. R. Co., 4 Gray, 465 (1855), for damages for arrest and false imprisonment; ¹ for knowingly keeping a dangerous animal; ² for a vexatious civil suit; ³ for trespass quare clausum fregit; ⁴ for malicious prosecution; ⁵ for a nuisance; ⁶ for conversion; ⁷ and for a conspiracy. ⁸

where, in an action for assault in ejecting from a train, there being a verdict against the corporation but in favor of the conductor, the joinder of the defendants was held not to be a ground of exception by the corporation; Chicago & N. W. R. R. Co. v. Williams, 55 Ill., 185 (1870), for preventing a colored woman from entering a car set apart for ladies; Jeffersonville R. R. Co. v. Rogers, 28 Ind., 1 (1867); St. Louis, Alton & C. R. R. Co. v. Dalby, 19 Ill., 353 (1857), holding that in Illinois the proper remedy is trespass on the case.

¹ A corporation is not necessarily liable for a false imprisonment instigated by its state agent. Travis v. Standard, etc., Ins. Co., 49 N. W. Rep., 140 (Mich., 1891); Owlsley v. Montgomery & W. P. R. R. Co., 37 Ala., 560 (1861), where a corporation was held liable for false imprisonment; Wheeler, etc., Co. v. Boyce, 13 Pac. Rep., 609 (Kar., 1887); American Exp. Co. v. Patterson, 73 Ind., 430 (1881); Lynch v. Metropolitan E. R. Co., 90 N. Y., 77 (1882); Carter v. Howe Machine Co., 51 Md., 290 (1878); Hussey v. King, 3 S. E. Rep., 923 (N. C., 1887), holding the corporation liable for injuries received in collisions resulting from the negligence or carelessness of the employees; Philadelphia & R. R. Co. v.

Derby, 14 How., 408 (1852). A corporation is not liable for the arrest of a man by a special policeman appointed at its request and for its protection, even though the arrest was made at the request of an officer of the company. Tolchester, etc., Co. v. Steinmeier, 20-Atl. Rep., 188 (1890).

² Stiles v. Cardiff Steam Nav. Co., 33: L. J., Q. B., 310 (1864); but in this case the action failed for want of proof that the dangerous character of the animal was known to any one whose knowledge could, in point of law, be that of the corporation.

³ Goodspeed v. East Haddam Bank, 22. Conn., 530 (1853); Wheless v. Second. Nat'l Bank, 1 Bax. (Tenn.), 469 (1872). See 8 R'y & Corp. L. J., 478.

⁴ Maund v. Monmouthshire Canal Co., ⁴ Man. & G., 452 (1842), where the trespass consisted in breaking and entering canal locks and carrying away barges by an agent acting within the scope of his authority; Chicago, etc., R. R. Co. v. Davis, 86 Ill., 20 (1870).

⁵ Vance v. Erie R'y Co., 32 N. J. L., 334 (1867); Reed v. Home Savings Bank, 130 Mass., 443 (1881); Ricord v. Central Pacific R. R. Co., 15 Nev., 167 (1880), holding that prosecution of criminal offenders is one of the objects and priv-

⁶Baltimore, etc., R. R. Co. v. Fifth Bap. Ch., 108 U. S., 317 (1883); Pennsylvania R. R. v. Angel, 7 Atl. Rep., 432 (N. J., 1886). "The directors and officers are the persons primarily responsible, and therefore the proper ones to be prosecuted" for a nuisance carried on by the corporation. The corporation itself can also be prosecuted and fined. People v. Detroit, etc., Works, 46 N. W. Rep., 735 (Mich., 1890).

⁷ Beach v. Fulton Bank, ⁷ Cowen. 485 (1827); Dater v. Troy, etc., R. R. Co., ²

Hill, 629 (1842); Mayor, etc., v. Bailey, 2 Denio, 433 (1845), holding that an action of trespass or trover or an action on the case for malfeasance lies against a corporation; Chestnut, etc., Co. v. Rutter, 4 S. & R., 6 (1818), holding that trespass on the case lies against a corporation for stopping a water-course. See, also, ch. XXXV.

⁸ Buffalo Lubricating Oil Co. v. Standard Oil Co., 106 N. Y., 669 (1887); 42 Hun, 153.

Upon the question whether or not corporations are liable in exemplary or punitive damages for wrongs maliciously committed by their agents when acting in the line of their duty, the authorities are far from uniform. In one line of cases the courts adhere to the ordinary rule that a principal cannot be held for more than the actual damage resulting from the acts of his agent or for those immediately and necessarily growing out of them, and therefore refuse to allow exemplary damages. In other cases it is held that if it appears that injury has resulted through the wilful misconduct of employees, or through such a reckless indifference to the rights of others as amounts to an intentional violation of them, punitive or exemplary damages may be awarded. In still another class of

ileges of railroad corporations, and therefore they are liable for malicious prosecutions: Morton v. Metropolitan Life Ins. Co., 34 Hun, 366 (1884); Jordan v. Alabama G. S. R. R. Co., 74 Ala., 85 (1883), overruling Owsley v. Montgomery & W. P. R. Co., 37 Ala., 560 (1861); Boogher v. Life Asso. of America, 75 Mo., 319 (1882), overruling Gillett v. Missouri V. R. R. Co., 55 Mo., 315: Copley v. Grover & Baker Co., 2 Woods, 294 (1873): Carter v. Howe Machine Co., 51 Md., 290 (1878); Williams v. Planters' Ins. Co., 57 Miss., 759 (1880); Iron Mountain Bank v. Mercantile Bank, 4 Mo. App., 505 (1877). See, also, Brennan v. Tracy, 2 Mo. App., 540 (1876); Wheless v. Second Nat'l Bank, 1 Baxt. (Tenn.), 469 (1872); Philadelphia, W. & B. R. R. Co. v. Quigley, 21 How, 202 (1858). In the English case of Stevens v. Midland C. R'y Co., 10 Exch., 352 (1854), where the power to sue a corporation for malicious prosecution was questioned, Lord Alderson was of opinion that there was no such power. See Walker v. Southeastern R'y Co., L. R., 5 C. P., 640 (1870), where it was held that the action would not lie because the act out of which the case originated was not within the scope of the authority of the servant who committed it. And in the cases of Henderson v. Midland R'y Co., 20 W. R., 23 (1871), and Abrath v. Northeastern R'y Co., 55 L. T. R., 63 (1886), Lord Bramwell, in dissenting opinions, insisted that corporations aggregate cannot be liable for malicious prosecution, because they are incapable of malice or motive. Hussey v. King, 3 S. E. Rep., 923 (N. C., 1887). A corporation is liable for a malicious prosecution jointly with the officer who instituted the prosecution. No allegation of his authority to act is necessary. Hussey v. King, 3 S. E. Rep., 923 (N. C., 1887).

¹ Detroit Daily Post Co. v. McArthur. 16 Mich., 447 (1868); Great Western R'y Co. v. Miller, 19 Mich., 305 (1869); Wardrobe v. California Stage Co., 7 Cal., 118 (1857); Mendelsohn v. Anaheim Lighter Co., 40 Cal., 657 (1871); Turner v. North Beach & M. R. R. Co., 34 Cal., 594 (1868); Hill v. New Orleans, O. & G. W. R. R. Co., 11 La. Ann., 292 (1856); Hays v. Houston & G. N. R. R. Co., 46 Tex., 272 (1876); Ackerson v. Erie R'y Co., 32 N. J. L., 254 (1867); Doss v. Missouri, K. & T. R. R., 59 Mo., 27 (1875), bolding that no exemplary damages may be awarded unless the act complained of be wanton or malicious.

² Denver & R. G. R'y Co. v. Harris, 122 U. S., 597, 610 (1886); Milwaukee & St. P. R'y Co. v. Arms, 91 U. S., 489, 493 (1875); Philadelphia, W. & B. R. R. Co. v. Larkin, 47 Md., 155 (1877); Baltimore & Y. T. R. v. Boone, 45 Md., 344 (1876); Philadelphia & W. B. R. Co. v. Quigley, 21 How., 202, 214 (1858); New Orleans, Jackson & G. N. R. Co. v. Hurst, 36 Miss., 660 (1859); Beale v. Railway Co., 1 Dill., 568 (1871); Samuels v. Evening Mail, etc., 75 N. Y., 604 (1878), reversing

cases the liability for exemplary damages is made to depend upon the authority of the servant or agent who commits the wrong; the corporation being liable if the agent acted under the express direction of the corporation or of the officer representing it, or if the wrongful act was afterwards ratified either expressly or impliedly.¹

Since corporations are not in themselves capable of an evil intent, they can be indicted only for such offenses as arise from misfeasance—such as a nuisance; or from non-feasance—such as an

S. C., 9 Hun, 288 (1876), where a libel had been published: New Orleans, St. L. & C. R. Co. v. Burke, 53 Miss., 200 (1876). where the conduct of the conductor of a train in not properly protecting a passenger from the assault of employees of the road and the failure of the road to discharge or punish the assailants was held to justify a verdict for exemplary damages; Jeffersonville R. R. Co. v. Rogers, 38 Ind., 116 (1871), it being held that exemplary damages may be awarded for a wrongful expulsion from a train without harsh or unnecessary force, on account of the time, place and circumstances of the act: Goddard v. Grand Trunk R'y of Can., 57 Me., 202 (1869), where exemplary damages were awarded because a railroad company had retained in service a brakeman after knowledge of his gross assault upon a passenger; Taylor v. Grand Trunk R'y, 48 N. H., 304 (1869); Belknap v. Boston & Maine R. R., 49 N. H., 358 (1870), holding that in estimating exemplary damages the condition and circumstances of the defendant may be material and are to be considered; Caldwell v. New Jersey Steamboat Co., 47 N. Y., 282 (1872); Cleghorn v. New York Central & H. R. R. Co., 56 N. Y., 44 (1874).

¹ Hagan v. Providence & W. R. Co., 3 R. I., 88 (1854); Nashville & C. R. Co. v. Starries, 9 Heisk. (Tenn.), 52 (1871), where exemplary damages were refused because it did not appear that the company after knowing the reckless character of its agent retained him in its employment; Bass v. Chicago & N. W.

R'y Co., 42 Wis., 654 (1877); Cleghorn v. N. Y. Central & H. R. R. Co., 56 N. Y., 44 (1874); Mendelsohn v. Anaheim Lighter Co., 40 Cal., 657 (1871): Turner v. North Beach & M. R. Co., 34 Cal., 594 (1868): Perkins v. Missouri, K. & T. R. R., 55 Mo., 201 (1874); Malleck v. Tower Grove & L. R'y Co., 57 Mo., 17 (1874), where the language of the superintendent of a street railway admitting and justifying an assault by a driver was held to bind the company: Travers v. Kansas Pac. R'y, 69 Mo., 421 (1876), holding that authority of the agent sufficient to warrant exemplary damages may be inferred from the general scope of his duty: Galveston, H. & S. A. R'v Co. v. Donahoe, 56 Tex., 162 (1882); Goddard v. Grand Trunk R'v of Can., 57 Me., 202 (1869). See, also, Ackerson v. Erie R'y Co., 32 N. J. L., 254 (1867). In some states the distinction between corporations and natural persons as to liability for exemplary damages is entirely obliterated, and corporations are held to be equally liable with individuals and to the same extent. New Orleans, J. & G. N. R. Co. v. Bailey, 40 Miss., 395 (1866); Atlantic & G. W. R'y Co. v. Dunn, 19 Ohio St., 162 (1869); Western Union Tel. Co. v. Eyser, 2 Colo., 141 (1873).

² Commonwealth v. Proprietors of New Bedford Bridge, 2 Gray, 339 (1854), erecting a bridge over a navigable stream; Commonwealth v. Vermont & M. R. R. Co., 4 Gray, 22 (1855), obstructing a high-vay by embankment; State v. Morris & Essex R. R. Co., 23 N. J. L., 360 (1852), obstructing a highway by a building

omission to perform a legal duty or obligation. "The corporation as such, the technical legal entity, cannot suffer imprisonment for a crime, but those who represent it and act for it as its officers and agents can." 2

§ 699. The name of a corporation.—A corporation has an existence distinct from that of the individuals constituting it. Hence,

and trains: Louisville & N. R. R. Co. v. The State, 3 Head (Tenn.), 523, obstruction by a cut across a street; Susquehanna & Bath T. R. Co. v. People, 15 Wend., 267 (1836), suffering a turnpike to be and remain out of repair: People v. Albany, 11 Wend., 539 (1834), neglecting to excavate and cleanse a basin, whereby the water became corrupted and a nuisance; Queen v. Great Northern, etc., R'y Co., 9 Q. B., 315 (1846), obstruction by a cut across a highway; Queen v. Bradford Navigation Co., 6 Best & S., 631 (1865), permitting water in a canal to become foul. Contra. State v. Great Works Milling Co., 20 Me., 41 (1841). A corporation may be indicted for keeping a disorderly house. State v. Passaic, etc., Soc., 23 Atl. Rep., 680 (N. J., 1892). A corporation may be indicted for an offense which is punishable by fine. Commonwealth v. Pulaski, etc., Ass'n, 17 S. W. Rep., 442 (Ky., 1891). A corporation may be indicted. State v. Security Bank, 51 N. W. Rep., 337 (S. D., 1892).

1 A national bank may be indicted for violating the state usury laws. State v. First Nat'l Bank, 51 N. W. Rep., 587 (S. D., 1892). An indictment of the directors of the New York & New Haven R. R. Co. for an accident due to not using steam heat in cars as required by statute failed in People v. Clark, N. Y. L. J., May 28, 1891; Commonwealth v. Central Bridge Co., 12 Cush., 242 (1853), for not keeping a bridge properly lighted at night, its charter requiring it to be kept in "good, safe and passable repair; "Louisville & N. R. R. Co. v. Commonwealth, 13 Bush (Ky.), 388 (1877), involving a failure to place signals on intersecting highways; Queen v. Manchester, 7 El. & B., 453 (1857), where there was a failure of a city to repair streets: State v. Murfreesboro, 11 Humph. (Tenn.), 217 (1850), to same effect; People v. N. Y. C., etc., R. R. Co., 74 N. Y., 302 (1878), sustaining an indictment for failure to repair a highway; President, etc., v. People, 15 Wend., 267 (1836), for failure to repair a plank-road. An indictment lies against a turnpike company for failure to repair its road. State v. Godwinsville, etc., Co., 10 Atl. Rep., 666 (N. J., 1887); Mower v. Inhabitants of Leicester, 9 Grav. 247 (1812), holding that an indictment may lie when there is no action at common law for damages sustained through defects in a highway. In Brennan v. Tracy, 2 Mo. App., 540 (1876), it was said that a corporation may be subjected to criminal libel. It has been held that a statute subjecting railroads to indictment and fine for loss of life on account of the negligence or carelessness of the proprietors or their servants is uncoustitutional. Boston, C. & M. R. R. v. The State, 32 N. H., 215 (1855). A corporation may be indicted for failing to use revenue stamps. United States v. B. & O. R. R. Co., 7 Am. L. Reg. (N. S.), 757 (1868). A corporation cannot be indicted for a crime. Anon., 12 Mod., 559 (1701). A corporation may be indicted. See 4 Am. & Eng. Encyclopedia of Law, pp. 267, etc.

² People v. Sherman, 133 N. Y., 349, 354 (1892). Where the law permits punishment or confiscation of property, but not both, the conviction of a stockholder for violation of the internal revenue law prevents a confiscation of the corporation property. United States v. Distillery, 43 Fed. Rep., 846 (1890).

for the purposes of identification and perpetuity, it is essential that the corporation have a name.

The corporate name is usually the choice of the incorporators, and is specified in the creating instrument. By this name it takes and grants property, sues and is sued, and does all corporate acts. The right of a corporation to the exclusive use of its chosen name is recognized by statute in many states, but is usually protected independent of any statute.

¹ Viner's Abridgment, tit. Corp.: Bacon's Abridgment, id.; 1 Blackst. Com., 475, 476; Glass v. Tipton, etc., Co., 32 Ind., 376 (1869). Statutes relative to corporations usually prescribe, expressly or by implication, that the articles of incorporation shall specify the name assumed by the corporation. In Wells v. Oregon R'y, etc., Co., 15 Fed. Rep., 561, 567, it is said that the statute might create a corporation without any special designation, although some description would be necessary, and then it might subsequently acquire a name. Corporations are required both at common law and by the statutes of all the states to have names. Glass v. Tipton, etc., Co., 32 Ind., 376 (1869). The corporate name has been variously spoken of as "the very being of the constitution," "the knot of their combination," "as the name of baptism," "the substance and essence of it." The form of the name is sometimes prescribed by statute, as that it shall begin with "The" and end with "company," "corporation," "association" or "society." Gen. Laws of Colo., 1877, pp. 143, 144. See, also, Gen. Stat. of Conn., 1888, § 1905. In the case Hammond v. Hastings, 134 U.S., 401 (1890), the name of the corporation was "George H. Hammond & Company." The court held that even if this name on the certificate of stock did not give notice that it was a corporation, yet that a lien on the stock was sufficient. School districts erected under a general law, which does not require the designation of a name. may acquire such for the purposes of suits and other corporate acts by usage. South School District v. Blakeslee, 13

Conn., 227 (1839). The code of West Virginia, 1887, p. 492, § 11, prescribes that no joint-stock company shall adopt the same name that is being used at the time by another corporation of this state. N. Y. Laws, 1875, ch. 611, § 4, prohibits even the selection of a name sufficiently resembling another as to deceive. Mo. Rev. St., §§ 762, 926.

² Thus, it is said that a corporate name legally acquired should be protected upon the same principle and to the same extent that individuals are protected in the use of trade-marks. Holmes, Booth & Haydens v. The Holmes, etc., Co., 37 Conn., 278, 293 (1870). The corporate name is a trademark from the necessity of the thing, and upon every consideration of private justice and public policy deserves the same consideration and protection from a court of equity. The case of an encroachment is analogous to if not stronger than that of a piracy upon an established trade-mark, Newby v. Oregon, etc., R. R. Co., Deady's R., 609, 616 (1869). Cf. Goodyear Rubber Co. v. Goodyear's, etc., Co., 128 U.S., 598 (1888); Farmers' Loan & Trust Co. v. Same, N. Y. Daily Reg., May 5, 1888. A domestic corporation may take the name that a foreign corporation has, even though a fraud is worked thereby. Lebigh Valley Coal Co. v. Hamblen, 23 Fed. Rep., 225 (1885). In Massachusetts, by statute, a foreign corporation doing a banking, loan, trust or investment business in the state cannot use the same name as or a similar name to a domestic corporation. International T. Co. v. International, etc., Co., 26 N. E. Rep., 693 The matter of protecting the use of a corporate name is intrinsically of equitable cognizance, as the injured party seldom if ever has an adequate and complete remedy at law. To prevent the continuance of such a wrong equity will interfere, at the suit of the injured party, by injunction.

(Mass., 1891). A corporation may take a name which an old corporation is about to take by change of name. Illinois, etc., Co. v. Pearson, 30 Pac. Rep., 400 (Ill., 1892). A foreign corporation cannot prevent a domestic corporation from using the same name, especially where the latter was incorporated first, even though the public may be misled. In this case a party sold out to individuals, but did not sell any trade-marks. He then incorporated a company under the name of the trade-mark. Hazelton, etc., Co. v. Hazelton, etc., Co., 30 N. E. Rep., 339 (Ill., 1892).

1 Ottoman, etc., Co. v. Dane, 95 Ill., 203 (1880). Equity will always interfere where the same name has been wrongfully appropriated. Where only a similar name is used it is usually held that some actual damage, past, present or imminent, must be shown. A corporation will be protected in its name as a trade-mark. Often so by statute. State v. McGrath, 5 S. W. Rep., 29 (Mo., 1887). A corporation may enjoin another corporation from taking and using its name. Farmers', etc., Co. v. Farmers', etc., Co., 1 N. Y. Supp., 44 (1888). The use of any particular name by a corporation will not be enjoined nuless it be clearly proven that the complainant will suffer injury. Drummond Tobacco Co. v. Randle, 114 Ill., 412 (1885); London, etc., Ass. Soc. v. London, etc., Life Ins. Co., 11 Jurist, 938 (1847); Newby v. Oregon Cent. R. R. Co., Deady, 609, 616 (1869); Holmes v. Holmes, etc., Co., 37 Conn., 278, 295 (1870), where the language of the court is as follows: "The ground on which courts of equity afford relief in this class of cases is the injury to the party aggrieved, and the imposition upon the public by causing them to believe that the goods of one man or firm are the production of another. The existence of these consequences does not necessarily depend upon the question whether fraud or an evil intent does or does not exist. The quo animo, therefore, would seem to be an immaterial A New York corporation, inquiry." "Goodyear Rubber Co.," cannot enjoin a Connecticut corporation from using substantially the same name. Goodyear Rubber Co. v. Goodyear's, etc., Co., 128 U. S., 398 (1888); rev'g 21 Fed. Rep., 276 (1884). Cf. 21 N. E. Rep., 875. The corporate name is not a franchise, even though it is a trade-mark. Hazelton B. Co. v. Hazelton, etc., Co., 28 N. E. Rep., 248 (Ill., 1891). A benevolent corporation cannot object to a subsequent corporation assuming a somewhat similar name. American, etc., Clans v. Merrill, 24 N. E. Rep., 918 (Mass., 1890). The words "employers' liability" used in the name of an insurance company may be used in the name of another insurance company, both companies being foreign corporations. Employers', etc., Corp. v. Employers', etc., Co., 10 N. Y. Supp., 845 (1890). A corporation of Nebraska, "The Nebraska Loan & Trust Company," cannot enjoin another Nebraska corporation, the "Nebraska Loan & Trust Company," from using that name. The name is too general for a trade-mark, and the location of the companies in different cities prevents confusion of business. Nebraska Loan & Trust Co. v. Nine, 43 N. W. Rep., 348 (Neb., 1889). Technically this decision is correct, but when such a fraud is sustained by the courts it is time for the legislature of Nebraska to enact the usual law against one corporation assuming the name of a prior corporation. The corporate name "Richardson & Boynton Company? does not prevent

A corporation has neither the right nor the power to change the corporate name originally selected unless it is allowed so to do by the laws under which it has been created, or by the consent of the authority from which its charter is derived; but a change of name even without authority does not affect the obligations of the company.²

another company using the name "Richardson & Morgan Company," Richardson, etc., Co. v. Richardson, etc., Co., 8 N. Y. Supp., 52 (1889). If a corporation wrongfully refuses to accept watch movements with its name thereon the manufacturer may sell them with that name on. McCulloch v. Smith, 44 Fed. Rep., 12 (1890). The "International Banking Company" cannot prevent another concern using the name the "International Bank." Koehler v. Sanders. 122 N. Y., 65 (1890). Where a company has a well established and known business, and a person having the same name attempts to incorporate under his name and carry on the same business. although he was never in the business before, he will be restrained. Tussand v. Tussand, 62 L. T. Rep., 633 (1890). While there may be "nothing in the adoption of a name which is borne by another which infracts any known law" (Re Baptist Church, 3 Haz. Pa. Reg., 226; S. C., 1 id., 75), yet approval will generally be withheld if the name conflicts with that of an existing corporation. First Presbyterian Church of Harrisburg, 2 Grant's Cases, 240; In re Sons of Progress, 14 Weekly Notes Cas., 31. ² In the case of voluntary religious societies constituted under general laws, without a special act of incorporation and without an established name, names are purely arbitrary, and changes therein do not at all affect their identity. Wardens, etc., Trinity Ch. v. Hall, 22 Conn., 125 (1852); Cahill v. Bigger, 8 B. Mon., 211 (1848). So the identity and rights of a municipal corporation are not affected by a change of its name. v. Philadelphia, 7 Wall., 1 (1868). The power is sometimes given by legislature

to the courts of common pleas to change the name of any corporation within their jurisdictions upon proper notice being given to the auditor-general; and this applies to religious corporations. In re First Presby. Ch., 111 Pa. St., 156 (1885). A reorganization, with change of name, under a statute does not affect fixed or running obligations. Hyatt v. McMahon, 25 Barb., 457 (1857); City Nat'l Bank v. Phelps, 16 Hun, 158 (1878). Change of name under the New York statute. Matter of U. S., etc., Agency, 115 N. Y., 176 (1889). A judgment in the new name which a corporation has taken by proceedings under a statute is valid although such proceedings to change the name were not regular. King v. Ilwaco R'y, etc., Co., 23 Pac. Rep., 924 (Wash., 1890). An irregular and ineffectual attempt to change the name of a corporation docs not affect its charter. O'Donnell v. C. R. Johns & Co., 13 S. W. Rep., 376 (Tex., 1890). A corporation cannot change its name unless allowed by statute so to do. Sykes v. People, 23 N. F. Rep., 391 (Ill., 1890); Bellows v. Hallowell, etc., Bank, 2 Mason, 31 (Mass., 1819), and § 643. In some states it is provided in the general laws that the corporate name may be changed by a resolution of the stockholders or of the directors, properly filed and recorded. R. S. Maine, 1883, ch. 46, § 6; Code of Tenn., 1884, § 1695; Shackleford v. Dangerfield, L. R., 3 C. P., 407 (1868). under the English Companies Act. Similar provision is sometimes made in special acts. Morris v. St. Paul, etc., R'y Co., 19 Minn., 528 (1873); Att'y-Gen. v. Joy, 55 Mich., 94, 106 (1884). Or the change may be directly made While a corporation cannot change its corporate name, it may nevertheless become known by another name through usage; and the courts have frequently treated acts done and contracts entered into by corporations under another name as having been done or entered into by it under its true name.¹

Modern law has departed from the strict rules of the common

by the special act. Wallace v. Loomis, 97 U.S., 146, 154 (1877); Alexander v. Berney, 28 N. J. Eq., 90, 92 (1877). Cf. Pacific Bank v. De Ro. 37 Cal., 538 (1869). Or the original special act of incorporation may provide for a change by an order of the directors approved by the stockholders. Oregon R'v & Nav. Co., 15 Fed. Rep., 561 (1883). If the legislature changes the name of a corporation without altering its powers or identity it does not affect a controtroversy between the company and third parties. Rosenthal v. Madison, etc., Co., 10 Ind., 358 (1858). As to the right of the corporation to maintain an action on a note executed to it in the old name, Trustees N. W. College v. Schwalger, 37 Iowa, 577 (1873). A grant to a church in a particular name is not lost by a subsequent change of name. Cahill v. Bigger, 8 B. Mon., 211 (1848). Where a railroad company was authorized by special act to change its name or the names of its branches, and did change the name of one branch and of itself in the management of such branch, held, that for the purpose of suits its original name remained unchanged. Morris v. St., Paul, etc., R'y Co., 19 Minn., 528 (1873). The change of a corporation's name does not affect its real estate contracts. Welfley v. Shenandoah, etc., Co., 3 S. E. Rep., 376 (Va., 1887). Nor an obligation on a bond. West v. Carolina, etc., Co., 31 Ark., 476 (1876).

¹Society for Propagating Gospel v. Young, 2 N. H., 310 (1820). In McGary v. People, 45 N. Y., 153 (1871), it is held (three justices dissenting) that a misnomer of the corporation owner of the

property in an indictment for arson is fatal: and it is implied that, whatever may have been true of ancient corporations by prescription, modern charter corporations can legally have but one name. Smith v. Central Plank-road, 30 Ala., 650, 664 (1857); South School District v. Blakeslee, 13 Conn., 227 (1839); Minot v. Curtis, 7 Mass., 441 (1811), where the court in using the language, "We know not why corporations may not be known by several names as well as individuals," evidently had in mind certain classes of corporations and societies. They say that identity is a question of fact for the jury. Dutch West India Co. v. Van Moses, 1 Strange, 612 (11 Geo.). An assignment of a claim against a corporation need not accurately describe its name. Adler v. Kansas, etc., R. R., 4 S. W. Rep., 917 (Mo., 1887). A corporation is bound by an abbreviated name. People v. Sierra, etc., Co., 39 Cal., 511, 514 (1870). There is a distinction in some of the old cases to the effect that corporations by prescription may have several names, while with charter corporations it is otherwise. Anon., 3 Salk., 102; Warden, etc., Shrewsbury v. Hart, 1 C. & P., 113 (1823); Hammond v. Shepard, 29 How. Pr., 188, 191 (1865); Thomas v. Dakin, 22 Wend., 9, 72 (1839); Melledge v. Boston Iron Co., 59 Mass., 158, 175 (1849); Medway Cotton M'f'ry v. Adams. 10 Mass., 360 (1813); Alexander v. Berney, 28 N. J. Eq., 90 (1877), holding that a corporation, through its retaining the use of its original name after the passage of an amendatory act changing it, regained, so to speak, its original name, and could be sued and be proceeded against in bankruptcy by it.

law as to the use of the corporate name. As corporations are now able to contract almost as freely as natural persons, it is held that a departure from the strict name of a corporation will not avoid its contract if its identity substantially appears; and a latent ambiguity may, under proper averments, be explained by parol.¹

¹ Haag v. Board, etc., 34 Fed. Rep., 778 (1888); Berks, etc., Road v. Myers, 6 S. & R., 12, 17 (1820); Boisgerard v. New York Banking Co., 2 Sandf. Ch., 23 (1844): Hammond v. Shepard, 29 How. Pr., 188 (1865); Gifford v. Rockett, 121 Mass., 431; Melledge v. Boston Iron Co., 59 Mass., 158, 175 (1849); Medway Cotton M'f'ry v. Adams, 10 Mass., 360 (1813); Commercial Bank v. French, 38 Mass., 486 (1839); Hascall v. Life Assoc., 5 Hun, 151 (1875); Conro v. Port Henry Iron Co., 12 Barb., 27, 55 (1851); North W. Distilling Co. v. Brant, 69 Ill., 658 (1873). Cf. New York African Soc. v. Varick, 13 Johns., 38 (1816); Mott v. Hicks, 1 Cowen, 513 (1823); Brockway v. Allen, 17 Wend., 40 (1837). The omission of part of the corporate name in the assignment of a mortgage by a corporation is immaterial. Chilton Brooks, 18 Atl. Rep., 868 (Md., 1889). Although the name used in a contract is different from the corporate name, yet if the identity is clear the contract is enforceable. Hasselman v. Japanese, etc., Co., 27 N. E. Rep., 318 (Ind., 1891). There is a line of cases where corporations draw or accept bills or make deeds in another name merely as a convenient mode of doing the special act of business, and they are held liable although the corporate name is not mentioned. In such cases they are to be sued in their true name. Culpeper Agric., etc., Soc. v. Digges, 6 Rand. (Va.), 165 (1828); Milford, etc., Turnpike Co. v. Brush, 10 Ohio, 111 (1840); Ryan v. Martin, 91 N. C., 464 (1884); Asheville Division v. Aston, 92 id., 578 (1885); Clement v. City of Lathrop, 18 Fed. Rep., 885 (Mo., 1884); Bridgeford v. Hall, 18 La. Ann., 211, 218 (1866); Brock Dist. Council v. Bowen, 7 Upp. Can., Q. B., 471 (1850).

A misnomer has been held material in the following cases: Where a corporation is required by statute to act for its own benefit, as in collecting assessments for benefit to land from proposed road. Glass v. Tipton, etc., Co., 32 Ind., 376 In an indictment for arson, McGary v. People, 45 N. Y., 153 (1871). Where the name in a fi. fa. was different from that by which the corporation was sued and judgment had: Bradford v. Water Lot Co., 58 Ga., 280 (1877), Cf. Ga. Code. § 3636. A variation will not in general invalidate a deed, grant or lease by or to a corporation when the true name can be collected from the instrument or is shown by proper ' averments. Kent's Com., 92; Bacon's Abridg., tit. Corp.; Kentucky Seminary v. Wallace, 15 B. Mon., 35, 45 (1854); Clarke v. Potter County, 1 Pa. St., 159 (1845); Douglass v. Branch Bank at Mobile, 19 Ala., 59 (1851); Culpeper Agric., etc., Soc. v. Digges, 6 Rand. (Va.), 165 (1828); 1 Kyd, Corp., pp. 286, 288; Com. Dig., tit. Pleader, 2, B., 2; Mayor and Burgesses, 10 Co., 125b; 11 Co., 19. At common law a substantial variance between the name of the party injured as laid in the indictment and as given in evidence was fatal; and it was so held in New York, in a case involving a misnomer of the corporate owner of the property. McGary v. People, 45 N. Y., 153 (1871), three judges dissenting. Sykes v. People, 23 N. E. Rep., 391 (La., 1890). But this rule is modified in some jurisdictions, as by the Penal Code of California, section 956. See People vPotter, 35 Cal., 110 (1868). Cf. N. Y Code of Crim. Proc., § 281. Cf., also, People v. Runkel, 9 Johns., 147, 156 (1812).

A slight variation in documentary

§ 700. Statutes which apply to "persons" are generally construed to apply to corporations.—Thus, a statute prohibiting "persons" from engaging in banking applies not only to natural persons but

evidence of a national bank's corporate existence which does not go to raise a doubt of the identity is to be disregarded. Thatcher v. West River N. Bank, 19 Mich., 196 (1869). "A corporation may sue or be sued only by its corporate name." Iowa Revision, \$ 1151: Iowa Code, § 1059. "It is immaterial what name it does its business under. A corporate name is that which is adopted in the articles of incorporation. If the name is changed it must be done by changing these articles." Where a corporation sued on an agreement, and alleged a due and legal change of name between the time of the execution and the suit, it was held such change must be proved by the articles and not by testimony of the secretary. Chicago. etc., R. R. Co. v. Keisel, 43 Iowa, 39 A suit brought against the (1876).Bell Telephone Company is sustainable though the corporate name is the American Bell Telephone Company. State v. Telephone Co., 36 Ohio St., 296 (1880). When the corporate name has once correctly appeared it is generally not necessary that it should be completely stated at every recurrence in a pleading. Antipædo Baptist Soc. v. Mulford. 3 Halst., 182; London v. Lynn, 1 H. Bl., 206; Stafford v. Bolton, 1 Bos. & P., 40; Lynne Regis, 10 Rep., 120; New York Code Civ. Proc., § 1777. In an action or special proceeding brought by or against a corporation the defendant is deemed to have waived any mistake in the statement of the corporate name. unless the misnomer is pleaded in the answer or other pleading in the defendant's behalf. So generally a misnomer is not ground for a nonsuit and must be pleaded in abatement. Whittlesey v. Frantz, 74 N. Y., 456 (1878); Bauk of Utica v. Smalley, 2 Cowen, 770 (1824); Trustees M. E. Church v. Tryon, 1 Denio, 451 (1845); Lake Superior Build.

Assoc. v. Thompson, 32 Mich., 293 (1875); Northumberland Co. Bank v. Eyer, 60 Pa. St., 436 (1869) Wilson v. Baker, 52 Iowa, 423 (1879); Medway Cotton Manuf'ry v. Adams, 10 Mass., 360 (1813); Gilbert v. Nantucket Bank, 5 Mass., 97 (1809); State v. Telephone Co., 36 Ohio St., 296 (1880); Suuapee v. Eastman, 32 N. H., 470 (1855); Burham v. Savings Bank, 5 id., 446 (1831); School District v. Griner, 8 Kan., 224 (1871).

Proceedings for perpetuating testimony are not admissible when only the letters "C., B. & Q. R. R. Co." are used to designate defendant. Accola v. C., B. & Q. R. R., 70 Iowa, 185 (1886). Cf. Martin v. Central, etc., R. R., 59 Iowa, 411 (1882); Stone v. Berkshire Soc., 14 Vt., 86 (1842); Souhegan Factory v. McConihe, 7 N. H., 309 (1834); Metropolis Bank v. Orme, 3 Gill, 443 (1845); Gray v. Monongahela Co., 2 W. & S. (Pa.), 156 (1841); Mayor of Stafford v. Bolton, 1 Bos. & P., 40; Beene v. Cahawba, etc., R. R. Co., 3 Ala., 660 (1842); Lafayette Ins. Co. v. French, 18 How., 405 (1855). Cf. Brittain v. Newland. 2 Dev. & Bat. (N. C. Law), 363 (1837); Traver v. Eighth R. R. Co., 4 Abb. Dec., 422, 433 (1867); Mauney v. High School Mfg. Co., 4 Ired. Eq., 195 (1845). A mistake in setting out the name of a corporation party in a pleading may be corrected by amendment. Smith v. Central Plank-road Co., 30 Ala., 650, 662 (1857); Bullard v. Nantucket Bank, 5 Mass., 99 (1809); Sherman v. Connecticut River Bridge, 11 Mass., 338 (1814); Brittain v. Newland, 2 Dev. & Bat. (N. C. Law), 363 (1837). Or if manifestly immaterial no objection will be allowed. Marine Bank v. Biays, 4 Harris & J. (Md.), 338 (1818). And judgmeut will not be arrested. Coulter v. Trustees Western, etc., Seminary, 29 Md., 69 (1868). There is little uniformity in the acts incorporating

also to corporations.¹ A corporation is subject to a statute which prescribes that a "person" shall be subject to a penalty; ² or that the United States shall be a preferred creditor; ³ or that all "in-

towns and villages: but where a corporate name is established it is usually held that suits must be brought and defended in such name. President, etc., of Romeo v. Chapman, 2 Mich., 179 (1851). In the case of a misnomer in a devise the courts are very liberal in permitting the identity of the corporation to be otherwise shown. Deaf and Mute Inst. v. Norwood, Busb. (N. C.) Eq., 65 (1852); First Parish in Sutton v. Cole, 20 Mass., 232 (1825): Minot v. Boston Asylum, 48 Mass., 416 (1844): St. Louis Hosp. Ass'n v. Williams' Adm., 19 Mo., 609 (1854); Preachers' Aid Soc. v. Rich, 45 Me., 552 (1858); Vansant v. Roberts, 3 Md., 119 (1852); Weisser v. Denison, 10 N. Y., 68 (1854); Domestic & For. Miss. Society's Appeal, 30 Pa. St., 425 (1858); Cresson's Appeal, id., 437: Newell's Appeal, 24 id., 197 (1855): Chapin v. School District, 35 N. H., 445 (1857); Button v. American Tract Soc., 23 Vt., 336 (1851); Horneck's Exec. v. American Bible Soc., 2 Sandf, Ch., 133 (1844); Attorney-Gen'l v. Mayor of Rye, 7 Taunt., 546 (1817); General Lying-in Hosp. v. Knight, 21 L. J., Ch., 537 (1851); In re Kilvert's Trusts, L. R., 7 Ch. App., 170 (1871); Jarman on Wills. 330. Where a corporation voluntarily appears under a wrong name it becomes a party in such name and may not object to a decree for want of process against it. Virginia, etc., Nav. Co. v. United States, Taney's C. C. Dec., 418 (1840); State v. Bell Telephone Co., 36 Ohio St., 296 (1880); School District v. Griner, 8 Kan., 224 (1871). So, in general, whenever, for any purpose, a corporation is described, a slight variance will not be held material. Burdine v. Grand Lodge, 37 Ala., 478 (1861); Souhegan Nail, etc., Factory v. Mc-Conihe, 7 N. H., 309 (1834). In the case of a misuomer in a notice required by statute to be given as a condition prece-

dent to an action where there was no possibility of anybody being misled, Pollock, C. B., said: "For the sake of Westminster Hall we ought to refuse this rule." Eastham v. Blackburn R'y Co., 23 L. J., Exch., 199 (1854); Corporation (Provisional) of County of Bruce v. Cromar, 22 id., 321, 327 (1863); Trent, etc., Road Co. v. Marshall, 10 Up. Can., C. P., 329, 336 (1861): Hawkins v. Municipal Council, etc., Bruce, 2 id., 72, 121 (1852); Whitly v. Harrison, 18 Up. Can., Q. B., 603 (1859): Croydon Hospital v. Fairly, 6 Taunt., 467 (1816); Doe Malden v. Miller, 1 B. & Ald., 699 (1818): Hagerstrom Road Co. v. Creeger, 5 Harr. & J. (Md.), 122 (1820); Hoboken, etc., Ass'n v. Martin, 13 N. J. Eq., 427 (1861); Inhabitants, etc., Salem v. String. 10 N. J. L., 323 (1829); Inhabitants, etc., Gloucester v. Forest. 2 id., 115 (1806): Inhabitants of Middleton v. McCormick. 3 id. (3d ed.), 92 (1809); Charitable Ass'n in Granville v. Baldwin, 42 Mass., 359 (1840); City of Lowell v. Morse, id., 473: Shawmut Sugar Co. v. Hampden Mut. Ins. Co., 78 Mass., 540 (1859); Trustees, etc., in Lerant v. Parks. 10 Me., 441 (1833); Newport Mechanics' Mfg. Co. v. Starbird, 10 N. H., 123 (1839); Soc. Propagating Gospel v. Young, 2 N. H., 310 (1820); Delaware & Atlantic R. R. Co. v. Irick, 23 N. J. L., 321 (1852).

¹ People v. Utica Ins. Co., 15 John., 358 (1818). A corporation may be a "person" within the meaning of the words of a statute. Proprietors, etc., v. Inhabitants, etc., 26 N. E. Rep., 239 (Mass., 1891).

² United States v. Amedy, 11 Wheat, 392 (1826). Contra, Androscoggin, etc., Co. v. Bethel, etc., Co., 64 Me., 441 (1874); Cumberland, etc., Corp'n v. Portland, 56 Me., 78 (1868).

³ Beaston v. Farmers' Bank, 12 Peters, 102 (1838). Contra, Commonwealth v. Phoenix Bank, 52 Mass., 129 (1846).

habitants" or "residents" shall pay taxes: or that testimony shall be admitted as against certain "persons:"2 or that "persons" may do certain acts in regard to promissory notes;3 or that a local court shall have jurisdiction; 4 or that property may be attached; 5 or shall be guilty of a misdemeanor; for that "persons" shall be liable for damages for injuries which result in death; 7 or shall be injured by a dam; 8 or a statute which allows "owners" of vessels to obtain a registry.9 Stockholders are liable for taxes levied on a distillery, where the statute levies the tax on "persons interested in the use of the distillery." 10 A foreign corporation is a "person" outside of the state as regards the statute of limitations." But a foreign corporation is not a "resident" within the chattel-mortgage act; 12 nor is a domestic corporation a "resident tax-payer," so as to be counted in voting municipal aid to railroads; 13 nor is a state a person, and as such entitled to take by devise.¹⁴ A corporation is not a "citizen" within the meaning of the federal constitution; 15 but is a "person" within the meaning of the fourteenth amendment.16

§ 700a. By-laws.—According to Blackstone, one of the important features of a corporation is the power to make by-laws. A

¹ Bank of U. S. v. Deveaux, 5 Cranch, 61 (1809); Rex v. Gardner, Cowper, 79 (1774); Otis Co. v. Inhabitants, etc., 74 Mass., 509 (1857); International, etc., Soc. v. Com'rs, 28 Barb., 318 (1858); Baldwin v. Trustees, etc., 37 Me., 369 (1854); Cortis v. Kent, etc., Co., 7 B. & C., 314 (1827). Contra, Hartford, etc., Ins. Co. v. Inhabitants, 3 Conn., 15 (1819).

² La Farge v. Exchange, etc., Ins. Co.,
 ² N. Y., 352 (1860).

³ State of Indiana v. Woram, 6 Hill, 33 (1843).

⁴ Brown v. Mayor, etc., 66 N. Y., 385 (1876); Bristol v. Chicago, etc., R. R. Co., 15 Ill., 436 (1854); Bank of N. A. v. Chicago, etc., R. R. Co., 82 Ill., 493 (1876); Eslava v. Ames, etc., Co., 47 Ala., 384 (1872).

Knox v. Protection Ins. Co., 9 Conn.,
430 (1833); Mineral, etc., R. R. Co. v.
Keefe, 22 Ill., 9 (1859); Trenton Bank v.
Haversteck, 11 N. J. L., 171 (1829);
Bushel v. Commonwealth, etc., Ins. Co.,
15 S. & R., 173 (1827); Planters', etc.,
Bank v. Andrews, 17 Ala., 404 (1858). Or

garnished. Brauser v. New Eng., etc., Ins. Co., 21 Wis., 506 (1867).

⁶ White v. State, 69 Ind., 273 (1879).

⁷ South, etc., R. R. v. Paulk, 24 Ga., 356 (1858).

⁸ Lehigh v. Lehigh, etc., Co., 4 Rawle (Pa.), 8 (1833).

⁹ Regina v. Arnaud, 9 Q. B., 806 (1846).
 ¹⁰ United States v. Wolters, 46 Fed.
 Rep., 509 (1891).

11 Olcott v. Tioga R. R. Co., 20 N. Y., 210 (1859); Blossburg, etc., R. R. Co. v. Same, 5 Blatch., 387 (1867). Contra, Commonwealth, etc., Ins. Co. v. Dunson, 28 Gratt. (Va.), 630 (1877), where it had an agent in the state to accept service.

12 Cook v. Hager, 3 Col., 386 (1857).

13 People v. Schoonmaker, 63 Barb., 44
 (1871). Cf. Chafford v. Board of Supervisors, 12 S. E. Rep., 145.

¹⁴ In the Matter of Fox, 52 N. Y., 530 (1873); United States v. Fox, 94 U. S., 315 (1876).

 $^{15}\,\mathrm{See}$ § 696, supra. Cf. 130 U. S., 630 ; 21 Pac. Rep., 1019.

¹⁶ County of San Mateo v. Southern
 Pac. R. R. Co., 13 Fed. Rep., 722 (1882).

by-law is a permanent rule of action, in accordance with which the corporate affairs are to be conducted. A by-law differs from a resolution in that a resolution applies to a single act of the corporation, while a by-law is a permanent and continuing rule, which is to be applied on all future occasions. The power to make by-laws is always stated to be one of the essential incidents and rights of a corporation. This power exists at common law. Frequently, however, it is given by the charter or statutes.¹

By-laws are to be made by the stockholders in meeting assembled. The stockholders have few functions to perform, and this right to make by-laws is an essential and important one. The directors have no inherent power to make by-laws.² But the stockholders may delegate to the directors the power to make by-laws.³ Frequently the charter confers this power upon the directors.⁴

¹ People v. Crossley, 69 Ill., 195 (1873); Kearney v. Andrews, 10 N. J. Eq., 70 (1854); Commonwealth v. Woelper, 3 Serg. & R., 29 (1817); Juker v. Commonwealth, 20 Pa. St., 484 (1853); Newling v. Francis, 3 Term Rep., 189 (1789), the last two cases holding that at common law the corporation may make by-laws regulating elections.

² Morton, etc., Co. v. Wysoug, 51 Ind., 4 (1875), holding that a by-law made by the directors is void; Carroll v. Mullanphy Sav. Bank, 8 Mo. App., 249 (1880). A by-law may arise by custom. Union Bank v. Ridgely, 1 Har. & G. (Md.), 324 (1827). See In re Regents' Co., W. N. (1867), p. 79. See, also, Rex v. Head, 4 Burr., 2515 (1770), where Lord Mansfield said "that the body at large had no power to make by-laws, because that power is, by the charter, given to the common council and aldermen; and the common council could not by a by-law take away from the body at large the right of election which the charter had vested in the whole body." Unless authorized by the charter the board of directors have no power to make by-laws, nor to alter, amend or repeal the same (United Fire Association v. Bensman, 4 Weekly Notes Cas., 1); but when charter authority to enact by-laws is conferred upon the board of directors, they may

validly adopt a by-law authorizing voting by proxy at all meetings of the corporation (Wilson v. American Academy of Music, 43 Leg. Int., 86); and even in the absence of authority the affirmations and acquiescence of a member may estop him from questioning the mode in which the by-laws have been enacted (Morrison v. Dorsey, 48 Md., 462).

³ Rex v. Spencer. 3 Burr., 1827, 1837 (1766), where Lord Mansfield said that, "where the power of making by-laws is in a body at large, they may delegate their rights to a select body." See, also, in an association. Heintzelman v. Druids', etc., Assoc., 36 N. W. Rep., 100 (Minn., 1888). Although the stockholders authorize the directors to make bylaws, yet the directors cannot change or act contrary to a by-law made by the stockholders. Stevens v. Davison, 18 Gratt. (Va.), 819 (1868). City officials having power to elect new burgesses may delegate that power. Rex v. Westwood, 7 Bing., 1 (1830). So, also, as to the election of aldermen. King v. Ashwell, 10 East, 22 (1810).

⁴ Such is the case in the New York Manufacturing Companies Act of 1848. See, also, Cahill v. Kalamazoo Ins. Co., 2 Doug. (Mich.), 124 (1845; Samuel v. Holliday, 1 Woolw., 400 (1869); Commonwealth v. Gill, 3 Wharton, 228

By-laws must be reasonable; they must not interfere with the vested and substantial rights of the stockholders; and they must not be contrary to public policy or the established law of the land. This general rule, however, can be understood only by a study of the cases themselves, a collection of which is given in the notes.

(1837). A by-law made by the stock-holders instead of by the directors as prescribed by charter is nevertheless binding as to past acts on participating stockholders. People v. Sterling Manuf'g Co., 82 Ill., 457 (1876).

1 A by-law may authorize stockholders to vote by proxy. People v. Crossley, 69 Ill., 195 (1873). See, also, § 610, supra. A by-law may give the corporation a lien on stock for debts due to it from the stockholders. See ch. XXXI, supra. But cannot give the corporation the right to forfeit stock for non-payment of calls. See ch. VIII. supra. By-laws may regulate the manner of voting. Commonwealth v. Woelper, 3 S. & R. (Pa.), 29 (1817); Juker v. Fisher, 20 Pa. St., 484 (1853). May require bonds to be given by cashiers. Bank of Wilmington v. Wollaston, 3 Harr. (Del.), 90 (1840); Savings Bank v. Hunt, 72 Mo., 597 (1880). May prescribe qualifications for admission to membership. Queen v. Saddlers' Co., 10 H. L. Cas., 404 (1863). A by-law is illegal if it disturbs the vested property rights of the stockholders. Kent v. Quicksilver, etc., Co., 78 N. Y., 154 (1879), where preferred stock had been issued. So, also, of a bylaw which provides for the administration of an oath to stockholders who vote. People v. Kip, 4 Cow., 382, n. (1822). If the by-law is illegal its effect cannot be obtained by printing it upon the face of the certificate of stock. Conklin v. Second Nat'l Bank, 45 N. Y., 655 (1871), involving a lien on stock. A by-law by the directors excluding one of them from examining the corporate books is void. People v. Throop, 12 Wend., 183 (1834). A by-law restricting the right of members of a church to vote as authorized by statute is void. People v. Phillips, 1 Denio, 388 (1845). A by-law

may be good in part. Rogers v. Jones, 1 Wend., 237 (1828). A by-law of a bank that mistakes in pass-books must be corrected at once does not bind a depositor. Mechanics', etc., Bank v. Smith, 19 John., 115 (1821). A by-law that any five of a board of twenty-three directors should be a quorum for transacting business is valid. This is equivalent to an executive committee, except that the members may shift. Hovt v. Thompson's Ex'r, 19 N. Y., 207, 217 (1859). Bylaws may regulate the calling of meetings. Taylor v. Griswold, 14 N. J. L. 222 (1834). A by-law which limits or regulates the corporate powers which the charter confers on the directors may be disregarded by them. Union, etc., Ins. Co. v. Keyser, 32 N. H., 313 (1855). By-laws imposing fines for non-attendance or for refusal to accept office are valid, but a by-law making assessments is invalid. Tobacco Pipe Makers v. Woodraffe, 7 Barn. & Cres., 838 (1828). A by-law that voluntary contributions will be refunded is a contract which a contributor may enforce. Davis v. Proprietors, etc., 49 Mass., 321 (1844). A by-law imposing penalties for past acts is void. Pulford v. Fire Dep't, 31 Mich., 458 (1875). A by-law that transfers of stock are subject to the approval of the directors is void. Farmers', etc., Bank v. Wasson, 48 Iowa, 336 (1878). See, also, § 332, supra. Or the approval of the president. Sargent v. Franklin Ins. Co., 25 Mass., 90 (1829). A by-law restricting the right of electors in a town to vote is void. Rex v. Spencer, 3 Burr., 1827 (1766); Rex v. Head, 4 Burr., 2515, 2521 (1770). It has been held that the by-laws of a building association cannot impose an unreasonable fine for non-payment of assessments. Lynn v. Freemansburg, etc., Assoc., 11 Atl. Rep.,

Frequently the by-laws provide that the contracts of the corporation shall be authorized only in a certain way, and shall be signed by certain officers in order to be valid corporate obligations. Such

537 (Pa., 1887). It is legal for the bylaws to provide that the company may sell out all of its property at any time. Cotton v. The Imperial, etc., Corporation, 67 L. T. Rep., 342 (1892). The bylaws of a voluntary association - an exchange - forbidding the members from carrying on dealings outside of the exchange is legal. American, etc., Co. v. Chicago, etc., Exch., 32 N. E. Rep., 274 (Ill., 1892). A corporation may pass a by-law prescribing the qualifications of its directors, and may prescribe that a person who is an attorney against it in a suit shall not be a director. Cross v. West Virginia, etc., Co., 16 S. E. Rep., 587 (W. Va., 1892). A stockholder who is given a copy of the by-laws upon his becoming a stockholder is not bound to know that there are other bylaws not included in them. McKenney v. Diamond, etc., Assoc., 18 Atl. Rep., 905 (Del., 1889). A by-law that the members of a news association shall not publish news furnished by other associations in the same territory is valid. The penalty for violation may be suspension. Matthews v. Associated Press, 61 Hun, 199 (1891). Where stockholders in an apartment house corporation are entitled to rent apartments at a rental to be fixed by a majority vote of the stockholders, an increased rental so voted is legal. The by-laws providing for such a vote override a general statement in a prospectus to the contrary, the stockholders knowing of the bylaw. Compton v. Chelsea, 123 N. Y., 537 (1891). Where a land company is incorporated under the general act, and the general act does not provide for any statement in the articles of association as regards the amount of debts which the corporation may incur, a provision inserted in the articles of association that "the indebtedness of the company shall not exceed \$500 at any time" is

not a part of the charter. The provision is at the most merely a by-law. The court said: "We think that the limitation of \$500 in the charter of the corporation cannot be regarded of any more force than a by-law." Sherman, etc., Co. v. Morris, 23 Pac. Rep., 569 (Kan., 1890).

A by-law authorizing the corporation to sue a subscriber for the difference between the subscription and the price for which the stock sold on forfeiture is void. Jay Bridge Co. v. Woodman, 31 Me., 573 (1850); Kennebec R. R. v. Kendall, id., 470 (1850). See, also, ch. The following by-laws VIII, supra. were held to be void: Compelling menibers of an exchange to submit their controversies to arbitration on pain of expulsion or suspension, State v. Merchants' Ex., 2 Mo. App., 96 (1876); providing that suits to collect insurance shall be brought in the county where the company exists, Nute v. Hamilton, etc., Co., 72 Mass., 174 (1856); enlarging the liability of stockholders for debts of the corporation, Trustees', etc., v. Flint, 54 Mass., 539 (1847); certainly so where the creditor did not expressly rely on the by-law, Flint v. Pierce, 99 Mass., 68 (1868); or where an assignee of the corporate creditor seeks to enforce the liability; Gamwell v. Pomerov, '121 Mass., 207 (1876) (see, also, § 241, supra); authorizing less than a majority of directors to act when the statute required a majority, State v. Curtis, 9 Nev., 325 (1874); compelling stockholders to retire a part of their stock, Bergman v. St. Paul, etc., Assoc., 29 Minn., 275, 282 (1882); prohibiting the use of the company's canal on Sundays, Calder, etc., Nav. Co. v. Pilling, 14 M. & W., 76 (1845); restricting the members as to their fishing business, Adley v. Whitstable Co., 17 Ves., 315; 19 id., 304 (1815); restricting the number of apprentices a by-law, however, does not affect the validity of a contract executed in violation of the by-law, so far as such contract affects persons having no knowledge of the by-law.¹

A by-law authorizing the forfeiture of stock for non-payment of a call is discussed elsewhere; 2 as is also the right of the corporation to create a lien on stock by by-law.3 There are no particular rules in regard to the method of enacting, amending or repealing by-laws.4

which members may have. Rex v. Coopers' Co., 7 T. R., 543 (1798); Rex v. Tappenden, 3 East, 186 (1802); restricting the sale of guns. Gunmakers v. Fell. Willes Rep., 384 (1742); restricting the transfer of seats in an exchange, Ritterband v. Baggett, 42 N. Y. Sup. Ct., 556 (1877). Railroad regulations as to passengers, etc., are not by-laws. validity, however, depends on their reasonableness. State v. Overton, 24 N. J. L., 440 (1854). The by-laws of a city cannot exclude from business all painters who belong to a union. Clark v, Le Cren, 9 B. & C., 52 (1829). See, however, as to city by-laws, Dillon on Munic. Corporations. If a by-law is divisible the invalidity of part does not invalidate the remaining part. Amesbury v. Bowditch, etc., Co., 72 Mass., 596 (1856). For a valuable statement of the law in relation to by-laws, see, also, In re Long Island R. R., 19 Wend., 37, 41 (1837): Angell & Ames on Corp., 184; Lumley on By-laws (English, 1875); 2 Am. & Eng. Cyclo. of Law, 705. By-laws are construed as they are construed by the corporation if that construction be reasonable. State v. Conklin, 34 Wis., 21 By-laws are binding on all members. Cummings v. Webster, 43 Me., 192 (1857). But strangers are not bound to know of them. Kingsley v. New Eng., etc., Co., 62 Mass., 393 (1851), where the by-law was printed on an insurance policy; Wait v. Smith, 92 Ill., 385 (1879); Royal Bank, etc., Co., L. R., 4 Ch., 252 (1869). See, also, § 725, infra, relative to contracts by agents in violation of by-laws. A by-law cannot give

the president a casting vote in addition to his regular vote. State v. Curtis, 9 Nev., 325 (1874). A by-law which prohibits members from working with persons who are not members is void. Thomas v. Mutual, etc., Union, 49 Hun, 171 (1888).

¹ See § 725, infra.

²See § 123, supra.

³ See §§ 522, 524, supra.

⁴They need not be written. Union Bank v. Ridgely, 1 H. & G. (Md.), 324, 413 (1827). The corporation may adopt Cushing's Manual. State v. American Institute, 44 How Pr., 468 (1873). Bylaws may be modified by usage. Henry v. Jackson, 37 Vt., 431 (1865). charter may require by-laws to be enacted under seal. Dunston v. Imperial, etc., Co., 3 B. & Ad., 125 (1832). If amendments to the by-laws are, by the by-laws, to be made only after notice, that notice is necessary. French v. O'Brien, 52 How, Pr., 394 (1877). Directors may disregard their own by-laws. Martino v. Commerce, etc., Co., 47 N. Y. Super. Ct., 520 (1881). Power to make by-laws implies power to repeal them. King v. Ashwell, 12 East, 22 (1810). Although the by-laws provide for changes therein only on a two-thirds vote, vet a majority may make changes. Smith v. Nelson, 18 Vt., 511 (1846). They may arise by custom. See note 1, p. 887, supra. By-laws of mutual insurance associations may be changed. Supreme Lodge, etc.. v. Knight, 20 N. E. Rep., 479 (Ind., 1889). A by-law may be repealed by a resolution inconsistent with it. Royal Bank, etc., Co., L. R., 4 Ch., 252 (1869).

§ 700b. The expulsion of members.— In joint-stock companies, or in any corporation owning property, no power of expulsion can be exercised unless expressly conferred by the charter or by statute.¹ The expulsion by virtue of a by-law has been held to be unlawful.² A member who has been unjustly expelled may have mandamus to compel the corporation to restore him to membership.³ Accordingly, where a corporate body strikes off the name of one of its members without giving him previous notice of their intention so to do, and affording him opportunity to be heard in his own defense, a mandamus to restore will be granted;⁴ and an injunction lies to restrain a board of brokers from irregularly expelling one of their members.⁵

Where the expulsion is regular and authorized by the charter or statute it is conclusive, and mandamus will not lie.⁶ An act of ex-

¹ Evans v. Philadelphia Club, 50 Pa. St., 107 (1865); State v. Chamber of Commerce, 20 Wis., 63 (1865); also State v. Chamber of Commerce, 47 Wis., 670 (1879). In Dickinson v. Chamber of Commerce, 29 Wis., 45 (1871), it is held that there may be a lawful expulsion under a valid by-law. Expulsion of a member from the New York Stock Exchange. Belton v. Hatch, 109 N. Y., 593 (1888). See, also, § 504, supra, note on Exchanges; also § 710.

² People v. Saint Francisco's Benevolent Society, 24 How. Prac., 216 (1862); Roehler v. Mechanics' Aid Society, 22 Mich., 86; Green v. African Methodist Epis. Society, 1 Serg. & R., 254. A resolution spread upon the corporate records unjustly expelling a member is a libel, and the member offering the resolution is liable to an action thereupon. Fawcett v. Charles, 13 Wend., 473 (1835). Cf. Adley v. Whitstable Co., 19 Vesey, 304 (1815); Chase v. East Tennessee, etc., Railroad Co., 5 Lea (Tenn.), 415 (1880).

³ Black & White Smith's Society v. Vandyke, 2 Wharton (Pa.), 309 (1836); Commonwealth v. German Society, 15 Pa. St., 251 (1850); People v. Saint Francisco's Benevolent Society, supra; State v. Carteret Club, 40 N. J. Law, 295; People v. Medical Society of Erie Co., 32 N. Y., 187 (1865); People v. New

York Benevolent Soc., 3 Hun, 361 (1875); Medical, etc., Society v. Weatherly, 75 Ala., 248. As to the damages to be paid to a member who has been unlawfully expelled and is reinstated by the court, see People v. Musical, etc., Union, 118: N. Y., 101 (1889).

⁴ Delacy v. Neuse River Navigation Co., 1 Hawks' Law (N. C.), 274 (1821). The member must have a fair hearing. Southern Plank-road Co. v. Hixon, 5-Ind., 165 (1854).

⁵ Leech v. Harris, 2 Brews, (Pa.). 571 (1870); Hutchinson v. Lawrence (N. Y. Supr. Ct.), N. Y. Daily Reg., Feb. 8, 1887. Cf. Society of Italian Union, etc., v. Montedonico (Ky., 1884), 4 Anı. & Eng. Corp. Cas., 22. But not as against a medical society. Gregg v. Mass. Medical Society, 111 Mass., 185 (1872). So. also, the courts will not grant an injunction to restrain a corporation from initiating new members upon the application of a member of the corporation, when no danger of pecuniary loss is shown as likely to result to the petitioner from such initiation. Thompson v. Society of Tammany, 17 Hun, 305 (1879).

⁶ Commonwealth v. Pike Beneficial Society, 8 Watts & S., 247 (1844); People v. Fire Underwriters, 7 Hun, 248 (1876).

pulsion cannot be impeached or attacked collaterally. At common law there were three causes for expulsion: where the member was guilty of an infamous, indictable offense; or guilty of an offense against his duty as a corporator; or of an offense compounded of these two.

¹Black & White Smith's Society v. Vandyke, 2 Wharton (Pa.), 309 (1836); Commonwealth v. Pike Beneficial Society, 8 Watts & S. (Pa.), 247 (1844); Society for the Visitation of the Sick v. Meyer, 52 Pa. St., 125, 131 (1866). Cf. Commonwealth v. Oliver, 2 Parson's Sel. Cases, 420, 426 (1849).

²James Bagg's Case, 11 Coke, 94, 99 (1616): Rex v. Town of Liverpool, 2 Burr., 723, 732 (1759); State v. Chamber of Commerce, 20 Wis., 63 (1865): People v. New York Commercial Association, 18 Abb. Prac., 271 (1864); People v. Chicago Board of Trade, 45 Ill., 112 (1867). Cf. Smith v. Smith, 3 Desauss. (S. C.), 557 (1813), where an expulsion for misconduct was sustained; Woolsey v. Independent Order, etc. (Iowa, 1883), 1 Am. & Eng. Corp. Cas., 172; Fisher v. Keane, L. R., 11 Chan. Div., 353; Hopkinson v. Exeter, L. R., 5 Eq., 63; Dawkins v. Antrobus, L. R., 17 Chan. Div., 615; Gardner v. Freemantle, 19 W. R., 256; People v. New York Cotton Exchange, 8 Hun, 216 (1876); Dean v. Ben-

nett. L. R., 6 Chan., 489. In Sturgis v. Board of Trade, 86 Ill., 441 (1877), it was held that the remedy of the expelled member was at law and not in equity. But see State v. Lusitanian Portuguese Society, etc., 15 La. Ann., 73 (1860); Wood v. Woad, L. R., 9 Exch., 190 (1874); Bostwick v. Fire Department of Detroit, 49 Mich., 513; Hassler v. Phila. Musical Ass'n. 14 Phila., 233: Anaconda Tribe v. Murbach, 13 Md., 91; State v. George Medical Soc., 38 Ga., 608; Washington Benevolent Soc. v. Bacher, 20 Pa. St. 425: Riddle v. Harmony Fire, etc., Co., 8 Phila, 310; State v. Adams, 44 Mo., 570; Harmstead v. Washington Fire. etc., Co., 8 Phila., 381; Commonwealth v. Philanthropic Soc., 5 Binn., 486; Commonwealth v. St. Patrick Soc. 2 id., 448; People v. Fire Underwriters. 14 N. Y. Super. Ct., 248. Upon the general question of the power to expel members, see Angell & Ames on Corp., § 410 et seq.; 2 Kent's Com., 297.

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CHAPTER XLII

STOCKHOLDER'S ACTIONS TO HOLD THE DIRECTORS LIABLE FOR NEGLIGENCE IN THE DISCHARGE OF THEIR DUTIES.

- § 701. Remedy of the stockholder herein.
 - 702. Instances of negligence of directors in the performance of their duties.
- stockholder | § 703. Directors must use ordinary care and diligence in the management of the corporation and the transaction of its business.

§ 701. Remedy of the stockholder herein.—Where, by reason of the negligence of the directors or other officers, the corporate funds, property or rights have been lost, the injury is practically and ultimately an injury to the stockholders. But, in the eye of the law. the injury is to the corporation itself. The loss has depleted its Moreover, the negligent act was in reference to the affairs of the corporation, and was an injury to the corporation. Accordingly, it is for the corporation to call the directors to an account for their negligence. The action is not an action which the stockholder is to bring. The negligence affects him, not directly, but indirectly. Hence, the law is well settled that a stockholder cannot bring the ordinary action at law for damages against the corporate directors for their negligence in the management of the corporate affairs. It is clear also that the stockholder cannot hold the corporation itself liable for the negligence herein of its directors. To allow such an action would be to make part of the stockholders liable to other stockholders for the loss, when all are equally injured, equally innocent and equally in position to com-Ordinarily the remedy for the negligence of corporate

1 The leading case on this point is Smith v. Hurd, 53 Mass., 371 (1847), the court saying: "An injury done to the stock and capital by negligence or defeasance is not an injury to such separate interest, but to the whole body of stockholders in common." Brinckerhoff v. Bostwick, 88 N. Y., 52 (1882); Craig v. Gregg, 83 Pa. St., 19 (1876). To same effect, Allen v. Curtis, 26 Conn., 456 (1857). "A fatal defect in the plaintiff's petition, both original and amended, is that it seeks no recovery in behalf of

the corporation, but seeks a direct recovery of damages for the plaintiff individually, the case stated not entitling him to such a recovery." Evans v. Brandon, 53 Texas, 56 (1880); Kent v. Jackson, 2 De G., M. & G., 49 (1852). An action at law does not lie at the instance of a stockholder against a director for mismanagement of the corporation. Howe v. Barney, 45 Fed. Rep., 668 (1891); Hirsh v. Jones, 56 id., 137 (1893).

² Oliphant v. Woodburn, etc., Co., 63 Iowa, 332 (1884).

directors in the management of the corporate affairs is a suit in equity instituted by the corporation itself.\(^1\) If, however, the corporation is under the control of the guilty parties, or if it refuses to sue when requested by a stockholder to do so, then the stockholder himself may bring a suit in equity in his own behalf, and in behalf of all other stockholders who may wish to come in, making the corporation and the guilty parties the defendants, and compel them to make good to the corporation the corporate money or property lost by their negligence.\(^2\) The money or property recovered in such an action belongs to the corporation, and not to the stockholder who brings the suit.\(^3\) In a stockholder's suit to hold the directors liable for negligence, the acts of negligence need not be set out with great particularity. The suit is in a court of equity, and the court decides the questions of fact, since the suit is in the nature of an accounting.\(^4\) A receiver may institute the suit.\(^5\)

§ 702. Instances of negligence of directors in the performance of their duties.—It is difficult to lay down any rules as to what acts will constitute negligence on the part of corporate officers. Each case is to be determined largely on its own facts. Thus, where the

¹ In an action by a corporation against its officers for damages for negligence, all of the guilty parties must be joined. The remedy of the company is in equity. The court said that the officer was "responsible only for a failure to bring to the discharge of his duties such degree of attention, care, skill and judgment as are ordinarily used and practiced in the discharge of such duties or employments; the degree of care, skill and judgment depending upon the subject to which it is to be applied, the particular circumstances of the case, and the usages of business." The court also said: "Where they have not profited personally by their bad management, or appropriated any of the property of the corporation to their own use, courts of equity treat them with indulgence. Were a more rigid rule to be applied, it would be difficult to get men of character and pecuniary responsibility to fill such positions." North Hudson, etc., Ass'n v. Childs et al., 52 N. W. Rep., 600 (Wis., 1892).

² A stockholder in a national bank who has been subjected to a statutory

liability may sue the directors, in behalf of the corporation, to render them liable for their gross negligence, the receiver having neglected to sue. Nelson v. Burrows, 9 Abb. N. C., 280 (1881), giving the complaint in full.

³ Evans v. Brandon, supra; Dewing v. Perdicaris, 96 U. S., 193, 198 (1877); Smith v. Poor, 40 Me., 415 (1855); Carter v. Ford, etc., Co., 85 Ind., 180 (1882).

⁴ Halsey v. Ackerman, 38 N. J. Eq., 501 (1884), affirming 10 Stew. Eq., 356. This case holds also that the stockholder's action lies even after the corporation has become insolvent. See, also, Smith v. Poor, 3 Ware (U. S. C. C.), 148 (1858); Gardiner v. Pollard, 10 Bosw. (N. Y.), 674 (1863), and 2 N. Y. Rev. Stat., 589, § 1, and 591, § 16.

⁵ Where a receiver has been appointed it is for him and not for a stockholder to hold the directors responsible for mismanagement of a bank. Howe v. Barney, 45 Fed. Rep., 668 (1891). A stockholder or creditor may hold a director liable for negligence where a receiver cannot. Briggs v. Spaulding, 141 U. S., 132, 150 (1891).

directors kept no accounts, paid no calls, collected no subscriptions, they were quite properly held guilty of negligence and were made liable therefor. So also the directors of a national bank are liable when they loan money to irresponsible persons, allow overdrafts, employ dishonest, unfaithful and incompetent clerks, and neglect to take security from the cashier, president and other officers for good conduct and the performance of duties.2 The president is negligent and is liable if he does not require the secretary to give a bond for his good conduct, as required by the by-laws of the corporation.³ But it has been held that the directors are not liable for a failure to have the secretary's bond renewed, they supposing that it did not expire at the end of the year.4 The law is well established that the corporate officers are not liable on the ground of negligence for ultra vires acts which they have done or sanctioned, but in good faith and without knowledge of their ultra vires character. The act itself may be impeached and set aside, and property transferred thereunder may be recovered back; but if the directors have made an honest mistake, and it was a mistake which a man of usual intelligence might make, they are not personally liable therefor. The law does not require them to be learned in the law. The directors, however, are liable for allowing the treasurer to use corporate funds for lobbying purposes;6 but not for allowing one of their number to manage the business. though he appropriate its property to himself.⁷ They are liable for making investments contrary to the charter.8 But they are not

¹ Neall v. Hill, 16 Cal., 145 (1860).

²Brinckerhoff v. Bostwick, 88 N. Y., 52 (1882). See, also, Smith v. Rathbun, 22 Hun, 150 (1880). As to the liability of a cashier, see Com. Bank v. Ten Eyck, 48 N. Y., 305.

³ Pontchartrain R. R. Co. v. Paulding, 11 La., 41 (1837).

⁴ Vance v. Phœnix Ins. Co., 4 Lea (Tenn.), 385 (1880).

⁵ Watt's Appeal, 78 Pa. St., 370 (1875); Hodges v. New Eng. Screw Co., 1 R. I., 312, 348 (1850); Spering's Appeal, 71 Pa. St., 24; Williams v. McDonald, 37 N. J. Eq., 409 (1883). *Cf.* Joint-stock Co. v. Brown, L. R., 3 Eq., 139; 8 Eq., 381 (1866).

⁶Shea v. Mabry, 1 Lea (Tenn.), 319 (1878).

⁷A director is not liable to a creditor of the bank for negligence in allowing the president to gradually embezzle all

its assets, where such director received no pay, and once or twice a week he attended to the discounts, saw how much money was on hand, and once a year counted the cash and securities. Swentzel v. Penn. Bank, 23 Atl. Rep., 405 (Pa., 1892). The plaintiff is not entitled to costs, having failed to prove his case. Id., 415. Contra in New Jersey. The corporation should be a party defendant. Creditors also may be made parties defendant. Camp v. Taylor, 19 Atl. Rep., 968 (N. J., 1890).

⁸The case Williams v. McKay, 18 Atl. Rep., 824 (N. J., 1889), is very full, explicit and clear in its adjudication and distribution of losses on the president, treasurer, manager, officers, finance committee, secretary and directors of a savings bank, where those officers, etc., had made investments contrary to the by-laws, charter and statutes.

liable for errors of themselves or the cashier in making loans. Inasmuch as directors serve in nearly all cases without pay, the law is not exacting in its requirements of them.

It is not actionable negligence in directors to proceed to business where only a small part of the capital is subscribed.² They are not liable for special deposits where there was no negligence on their part.³

Directors are not bound to make a thorough examination of the books and papers of a bank.⁴

A director who is absent on leave of absence is not liable for losses occurring during that time, nor for losses occurring shortly after he becomes a director.

§ 703. Directors must use ordinary care and diligence in the management of the corporation and the transaction of its business.—
The directors of a corporation are not guarantors that no mistakes will be made in the management of the corporate business, nor do they insure the corporation against loss by the frauds or embezzlement of subordinate officers and agents. They are required to exercise reasonable care and sound business judgment, but nothing further than this. They generally serve without pay, and usually by reason of their own interest in the stock of the company are directly interested in the welfare of the corporation. But, though this is the case, they must use ordinary diligence in ascertaining the condition of things, and ordinary intelligence in their action as

¹ The directors of a building corporation are not liable for investing in second mortgages, the act being ultra vires. Sheffield, etc., Soc. v. Aizlewood, 62 L. T. Rep., 678 (1890). Directors are not liable for a negligent or ultra vires act in lending the funds without taking proper security, unless it is shown that they failed to really exercise in good faith their discretion and judgment as directors. Re New Mashonaland, etc., Co., 67 L. T. Rep., 90 (1892). Negligence is not proved by the fact that the bank's capital is gone, and that large dividends were declared based on large amounts of assets that turned out to be worthless. and that real estate taken for debts depreciated in value, and that real estate was bought in on foreclosure sales by the bank, and that the directors did not closely watch the cashier, there being no proof of lack of reasonable skill, etc., on his part, and that they intrusted the

management to the cashier, a man of experience and ability, and that overdrafts were allowed to responsible parties, and that there was delay in suing on notes. Wallace v. Lincoln, etc., Bank, 15 S. W. Rep., 448 (Tenn., 1891). Various acts of mismanagement were considered in Re Liverpool, etc., Ass'n, 62 L. T. Rep., 873 (1890).

 2 Re Liverpool, etc., Ass'n, 62 L. T. Rep., 873 (1890).

³ An officer of a corporation is not liable for the loss of corporate securities without negligence on his part, though intrusted with their care. Howbray v. Antrin, 23 N. E. Rep., 858 (Ind., 1890).

⁴ Briggs v. Spaulding, 141 U. S., 132 (1891).

5 Id.

⁶ A bank director is not liable for negligence where the bank becomes insolvent within a short time after he became a director. Id.

directors. They are liable for losses if they go to sleep at meetings of the directors, or if they regularly fail to attend such meetings. They must exercise the same diligence and care that men of usual prudence and skill would exercise in the management of a similar business for themselves.

1 The leading case on the liability of directors for negligence is Charitable Corporation v. Sutton, 2 Atk., 400 (1742). The most important, recent and fully considered case, bowever, is Briggs v. Spaulding, 141 U.S., 132 (1891), where the supreme court of the United States laid down rules (see pp. 147, 151, 152) which very largely exempt directors in national banks from any liability whatsoever. In Percy v. Millaudon, 6 Mart. (La.), 68 (1829), the court said: "If nothing has come to their knowledge to awaken suspicion of the fidelity of the president and cashier, ordinary attention to the affairs of the institution is sufficient. If they become acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required, and a want of that care certainly makes them responsible." This case also holds that directors are not liable for errors of judgment unless they are grossly wrong. United Society, etc., v. Underwood, 9 Bush (Ky.), 609 (1873), holding that the directors must use ordinary diligence; Williams v. Gregg, 2 Strob. Eq. (S. C.), 297 (1848). In Richards v. New Hampshire Ins. Co., 43 N. H., 263 (1861), the court say: "The rule is a just one that an agent is bound to apply the same diligence to obtain payment of debts in his care that he does to recover his own." In the case of Land Credit Co. v. Fermoy, L. R., 5 Ch., 763 (1870), an attempt was made to hold liable for negligence, directors who innocently approved of a loan which in reality had not been made, but the money had been used by other directors for speculative purposes. See, also, R'y Light Co., 42 L. T. R., 206; Scholefield's Case, 1882, W. N., 22; British. etc., Life Assurance, L. R., 14 Ch. D., 335. In the

case of Dunn's Adm'r v. Kyle's Adm'r, 14 Bush (Kv.), 134 (1878), where a cashier had embezzled the funds of the bank, the court said: "Bad faith or gross negligence is certainly necessary to render the director liable to a stockholder in a case like this." The court also approved of the rule given in Morse on Banking, p. 117, to the effect that, "for excusable mistakes concerning the law, and for many errors strictly of discretion, they are not liable. Though in cases in which their action has been so grossly ill-advised as to warrant the imputation of fraud, or to show a want of the knowledge absolutely necessary for the performance of their duties, so great that they were not justified in assuming the office, they may be held responsible." The mere fact that loans by a bank turn out to have been unwise and bazardous does not render the director liable therefor. Witters v. Sowers, 31 Fed. Rep., 1 (1887). Bank directors cannot be held liable for negligence in loans, etc., at the suit of a stockholder, where they have used ordinary care and acted in good faith. Jones v. Johnson, 6 S. W. Rep., 582 (Ky., 1888). Director held not liable for negligence in failing to sue for debt due to corporation. In re Forest, etc., Min. Co., L. R., 10 Cb. D., 450 (1878). Directors are not liable for money lost by an overdrawn account. Turquand v. Marshall, L. R., 4 Ch., 376 (1869). A director of a loaning company is not liable for an unsecured loan which is lost, merely because it appeared on the books, etc. Proof is necessary that he knew of the loan. Caledonian. etc., Co. v. Curror, 9 C. of S. Cases (4th series), 1115 (1882). Bank directors are not liable for negligence merely because the cashier has for years been embezzling the funds and making false The directors are not bound to examine the books of the company, nor to investigate the mode of living of their employees. But they are required to attend the directors' meetings with reasonable regularity; to have statements of the business made to them; to object to the transaction of important business without the knowledge and consent of the board of directors; to examine with reasonable care the reports and matters of business brought before them; and not to shut their eyes to obvious objections to the business transactions and general condition of the corporation, or to the character and well-known reputation of the employees.\footnote{1} More-

entries. Savings Bank, etc., v. Caperton, 8 S. W. Rep., 885 (Ky., 1888). The directors of a bank are not bound to know of the cashier's mismanagement, and are not liable therefor. Clews v. Bardon, 36 Fed. Rep., 617 (1888).

. 1 The law on this subject is ably and clearly set forth by Mr. Justice Earl, in Hun v. Cary, 82 N. Y., 65 (1880). Cf. Van Dyck v. McQuade, 86 N. Y., 38 (1881). See, also, Scott v. De Peyster, 1 Edw. Ch., 513 (1832); Litchfield v. White, 3 Sandf., 545; Liquidators, etc., v. Douglas, 32 Scottish Jur., 212 (1860); Spering's Appeal, 71 Pa. St., 11 (1872), an important case, and one which is frequently spoken of as the leading case herein. A director who trusts everything to the other directors, or who performs all acts as a mere man of straw, is liable. Brown's Case, L. R., 8 Eq., 404, 405. See, also, Williams v. McKay, 40 N. J. Eq., 189 (1885). See, also, Ackerman v. Halsey, 37 N. J. Eq., 356 (1883): aff'd, 38 id., 501; Trustees, etc., v. Bosseiux, 3 Fed. Rep., 817 (1880). That directors are not liable for the fraud or misconduct of co-directors, see Movins v. Lee, 30 Fed. Rep., 298 (1887). Directors are not liable for gross negligence in buying out a business where the corporation was organized for the express purpose of buying ont that business. Overend, etc., Co. v. Gibb, L. R., 5 H. L., 480 (1872). Where loans without secnrities are improperly made, and the guilty directors are liable therefor, a director who did not participate is nevertheless liable, if he does not take steps to remedy the matter as soon as he learns of it. Jackson v. Munster Bank, 15 L. R., Ir., 356 (1885). Bank directors who meet but once or twice during the year, and do not examine the books, and have no knowledge of affairs, are liable for losses resulting from long-continued overdrafts by insolvent parties. Marshall v. Farmers', etc., Bank, 8 S. E. Rep., 586 (Va., 1889). After a director sends in a letter of resignation he is not liable for the wrongful acts of the directors. even though no attention is paid to his letter. Perry's Case, 34 L. T. (N. S.), 716 (1876). Managers of a building-loan corporation are liable for loans made to a firm in excess of the amount allowed by a by-law; but are not liable for a mistaken estimate of value of the security taken, nor for a defect in the acknowledgment of the security - a mortgage. Citizens' Bldg., etc., Assoc. v. Coriell, 34 N. J. Eq., 383 (1881). In the case, however, of Movius v. Lee, 80 Fed. Rep., 298 (1887), the court held, reviewing the cases, that "there is no case which has been cited or observed in which it has been decided that a director of a corporation was liable to make good a loss occasioned by the fraud or misconduct of a co-director, in which he had no part, and which was perpetrated without his connivance or knowledge. . . . It is nowhere adjudged that all must always act, or that they must not trust one another to act, or that they are liable for the mere omission to watch and restrain the others, without wrong intention on their own part. Treasurer

over, when a director has knowledge that an unauthorized act is being done he cannot escape liability, however innocent he may be, unless he prevents the act by his protest, or files a bill in equity to remedy the wrong.¹

is not liable for losses by deposits made by him, where the corporation acquiesced in the deposits. New York, etc., R. R. Co. v. Dixon, 21 N. E. Rep., 110 (N. Y., 1889). Directors are required to use such care and diligence as a prudent man exercises in his own affairs. If he utterly neglects his duties he is liable. Horn, etc., Co. v. Ryan, 44 N. W. Rep., 56 (Minn., 1889). Misfeasance is such non-feasance as is negligence amounting to a breach of trust. Liability for negligence cannot be imputed to directors nnless it is gross negligence resulting in loss. To constitute gross negligence there must be, first, a plain duty to do or abstain from a particular thing; secondly, such abstention or such action as the court would be justified in holding to be mischievous or reckless. When a duty incumbent on the directors has not been performed, the hurden of proving gross negligence is on those who allege that conclusion: but where the facts establish gross negligence, but at the same time show that it is possible or likely that a satisfactory explanation ought to be forthcoming, the burden of proof is shifted. Re Liverpool, etc., Assoc., 62 L. T. Rep., 873 (Pa., 1890). A treasurer of an association who receives no compensation is a gratuitous bailee, and is only liable for gross negligence in paying out funds. Hibernia, etc., Assoc. v. McGrath, 26 Atl. Rep., 377 (Pa., 1893). For an English case holding the trustees and managers of a savings bank liable for a defalcation of the actuary, see Re Cardiff, etc., Bank, 62 L. T. Rep., 628 (1890).

I Joint-stock Discount Co. v. Brown, L. R., 8 Eq., 381, 402 (1869); Ashhurst v. Fowler, L. R., 20 Eq., 225 (1875). That a director is not in general liable for misdeeds of subordinate corporate agents, see Bath v. Caton, 37 Mich., 199 (1877); Bacheller v. Pinkham, 68 Me., 253 (1878); Nicholson v. Mounsey, 15 East, 384 (1812); Stone v. Cartright, 6 Term Rep., 411 (1795); Hewitt v. Swift, 3 Allen, 420 (1862). Cf. Weir v. Barnett, L. R., 3 Ex. D., 238 (1878). But knowledge obtained by the director previous to becoming such does not compel him to act. Forest, etc., Coal Co., L. R., 10 Ch. D., 450.

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CHAPTER XLIII.

- THE POWER OF VARIOUS OFFICERS AND AGENTS TO CONTRACT FOR A CORPORATION, AND THE MODE OF DRAWING AND EXE-CUTING CORPORATE CONTRACTS -- ADMISSIONS AND NOTICE.
- corporation bound by a contract made in its name.
- A. POWER OF PROMOTERS, STOCKHOLD-ERS. DIRECTORS. EXECUTIVE COM-MITTEE. PRESIDENT. SECRETARY. TREASURER, CASHIER, GENERAL AND MISCELLANEOUS MANAGER AGENTS TO CONTRACT FOR A COR-PORATION.
- §§ 705-707. Promoters Their liability and the liability of the corporation and subscribers.
 - 708-711. Stockholders Their power to make by-laws and contracts, expel members and remove directors.
 - 712-714. Directors Their power to contract — De facto directors — Directors' meetings, call, quorum — Their minute-book as evidence.
 - 715. Executive committee.
 - 716. President.
 - 717. Secretary and treasurer.
 - 718. Cashier.
 - 719. General manager and superintendent.
 - 720. Subordinate agents.

- § 704. Under what circumstances is a | B. THE FORM OF CORPORATE CON-TRACTS - CORPORATE SEAL-DRAFTING, SIGNING AND SEALING --LIABILITY OF OFFICERS ON CON-TRACTS IRREGULARLY EXECUTED.
 - § 721. Ordinary corporate contracts by the modern rule need not be under seal.
 - 722. Method of drafting, signing, sealing and acknowledging a corporate contract — Proof of seal and authority to attach it.
 - 723. Corporation is liable on irregularly-executed instruments.
 - 724. Liability of officers on irregularly-executed instruments.
 - 725. Charter and by-law requirements as to manner of executing corporate contracts.
 - C. ADMISSIONS OF OFFICERS AND NOTICE TO OFFICERS.
 - § 726. When is the corporation bound by its officers' or agents' admissions.
 - 727. Notice to the corporation by notice to the officers.

§ 704. Under what circumstances is a corporation bound by a contract made in its name — The three tests for determining whether a contract may be enforced against a corporation .-- In determining whether a contract may be enforced against a corporation, three things are to be considered. First, did the corporation have the power to enter into such a contract? Second, was the contract entered into by a duly-authorized agent of the corporation? Third, was the contract drawn, signed and sealed in a form which binds the corporation?

The first of these questions has been already treated of in the preceding chapters of this book.1

There is an infinite variety of contracts which the corporation

1 See particularly chs. XL and XLL

may enter into, and the great mass of law on this subject is constantly being increased by new decisions. A corporation may enter into any contract which is within its express or implied powers, and which is not mala in se. And even a contract which is not within the express or implied powers of the corporation is sometimes enforced against it or for it when one party to the contract has already performed, or when the parties cannot be restored to their original positions.¹

The second and third tests of whether a contract is enforceable against a corporation are considered in this chapter.

A. POWER OF PROMOTERS, STOCKHOLDERS, DIRECTORS, EXECUTIVE COM-MITTEE, PRESIDENT, SECRETARY, TREASURER, CASHIER, GENERAL MANAGER AND MISCELLANEOUS AGENTS TO CONTRACT FOR A COR-PORATION, AND CONTRACTS BINDING ON THE CORPORATION BY RATIFICATION.

§ 705. Promoters — Liability to strangers, to the corporation and to subscribers for stock — Liability of subscribers herein — Contribution — Liability of the corporation herein to strangers and to promoters.— In America the question of the liability of promoters to persons who have performed services or entered into contracts relative to a prospective corporation has rarely arisen. But in England this question has frequently been passed upon. In general the promoter of a prospective corporation is liable for services rendered by others who are employed as clerks, engineers, or in a similar capacity in the work of promoting the enterprise.²

¹ See cb. XL.

²The promoters may be liable for royalties according to contract even though they organized a corporation which did all the business. American Paper-Bag Co. v. Van Nortwick, 52 Fed. Rep., 752 (1892). Promoters are liable for goods ordered and delivered for a corporation that is never organized. Hub Pub. Co. v. Richardson, 13 N. Y. Supp., 665 (1891). The chairman of the promoters who signs the prospectus may by the jury be held to have authorized the expense of printing, and is liable personally. Riley v. Packington, L. R., 2 C. P., 536 (1867). In Collingwood v. Berkeley, 15 C. B. (N. S.), 145 (1863), a director who allowed his name to be used as such for a proposed company was held liable for a passage ticket which was purchased on a repre-

sentation of the secretary that the company would be organized. That the interested parties may be liable to the attorney of the provisional committee of a company which is abandoned before incorporation, see Parsons v. Spooner, 5 Hare, 102 (1846). A promoter who employs a person in behalf of a proposed company is liable. Bell v. Francis, 9 Carr. & P., 66 (1839). A local committee to form a company are liable to their secretary. They are not allowed to say that he must look to the corporation for pay. Kerridge v. Hesse, 9 Carr. & P., 200 (1839). A promoter is liable personally on contracts made by him in behalf of the company with third persons, and his liability is not released by the subsequent adoption of the contract by the company. Kilner v. Baxter, L. R., 2 C. P., 174 (1866); Scott

There has been great difficulty in determining who is to be considered a promoter and who is not. As regards the liability to strangers, however, it seems that every one is liable herein as a promoter who induces such stranger to act in expectation of payment from the prospective corporation.

v. Embury, L. R., 2 C. P., 255 (1867). Question of whether a surveyor employed by promoters can look to them for compensation, the company not having been formed, is for the jury, considering all the facts of the employment. Higgins v. Hopkins, 3 Ex., 163 (1848). If he was present when the promoters resolved that they should not be liable he cannot recover from them. Laudman v. Entwistle, 7 Ex., 632 (1852). In Lake v. Argyle, 6 Q. B., 477 (1844), it was left to the jury to decide whether the president of a proposed corporation thereby held himself out as liable on a contract made by an agent of the proposed company. Question for jury whether a president of a proposed corporation is liable. Wood v. Argyle, 6 Man. & Gr., 928 (1844). Allowing one's name to be used as a director and suggesting that advertising be made does not render a person liable for the advertising. Burbridge v. Morris, 3 H. & C., 664 (1865). A promoter is not liable on a contract made before he joined in the enterprise, though the contract is performed afterwards. Newton v. Belcher, 12 Q. B., 921 (1848). Promoter is not liable on contracts made in writing before he became such. Beale v. Mouls, 5 Rail. Cas., 105 (1847).

Person contracting with a partnership may hold the partners liable, although he knew that their articles provided for incorporation and they afterwards did incorporate. Witmer v. Schlatter, 2 Rawle (Pa.), 359 (1830). But the rule is otherwise where the party allows the account to be transferred to the corporation and then carries on a long running account. Whitwell v. Warner, 20 Vt., 425 (1848). Or where the party knew that he was contracting with the other as an agent of an unincorporated

association. Abbott v. Cobb, 17 Vt., 593 (1845). See also, § 508. In England a provisional committee is generally appointed by the subscribers. This comnittee is generally held not liable. But a committee of management is usually appointed subsequently, and this committee is generally held liable. That a provisional committee is not liable, see Nevins v. Henderson, 5 R'y & Canal Cases, 684 (1848); Dawson v. Morrison, id., 62 (1847); Ex parte Roberts, 2 Mac. & G., 192 (1850); Carmichael's Case, 17 Sim., 163 (1850); Ex parte Clarke, 20 L. J. (Ch.), 14 (1851); Maitland's Case, 3 Giff., 28 (1861); Hall's Case, 3 De G. & S., 214 (1850); Ex parte Stocks, 22 L. J. (Ch.), 218 (1853); Tanner's Case, 5 De G. & S. 182 (1852): Forrester v. Bill, 10 Ir. Law Rep., 555 (1847); Ex parte Osborne, 15 Jur., 72 (1851); Burnside v. Dayrell, 3 Ex., 224 (1849); McEwan v. Campbell, 2 McQueen (S. C.), 499 (1857). Contra, Lefray v. Gore, 1 Jo. & Lat., 571 (1844). It is for the jury to say whether a provisional director is liable for advertisements which he authorized the secretary to publish at the secretary's expense. Maddick v. Marshall, 17 C. B., 829 (1864); affirming 16 id., 387. As to provisional committee-man, see, also, Williams v. Pigott, 2 Ex., 201 (1848). Merely allowing one's name to be used as a member of a provisional committee does not render a person liable on contracts made. Barker v. Stead, 3 C. B., 946 (1847); Patrick v. Reynolds, 1 C. B. (N. S.), 727 (1857). Nor is be liable to an engineer, although the former took part in meetings. Reunie v. Wynn, 4 Ex., 691 (1849). Moreover, the person sued may show that no personal liability was to be incurred and that the plaintiff knew it. Rennie v. Clarke, 5 Ex., 292 (1850). Question for jury whether the provisHaving induced the party to act, the promoter must see that he is paid. A promoter is a person who brings about the incorporation and organization of a corporation. He brings together the persons who become interested in the enterprise, aids in procuring subscrip-

ional committee authorized and became liable on contracts made by the managing committee. Williams v. Pigott, 5 Rail. Cas., 544 (1848). For a case where the provisional committee were held not to have so authorized, see Dawson v. Morrison, id., 62 (1847). But Barrett v. Blunt, 2 C. & K. (2 Eng. Com. L. Rep.), 271 (1846), made it a question for the juty. Burker v. Lyndon, id., 651 (1847). held the committee not liable. So, also, Giles v. Cornfoot, id., 653 (1847): Griffin v. Beverley, id., 648 (1847). In Bailey v. McCauley, 13 Q. B., 815 (1949), the court said that it was a question for the jury whether a committee-man, i. e., a promoter, allowed himself to be held out as liable, and that if the debt incurred was a necessary and usual one he is liable. In Ex parte Cottle, 2 Mac. & G., 185 (1850), affirmed sub nom, Norris v. Cottle. 2 H. L. Cas. 647 (1850), it was held that the mere fact of allowing one's name to appear as a member of the provisional committee does not render a person liable at law for the debts. To same effect. Ex parte Roberts, 2 Mac. & G., 192 (1850).

A person who consents to the use of his name as a provisional committee to promote and organize a company is liable, as a partner, for the debt of the committee for stationery. Barnett v. Lambert, 15 Mees. & W., 489 (1846). But not where a board of managers afterwards takes charge and incurs the expense. Bright v. Hutton, 3 H. of L. Cas., 341 (1852); rev'g 1 Sim. (N. S.), 602, and substantially overruling Hutton v. Upfield, 2 H. of L. Cap., 694. To same effect, Reynell v. Lewis, 15 Mees. & W., 517 (1846). As to the matters to be proved in rendering a promoter liable, see Carrick's Case, 1 Sim. (N. S.), 505 (1851). Lindley on Partnership (see Thompson on Liability of Officers

p. 202) says of Bright v. Hutton, supra, that it overruled directly or indirectly the following cases: "Upfill's Case, 2 H. L. Cas., 674; Ex parte Besley, 2 Mac. & G., 176. This case occurs three times in the books. It was first decided by Vice-Chancellor Knight-Bruce (3 De G. & S., 224), who held that Besley was not a contributory. This decision was appealed against and reversed by Lord Cottenham (2 Mac. & G., 176). But the appeal was reheard by Lord Truro, who affirmed the decision of the vice-chancellor (3 Mac. & G., 287). The case as reported in 3 De G. & S., 224, and 3 Mac. & G., 287, is still law. Bright's Case, 1 Sim. (N. S.), 602. This was reversed on appeal (3 H. L. Cas., 341). Ex parte Brittain, 1 Sim. (N. S.), 284, decided reluctantly on the authority of Upfill's case. Hole's Case. 3 De G. & S., 241, decided on the authority of Ex parte Besley, 2 Mac. & G., 176. Markwell's Case, 5 De G. & S., 528, decided on the authority of Upfill's Case, but after the decision of Bright v. Hutton. It cannot. however, be considered law. See Ex parte Capper, 1 Sim. (N. S.), 178, and Carrick's Case, 1 Sim. (N. S.), 505; Ex parte Morrison, 15 Jur., 346, and 20 L. J. (Ch.), 206, decided on the authority of Upfill's Case, and in effect overruled by Sharp and Jenner's Case, 1 De G., M. Nicholay's Case, 15 Jur., & G., 565. 420, decided on the authority of Upfill's Case. Ex parte Sichell, 1 Sim. (N. S.). 187, decided reluctantly on the authority of Upfill's Case. Ex parte Studley, 14 Jur., 539. This case is very briefly reported, but it seems inconsistent with such cases as Hall's (3 De G. & S., 214); Stock's (22 L. J. (Ch.), 218), and Carrick's (1 Sim. (N. S.), 505)." A member of the managing committee is liable where he attended a meeting and knew of employment. Norbury's Case, 5 De G. &

tions, and sets in motion the machinery which leads to the formation of the corporation itself.1

The liability of promoters to persons who have been induced by fraudulent prospectuses to subscribe for stock,² and the liability of promoters to the corporation itself to account for fraudulent profits which the promoter has secretly made out of contracts which he caused the corporation to enter into,³ have already been fully considered. Where a promoter has been held liable to strangers he may have contribution from his fellow-promoters.⁴

A promoter may also be liable to his co-promoters for a breach of contract; but one promoter is not liable to another for a failure to carry through the project.⁵

S., 423 (1852); Pearson's Case, 3 De G., M. & G., 241 (1852). Cf. Sharp's Case, 1 De G., M. & G., 565 (1852). But not if he was unaware of his being on the committee. Ex parte Haight, 1 Drew., 484 (1853). For a case where promoters were held liable on a contract that the company would pay certain damages to a land-owner, see Bland v. Crowley, 6 Ex., 522 (1851). In Webb v. London, etc., Railway, 1 De G., M. & G., 521 (1852), reversing 9 Hare, 129, the company was held not liable on such a contract. A promoter who promises that an existing railway company will pay the parliamentary expense of a contemplated new railway is not liable on such promise, the same being illegal and contrary to public policy. MacGregor v. Dover, etc., R'y, 18 Q. B., 618 (1852).

¹Secretary of prospective company ordering advertisements is liable for same, though he orders as "secretary pro tem." Hopcroft v. Parker, 16 L. T. Rep., 561 (1867). For definitions of a promoter, in reference to his liability to the corporation itself, see § 651, supra.

² See chs. IX and XX, supra.

³See § 651, *supra*. Concerning fraudulent prospectuses and fraudulent contracts by promoters, see, also, Cook on The Corporation Problem, pp. 91-94.

⁴ Boulter v. Peplow, 9 C. B., 493 (1850); Batard v. Hawes, 2 E. & B., 287 (1853); Edgar v. Knapp, 7 Jur., 583 (1843); Spottiswood's Case, 6 De G., M. & G., 345 (1855); Lefray v. Gore, 1 Jo. & Lat., 571 (1844). A promoter who has advanced money may have contribution. Hamilton v. Smith, 5 Jur. (N. S.), 32 (1859). Action at law lies for contribution between promoters. Batard v. Hawes, 2 El. & Bl., 287 (1853). Where the secretary was the original promoter and persuaded the others to go in, he cannot recover from them for his services. Parkin v. Fry, 2 Car. & P., 311 (1826). The promoters are not partners. Lindley on Partn. (4th ed.), 31-2, citing cases (Callaghan & Co., 1881). They are not liable to each other for services. Holmes v. Higgins, 1 B. & C., 74. May collect on surveying contract from co-promoters, though plaintiff was also a promoter. Lucas v. Beach, 1 Man. & Gr., 417 (1840). But not for services as secretary. Wilson v. Curzon, 15 M. & W., 532 (1847).

⁵Prometers are under no contract with each other to go on. A promoter who was to sell land to the company cannot sue the other promoters for damages for failure to organize, etc. Crow v. Greene, 4 Cent. Rep., 273 (Pa., 1886). One promoter is not liable to another. Hudson v. Spaulding, 6 N. Y. Supp., 877 (1889). For an agreement to take effect when a certain corporation should be formed, see Childs v. Smith, 46 N. Y., 34 (1871). Where a party to a contract relative to an incorporation and division of the stock sues to recover his interest according to the contract. the court will decree a proper division of the stock, all parties being allowed A promoter may, however, hold liable for breach of contract a party who had agreed to sell to or take part in the enterprise.

§ 706. The questions sometimes arise whether a subscriber for stock in a projected corporation is liable to its creditors in case the

the amounts invested by them in forwarding the enterprise. Bates v. Wilson, 24 Pac. Rep., 99 (Colo., 1890). Where one promoter sues another for failure to form the corporation, and obtains a verdict for the par value of the stock which plaintiff was to receive, there being no proof as to what the value would have been if issued, nor whether the company would be successful, the verdict will be set aside as excessive. Pitt v. Kellogg, 11 N. Y. Supp., 526 (1890). One promoter is not entitled to compensation for services as against the other, unless there was an agreement to that effect. Bailey v. Burgess. 22 Atl. Rep., 733 (N. J., 1891). One of the promoters suing for his interest according to the contract cannot hold any of them liable where he has released some. Burgess v. Sherman, 23 Atl. Rep., 554 (Pa., 1892).

1 Where parties intending to incorporate a company contract in behalf of that company to purchase certain property, and the parties selling refuse to fulfill, the parties purchasing may sue in their own names for breach of contract. They may recover damages, not as members of the company, but "which they suffered, if any, by reason of the defendants preventing them from successfully establishing and fitting out a business to be conducted by them as a" company. Abbott v. Hapgood, 22 N. E. Rep., 907 (Mass., 1889). Where promoters agree to construct a railroad and to give a part of the stock to parties who furnish valuable privileges, right of way, grants, etc., but instead of doing so sell out the affair to a competing railroad company, which buys with notice and does not go on with the enterprise, the parties who are injured may sue the purchasing railroad company for an accounting, etc. The promoters are not necessary parties

defendant. Hamilton v. Savannah, etc., R'v, 49 Fed, Rep., 412 (1892). A promoter who has brought about the sale of a large plant to new parties who have agreed to organize a new corporation and give the promoter a certain amount of stock therein cannot, upon the ground that he is being defrauded of his commissions, enjoin the parties from closing the transaction irrespective of the promoter, nor can he get specific performance of the contract to incorporate a company and deliver the stock. There is no fiduciary relation between the parties. The value of the stock can be estimated in damages. There was no allegation of defendant's insolvency. The promoter has ample remedy at law for damages. Avery v. Ryan, 43 N. W. Rep., 317 (Wis., 1889). For the measure of damages for the breach of a contract of defendants to organize a company and pay to plaintiff for his patents certain stock and cash, see Kirschmann v. Lediard, 61 Barb., 573. A promoter who is disregarded in the carrying out of the sale of a large plant to new parties may have an action for damages, but not an injunction and specific performance. Avery v. Ryan, 43 N. W. Rep., 317 (Wis., 1889), involving the sale of the Milwaukee street railways. Specific performance of a contract to form a corporation will not be granted. Avery v. Ryan, 43 N. W. Rep., 317 (Wis., 1889). Several persons defrauded as to their contract whereby they were to receive stock cannot sue jointly. Each must sue separately. Summerlin v. Fronteriza, etc., Co., 41 Fed. Rep., 249 (1890). Promoters' suit to enforce their right to stock. See, also. § 334, supra Where for \$1,300 a person was to have a ten per cent. commission on the price for which a mine is sold and is to have all stock received over and above the sum of \$225,000 net to the enterprise is abandoned before incorporation; and also whether the promoters of the abortive corporation are liable to the subscribers for deposits made by the latter. The former question is decided in the negative. "The subscribers to the stock or articles of association are not partners with those who assume the risk of acting for a corporation not yet legally established." As to the latter question the rule has become well established in England that a subscriber for stock in a corporation that never comes into existence, who has paid a part of his subscription, may recover back from the promoters of the enterprise the amount so paid, and is not liable even for the preliminary expenses.² His remedy may be

vendor, a complaint by the holder of the contract is subject to demurrer where the negotiations and agreements are not fully set forth. Sines v. Seymour, 44 Fed. Rep., 326 (1890).

¹ Ward v. Brigham, 117 Mass., 24 (1879), the court saving also: "Those who acted as agents for the inchoate corporation acted without a principal behind them, because there was no body corporate capable of appointing agents, and so became principals in the transaction." See, also, Duke v. Andrews, 2 Ex., 290 (1848); Hutton v. Thompson, 3 H. L. Cas., 161 (1857); Duke v. Diver, 1 Ex., 36 (1847), where the stockholder had promised to pay on a certain day, and was held to his promise. To same, effect, Duke v. Forbes, id., 356 (1847); Aldham v. Brown, 7 E. & B., 164 (1857); 2 E. & E., 398, on appeal; Woolmer v. Toby, 10 Q. B., 691 (1847). However, in the case of Lake v. Duke of Argyle, 6 Q. B., 477 (1844), the court held that attendance at a meeting, announcement of intention of being president and of taking stock, and concurrence in measures for incorporation, may be strong evidence that defendant "held himself out as a paymaster to all who executed the orders." The question, then, is for the jury. Where a proposed corporation, never incorporated, contracts to purchase certain property of a subscriber, he cannot bring suit at law against other subscribers for damage caused by non-fulfillment of contract.

vendor, and the mine is sold by the Crow v. Green, 5 Atl. Rep., 23 (Pa., 1886). Subscribers are not liable. Bourne v. Freeth, 9 B. & C., 632 (1829). Unless they allow themselves to be held out as partners in the enterprise. Fox v. Clifton, 9 Bing., 115 (1832), rev'g 6 id., 776. Cf. Herand v. Leaf, 5 C. B., 157 (1847); Dickinson v. Valpy, 10 B. & C., 128 (1829). Ex parte Hirschel, 15 Jur., 924 (1851), held that a subscriber for stock in an abortive company was not liable for debts incurred. The vice-chancellor said: "Where courts have been contradicting each other for years this court can do no otherwise than follow the last decision."

> ² Ashpitel v. Sercombe, 5 Ex., 147 (1850), where the court says: "There seems to be no doubt that the plaintiff. having paid his money for shares in the concern which never came into existence, or a scheme which was abandoned before it was carried into execution, has paid it on a consideration which has failed, and may recover it back as money had and received to its use, unless he can be shown to have consented to or acquiesced in the application of the money which the directors have made." See, also, Thompson on Liabilities of Officers, etc., 210: Nockels v. Crosby, 3 B. & C., 814 (1825), the leading case; 1 Lindley on Partnership (4th ed.), 119, citing Walstab v. Spottiswoode, 15 M. & W., 501 (1846); Moore v. Garwood, 4 Ex., 681 (1849); Coupland v. Challis, 2 Ex., 682 (1848); Owen v. Challis, 5 C. B., 115 (1848); Ward v. Londes

by bill in equity. If, however, the subscriber expressly or by implication authorizes expenditures, he cannot recover back his deposit. The subscriber need not submit to the deduction of any part of his subscriptions to be applied to the payment of the expenses incurred by the promoters in attempting the incorporation.

§ 707. Great difficulty has arisen in determining whether a corporation is liable on contracts made in its behalf by its promoters before the incorporation took place. The decided weight of authority holds that the corporation is not bound thereby.

borough, 12 C. B., 252 (1852); Mowatt v. Londesborough, 3 E. & B., 307 (1854), and 4 id., 1. See, also, Vollans v. Fletcher, 1 Ex., 20 (1847); Chaplin v. Clarke, 4 Ex., 402 (1849). Where a contract is made in the corporate name after the articles have been filed, but before any subscriptions have been obtained and before an organization meeting has been held or officers elected, the incorporators are liable on the contract as part-McVicker v. Cone, 28 Pac. Rep., 76 (Oreg., 1891). A subscription agreement prior to incorporation, in which the parties state the number of shares taken, and in which they agree to pay the contractors, who are parties to the contract, a specified sum, is a joint undertaking on the subscribers' part. The contractors may hold them liable as partners, the agreement not limiting their liability to the number of shares taken by each. An immaterial alteration after a part' have signed does not release any one. The agreement of the contractors to hold each subscriber liable only on his subscription if he would pay that is without consideration and void. Any subscriber could expressly limit his liability to his subscription. Davis v. Shafer, 50 Fed. Rep., 764 (1892).

12 Lindley on Partnership (4th ed.), 954, citing Harvey v. Collett, 15 Sim., 332 (1846). "A bill in equity lies to recover back money paid in a bubble." Colt v. Woolaston, 2 P. Wms., 154 (1723), where there was fraud; Green v. Barrett, 1 Sim., 45 (1826); Blain v. Agar, 1 Sim., 37 (1826); 2 id., 289 (1828); Cridland v. De Mauley, 1 De G. & S., 459 (1847), before

the Judicature Acts; and Cooper v. Welb, id., 454 (1846); Wilson v. Stanhope, 2 Coll., 627 (1846); Apperly v. Page, 1 Phillips, 775 (1847); Clements v. Bowes, 17 Sim., 167; Sheppard v. Oxenford, 1 K. & J., 491 (1855); Butt v. Monteaux, id., 98 (1854), since such acts. In these latter cases the demurrers were overruled. See, also, Williams v. Page, 24 Beav., 654 (1857), and "The Bubble Act," 9 Geo. I., ch. 18.

²1 Lindley on Partnership (4th ed.), 121, citing Baird v. Ross, 2 Macqueen, 61, 68 (1856); Garwood v. Ede, 1 Ex., 264 (1847); Watts v. Salter, 10 C. B., 477 (1850); Vane v. Cobbold, 1 Ex., 798 (1848); Atkinson v. Pocock, id., 796 (1848); Willey v. Parratt, 3 Ex., 211 (1848); Clements v. Todd, 1 Ex., 268 (1847); Jones v. Harrison, 2 Ex., 52; Aldham v. Brown, 7 E. & B., 164 (1857); 2 E. & E., 398 (1859); Burnside v. Deyrell, 3 Ex., 224 (1849).

³ Nockels v. Crosby, supra. Contra, Williams v. Salmond, supra.

4 Munson v. Syracuse, etc., R. R. Co., 103 N. Y., 58, 75 (1886). The agreement of the promoters of a bank that a person will be paid for obtaining subscriptions to its stock does not bind the bank itself. Tifft v. Quaker, etc., Bank, 21 Atl. Rep., 660 (Pa., 1891). A corporation is not liable on a contract of its promoters to pay for drawings, plans, etc. Hence, although by statute stockholders are personally liable on corporate contracts, if the corporation commences business before one-half of its capital is subscribed and twenty per cent. paid in, they are not liable on such a contract.

Any other rule would be dangerous in the extreme, inasmuch as promoters are proverbially profuse in their promises, and, if the corporation were to be bound by them, it would be subject to many

Buffington v. Bardon, 50 N. W. Rep., 776 (Wis., 1891). The company is not bound to issue stock in payment for services of a claim which the promoters agreed should be paid for by the company. Carey v. Des Moines, etc., Co., 47 N. W. Rep., 882 (Iowa, 1891). The corporation is not liable for the breach of an agreement among its organizers as to the distribution of stock. Summerlin v. Fronteriza, etc., Co., 41 Fed. Rep., 249 (1890). A corporation is not bound by the contracts of its promoters, where it has not ratified the same nor accepted the benefit of the same. Moore, etc., Co. v. Towers, etc., Co., 6 S. Rep., 41 (Ala., 1889). The correspondence of one who afterwards becomes president of a corporation which is afterwards incorporated does not bind such corporation. First Nat'l Bank v. Armstrong, 42 Fed. Rep., 193 (1890). A promoter's contract is not binding on the company even though it obtains the benefits thereof. Wilbur v. N. Y., etc., Co., 12 N. Y. Supp., The parliamentary agent 456 (1891). was held bound to look to the promoters for his pay and not to the company, in Re Skeguess, etc., Co., 60 L. T. Rep., 406 Promoters have no power to bind the corporation even though they afterwards become trustees. Berridge v. Abernethy, 24 N. Y. Week, Dig., 513 (1886). An agreement among the officers to reduce their salaries cannot be insisted upon by the corporation. It was not a party to the agreement. Richard, etc., Co. v. Brook, 14 N. Y. Supp., 370 (1891). A contract of promoters to sell to a corporation to be formed cannot be enforced by a stockholder suing in behalf of himself and other stockholders when the company has not performed or endeavored to perform its part of the agreement. Negley v. McWood, N. Y. Law Journal, May 2, 1890. An assignment of patents by one of several par-

ties to a corporation formed to unite various patents in a certain business is absolute and cannot be revoked even though the party was by agreement to have a salary of \$6,000 per year and this salary had not been paid. Bracher v. Hat Sweat Mfg. Co., 49 Fed. Rep., 921 (1892). The company is not liable for goods ordered and received before it was incorporated even though it used them. Bradley, etc., Co. v. South Pub. Co., 17 N. Y. Supp., 587 (1892).

An insurance company may refuse to pay a loss incurred after its incorporation, but growing out of a policy taken by its promoters before incorporation. Gent v. Mfg., etc., Co., 107 Ill., 652 (1883); S. C., 106 id., 252. The corporation is not liable for the debts of an old partnership, and not even the parol promise of its president makes it liable. Georgia Co. v. Castleberry, 43 Ga., 187 (1871). See § 206. An agreement among the donors to an academy that the money should be repaid does not bind the academy after incorporation. Bluehill Academy v. Witham, 13 Me., 403 (1836). An agreement of promoters to pay a person for obtaining subscriptions is not binding on the corporation. New York, etc., R. R. v. Ketchum, 27 Conn., 169 (1858), the court saying: "Can a few persons combine for their own interest to get up a railroad - agree with one of their number to give him a large commission or bonus for every stockholder he can allure into the company - and privately make this commission bonus a charge on the corporation when formed? This would be a breach of faith towards the honest and unsuspecting stockholders who pay the charter price for their stock and expect to take it clear of all incumbrance." Illinois the rule is favored that the corporation is never liable on contracts made by its promoters unless it exunknown, unjust and heavy obligations. The only protection of the stockholders and of subsequent corporate creditors against such a result lies in the rule that the corporation is not bound by

pressly agreed to perform. So held as regards preliminary surveys. ford, etc., R. R. v. Sage, 65 Ill., 328 (1872); and book-keeping for one of the promoters, Safety, etc., Co. v. Smith, id., 309 (1872); and the liability of a new company for the services of the superintendent of an abortive company by the same parties, Western, etc., Co. v. Cousley, 72 Ill., 531 (1874). An agreement of promoters that a certain person shall have a certain part of the stock upon incorporation, upon his paying therefor, does not bind the corporation. Morrison v. Gold, etc., Co., 52 Cal., 306 (1877). An agreement with a vendor before formation of the company provided that he should not be removed from directorate until a certain date. The memorandum and articles provided that this agreement should be adopted, and the articles "confirmed" and incorporated it. The agreement was acted on, but no contract was made between the vendor and the company. Held, the articles did not form a contract between them, and the vendor could be removed. Eley v. Positive, etc., 34 L. T. Rep. (N. S.), 190; 1 Ex. Div., 88, followed; Brown v. La Trinidad, 58 L. T. Rep., 137. See Lindley, book ii, cap. 2, sec. 3, 4th ed., 396; Chadwyck, Healey, 36. Where the bondholders in order to procure a government land grant contracted with plaintiff to complete the road and subsequently the bondholders foreclosed and reorganized, the court held that the new company was not liable on such contract merely from having accepted the complete road. The court said: "From all the authorities it seems clear that, in order to recover in an action at law, the plaintiff must show either an express promise of the new company or that the contract was made with persons then engaged in its formation, and

taking preliminary steps thereto, and that the contract was made on behalf of the new company, in the expectation on the part of the plaintiff and with the assurance on the part of the projectors that it would become a corporate debt. and that the company afterwards entered upon and enjoyed the benefit of the contract, and by no other title than that derived through it." Little Rock, etc., R. R. v. Perry, 37 Ark., 164, 191 (1881); aff'd in Perry v. Little Rock, etc., R. R., 44 Ark., 383 (1884). See, also, Re The Empress Engineering Co., 43 L. T. Rep. (N. S.), 742 (Ct. of App., 1881), where G. & A., the owners of the right to manufacture "the Empress Water Motor," agreed with C., the agent of the proposed company, to sell their right to the company, and it was agreed with C. on behalf of the company that it could pay the costs and charges of J. & P., solicitors, for services and disbursements in perfecting the organization thereof. Petition by J. & P. for purpose of winding up the company and for their pay under the said coutract. The court say: "The contract between the promoters and the so-called agent of the company of course was not a contract binding on the company, for the company had then no existence; nor could it become binding on the company by ratification, because it has been decided, and, as it appears to me, well decided, that there canuot be in law an efficient ratification of a contract which could not have been made binding on the ratifier at the time it was made, because the ratifier was not then in existence." Claim dismissed, but without prejudice to any equitable claim on a quantum meruit. Re Northumberland Avenue Hotel Co., Ltd., Sully's Case, 54 L. T. Rep. (N. S.), 777 (Ct. of App., 1886), holding that, in the absence of a new contract made by a company after its incorporation, a the contracts of its promoters. The rule is just and should not be weakened. It is entirely legal, however, for the corporation to ratify, confirm or adopt the contracts of its promoters. A pro-

contract made before its incorporation by a person purporting to contract as trustee for the company is not binding on the company, though the parties afterwards carry out some of the terms of the contract and act on the supposition that it is binding on the company. Affirming S. C., Ch. Div., page 76, same volume. A provision in the by-laws, which in England are filed, that a certain person shall be the attorney for the company is not binding on the company. Eley v. Positive, etc., Co., L. R., 1 Ex. D., 20 (1875). See, also, 60 L. T. Rep., 406.

An agreement of promoters with a turnpike company that the proposed railway company will make a certain grade crossing with the former is not binding on the railway company. Aldred v. North, etc., R'y, 1 R'y Cas., 404 (1839). An attorney cannot collect his fees from the corporation for services previous to incorporation, even though the by-laws provided for payment and the directors in meeting assembled said that he would be paid. Re Rotheram, etc., Co., 50 L. T. Rep., 219 (1883). The corporation is not liable for services in obtaining street permits and franchises prior to its incorporation. Hutchinson v. Surrey, etc., Ass'n, 11 C. B., 689 (1851). A railway company is not bound by the agreement of its promoters that it will purchase the canal of a canal company if the latter will not oppose the grant of the charter. Leominster, etc., Co. v. Shrewsbury, etc., R'y, 3 K. & J., 654 A railway company is not bound by the contract of its promoters for it with a town that the company would build certain wharves, etc. such secret or unexpected terms are to be held binding on those who take shares, the result may be ruinous to those who act on the faith of what appears on the face of the legislative incorporation." Caledonian, etc., R'y v. Magistrates, etc., 2 Macq. (H. of L., Scotch), 391 (1855), questioning Edwards v. Grand Junction R'y, 1 De G., M. & G.; 1 M. & C., 650; Stanley v. Chester, etc., R'y, 1 R'y Cas., 58; 9 Sim., 264; aff'd in 3 M. & C., 773 (1838), and Petre v. Eastern, etc., R'y, id., 462. Where, by the articles of incorporation, the subscribers are not to be bound until a certain amount of stock is subscribed, the corporation is not liable for the salary of an engineer employed before such full subscription. Pierce v. Jersey, etc., Co., L. R., 5 Ex., 209 (1870).

A corporation is not liable on the contracts of its promoters to employ plaintiff as a broker, nor does an express ratification of the contract bind it unless a consideration is alleged. Payne v. New South, etc., Co., 10 Ex., 283 An agreement of promoters that the company shall pay an attorney a certain sum for services is not binding on the company - not even by ratification and agreement between the company and the promoters. In re Empress, etc., Co., L. R., 16 Ch. D., 125 (1880). It has been held that equity will enforce an agreement of the promoters that, if opposition to the grant of its charter is withdrawn, the company will contract to do certain things which the opposition desired to put into the charter. Edwards v. Grand, etc., R'y, 1 My. & Cr., 650 (1836); aff'g 7 Sim., 337; questioned in Caledonian, etc., R'y v. Helensburg, etc., 2 Macq. (H. of L.), 391 (1855), and held overruled in Earl of Shrewsbury v. North, etc., R'y, L. R., 1 Eq., 593 (1865). But an agreement to pay a large price for land owned by the opposition party is not so enforceable. Preston v. Liverpool, etc., R'y, 5 H. L. C., 605 (1856); aff'g 17 Beav., 114; S. C., before amendment of the bill, 1 Sim. (N. S.), 586 (1851). Cf. Stanley v. Chester, etc., R'y, 3 My. & moter's contract may be adopted by the corporation in any way in which a contract may be made by the corporation.

A corporation accepting the benefits of the contract of its incorporators must accept the burden,² and a promoter's contract which has been ratified or adopted by the corporation, or the benfits of which have been accepted by the corporation, may be enforced against it.²

Cr., 773 (1838); and Eastern, etc., R'y v. Hawkes, 5 H. L. Cas., 331 (1855); Earl of Lindsey v. Great Northern R'y, 10 Hare, 664 (1853), in an inferior court, This doctrine is sustained in Earl of Shrewsbury v. North, etc., R'v. L. R., 1 Eq., 593 (1865), disapproving Edwards v. Grand, etc., R'y Co., 1 My. & Cr., 650 (1836), and Petre v. Eastern, etc., Co., 1 Rail, Cas., 462, and is sustained also in Goodav v. Colchester, etc., R'v. 17 Beav., 132 (1852). The articles of association may provide for the payment of promoters' contracts. Terrell v. Hutton, 4 H. L. Cas., 1091 (1854). Cf. Gunn v. London, etc., Ins. Co., 12 C. B. (N. S.), 694 (1862). Contra, Mulhado v. Porto, etc., R'y, L. R., 9 C. P., 503 (1874); In re Empress, etc., Co., L. R., 16 Ch. D., 125 (1880). Under a charter provision that the company shall be liable, see In re Brampton, etc., R'v, L. R., 10 Ch., 177 (1875), where an attorney was allowed to collect although he had assured subscribers that they would not be liable, distinguishing Sabin v. Haylake R'y, L. R., 1 Ex., 9 (1865). Where the articles of incorporation expressly provide for the payment of a specified amount to a person who had contracted with the promoters to sell to the company certain facilities for business the company is liable. Touche v. Metropolitan R'y, etc., Co., L. R., 6 Ch., 671 (1871); rev'g 4 De G., M. & G., 465. Judgment against the company entered by consent on a claim of a land-owner that the promoters agreed that the company would take his land at a certain price is binding. Williams v. St. George, etc., Co., 2 De G. & J., 547 (1858).

¹ McArthur v. Times, etc., Co., 51 N. W. Rep., 216 (Minn., 1892), the court

holding also that the contract begins only from its adoption, and on that basis the statute of frauds is applicable.

² Rogers v. New York, etc., Land Co., 134 N. Y., 197, 211 (1892), the court saying: "While it could have refused, when it came into existence, to accept the one or to be bound by the other, it could not accept the advantages and then refuse to assume the obligations." The court saving also that "the company issuing stock for property is not a bona fide purchaser of that property." Although the promoters have no authority to bind the company by their agreements as to the construction contract, yet where the company receives a benefit from such agreement and in its records and minutes recognizes it, the company will be liable in damages for letting the contract to others. Wilson v. Kings, etc., R. R., 114 N. Y., 487 (1889).

2"A corporation has power, when fully organized, to ratify a contract made by the promoters when it is one within its purposes for which the corporation was organized and appears to be a reasonable means for the carrying out of those purposes." Stanton v. N.. Y., etc., R. R., 22 Atl. Rep., 300 (Conn., 1891). The corporation may accept and ratify a contract of its promoters. Davis v. Montgomery, etc., Co., 8 S. Rep., 496 (Ala., 1890). Where promoters agree to employ a person, and the company actually does employ him afterwards, the company thereby ratifies the contract. Pittsburg, etc., Co. v. Quintrell, 20 S. W. Rep., 248 (Tenn., 1892). Bonds and mortgages executed by corporate officers in pursuance of a resolutiou made by promoters previous to incorporation are: valid where the directors ordered

The corporation alone is liable where its note was given in fulfillment of a contract entered into in its name, although such contract was prior to its incorporation.¹

Where property is to be turned into a corporation for stock, but work is to be done by the owners on the property before it is so turned in, the corporation is not liable to third persons for such work, the deeds never having been made to it.²

A consolidation agreement between individuals whereby the consolidated company was to assume a lease then owned by another company cannot be enforced by such other company. It is not a party to the agreement.³

the issue of the bonds after their execution. Wood v. Whelan, 93 Ill., 153 (1879). A bank, after incorporation, may ratify and become liable on the contract of its promoters to the effect that the bank would give stock and a certain sum of money to a person for his services. McDonough v. Bank, 34 Tex., 309 (1870). Where a corporation is organized before its articles are filed and a contract of purchase is made the contract price is collectible, the company having received the property after incorporation. Paxton, etc., Co. v. First Nat'l Bank, 21 Neb., 621 (1887). A corporation is liable for machinery which is accepted by it on a contract made by its organizers for it before incorporation. Whitney v. Wyman, 101 U.S., 392 (1879). An agreement by corporate organizers that the corporation will pay royalties on a patent is enforceable against the corporation when it has acted on the contract and for a time paid the royalties. Bommer v. American, etc., Co., 81 N. Y., 468 (1880). See, also, Lorillard v. Clyde, 86 id., 384 (1881). A preliminary agreement that a person may turn in property for stock is valid where the corporation has afterwards accepted the property and issued the stock therefor. Reichwald v. Commercial Hotel Co., 106 Ill., 439 (1883). See, also, ch. II, supra. A contract made by the president as such after the certificate of incorporation was signed, but before it was filed, binds the corporation where it has adopted the contract by carrying it out. Grape, etc.,

Co. v. Small, 40 Md., 395 (1874). A corporation is not bound by the contracts of its promoters, but it may adopt them after incorporation. Adoption may be in any way in which it might make the contract de novo. Battelle v. Northwestern, etc., Co., 33 N. W. Rep., 327 (Minn., 1887), and note. The company may of course employ and be liable to a superintendent whom the promoters agreed should be employed. Browning v. Great. etc., Co., 5 H. & N., 856 (1860). A grant of a license to use a patent made to an individual with the privilege to assign to a contemplated corporation may, as to royalties, be enforced against the corporation when the corporation expressly adopted the contract and acted on it. Spiller v. Paris, etc., Co., L. R., 7 Ch. D., 368 (1878); distinguishing Melhado v. Porto, etc., Co., L. R., 9 C. P., 503, as being a case at law. Money paid by a town after its incorporation to a person for bribing the legislature to grant the charter may be recovered back by a bill in equity. Frost v. Inhabitants, etc., 88 Mass., 152 (1863). Where persons who give their notes in payment for property deed the property to a corporation, the latter is not bound to reimburse them for amounts paid by them on the notes. Ruby, etc., Co. v. Gurley, 29 Pac. Rep., 668 (Colo., 1892).

¹ Case Manuf. Co. v. Soxman, 138 U. S., 481 (1891).

² Rathbun v. Snow, 123 N. Y., 343 (1890).

3 Lorillard v. Clyde, 122 N. Y., 498 (1890).

Not only may a ratified contract be enforced against a corporation, but it may be enforced by such corporation.¹

In Massachusetts and England it is held that a corporation cannot ratify a promoter's contract.²

The corporation is not liable to the promoters for their expenses and labor in effecting the incorporation.³

1 An agreement of land-owners with a promoter that they will sell to the contemplated railway a right of way at a specified price may be enforced by the railway. Bedford, etc., R'v v. Stauley, 2 J. & H., 746 (1862). But the company cannot enforce it where no formal ratification has been made. Penn. Match Co. v. Hapgood, 141 Mass., 145 (1886). A corporation cannot ratify a contract made for it before it was incorporated, but it may adopt the contract expressly. See 3 R'y & Corp. L. J., 482 (English cases). If the corporation cannot enforce the contract the promoters may. Carmody v. Powers, 26 N. W. Rep., 801 (Mich., 1886). Mortgagor to a corporation cannot set up usury on ground that the promoters required him to subscribe for stock in order to obtain loan. Central, etc., Ins. Co. v. Callaghan, 41 Barb., 448 (1864). And see many cases in ch. IV, supra, holding that a corporation may enforce subscriptions taken before its incorporation.

2" If a contract is made in the name and for the benefit of a projected corporation, the corporation, after its organization, cannot become a party to the contract, even by adoption or ratification of it." Abbott v. Hapgood, 22 N. E. Rep., 907 (Mass., 1889), citing cases. In England the law "is settled by a series of decisions that it is impossible for a company to ratify anything that is done or any contract that is made before it comes into existence." Hence, a contract as to the secretary's salary is unenforceable. can recover only on a quantum meruit. Re Dale, etc., Limited, 61 L. T. Rep., 206 (1889).

³ Where a promoter contracts to ob-

tain subscriptions, and take his pay in stock, and the company when organized adopts the contract, and lie obtains the subscription, but the company is unable to get legislative authority to cross a river, and so abandons the enterprise, he may collect damages. Stanton v. N. Y., etc., R. R., 22 Atl. Rep., 300 (Conn., 1891). A corporation is liable for the expenses of its promoters in procuring a subscription, where, after its organization, it accepts the subscription with the knowledge of such expenses. Weatherford, etc., Co. v. Granger, 22 S. W. Rep., 70 (Tex., 1893). A. person who, at the request of a minority of the promoters, attends meetings of the promoters, lobbies for the charter. makes a preliminary survey and pays some expenses, cannot recover from the subsequently incorporated company. The court said that in all the cases to the contrary "the services were either performed after the charter had been obtained, and there was therefore an inchoate corporation, or there was an informal organization preparatory to obtaining a charter, and the employment was authorized by the organization as such, and was not the mere employment by individuals having no authority, express or implied, to contract for any one." Bell's, etc., R. R. v. Christy, 79 Pa. St., 54 (1875). For case where one of promoters of consolidation used his stock to bring it about, but failed to hold consolidated company liable therefor, see Eldred v. Bell Tel. Co., 119 U. S., 513 (1886). Company on winding up is not liable for promoters' expenses. Terrell's Case, 2 Sim. (N. S.), 126 (1851); Ex parte Lloyd, 1 Sim. (N. S.), 248 (1851). A promoter cannot recover from the corporation money which he

The question whether a person who has contracted with a corporation as an existing corporation can repudiate his contract on the ground that it was never incorporated is discussed elsewhere.

§ 708. Acts which must be authorized by stockholders' meetings instead of by directors' meetings - Stockholders make the bu-laws. The functions of stockholders are exceedingly limited. The theory of a corporation is that stockholders shall have all the profits, but shall turn over the complete management of the enterprise to their representatives and agents, called directors. Accordingly there is little for the stockholders to do beyond electing directors, making by-laws, increasing or decreasing the capital stock, authorizing an amendment to the charter, dissolving the corporation, and a few others.² Of the functions of the stockholders the most important. perhaps, is that of making by-laws. The law is clear that stockholders in meeting assembled have the power to make the by-laws. of the corporation.3

§ 709. Stockholders cannot carry on the business or enter into contracts for the corporation - These are the functions of the directors — One person owning all the stock — "Dummy" corporations.— The stockholders cannot enter into contracts with third persons. Contracts between the corporation and third persons must be entered into by the directors and not by the stockholders. The corporation, in such matters, is represented by the former and not

expended before its incorporation in sary to perfect its organization, and bribing the legislature to grant the charter. Marchaud v. Loan, etc., Assoc., 26 La. Ann., 389 (1874). See, also, Hall v. Vermont, etc., Co., 28 Vt., 401 (1856). The statutes may provide that corporations shall pay the promoters' expense of obtaining a charter. Hitchins v. Kilkenny R'y, 9 C. B., 536 (1850). Where a corporation was not to exist until a certain amount of stock was subscribed the secretary cannot recover from the corporation any compensation for bis services prior to the obtaining of that amount of subscriptions. Franklin, etc., Ins. Co. v. Hart, 31 Md., 59 (1869). In Law v. Conn., etc., R. R., 45 N. H., 370 (1864), a suit at law by a promoter against the company for services rendered in procuring subscriptions was sustained on the ground that "a corporatiou is liable at law, upon an implied assumpsit, for services rendered before it came in esse, but which were neces-

which, after such organization was perfected, it accepted, and the benefits of which it enjoyed." Affirmed, 46 N. H., 284 (1865). To same effect, Hall v. Vermont, etc., Co., 28 Vt., 401 (1856). Where work has been carried on by the president for his company he is allowed in his accounting credit for work done. materials furnished and money advanced before as well as after the full incorporation. Grand River B. Co. v. Rollins, 21 Pac. Rep., 897 (Colo., 1889),

¹ See § 637.

² See Eidman v. Bowman, 58 Ill., 444 (1871); Metropolitan, etc., R'y Co. v. Manhattan, etc., R'y Co., 11 Daly (N. Y.), 377 (1884). As to increasing or reducing the capital stock, see § 285, supra; amending charter, ch. XXVIII, supra; dissolution, ch. XXXVIIL

³ For a full discussion of the subject of by-laws, see § 700a, supra.

by the latter. Such is one of the main objects of corporate existence. To the directors are given the management and formation of corporate contracts. The stockholders cannot, in meeting assembled, bind the corporation by their contracts in its behalf.¹

¹Conro v. Port Henry, etc., Co., 12 Barb., 27 (1851), where a lease of iron works was declared void because it was the act of the stockholders and not of the directors; McCullough v. Moss, 5 Denio, 567 (1846), in which a promissory note signed by the president and secretary of the corporation was held invalid because authorized only by the stockholders and not by the directors: Dana v. Bank of United States, 5 Watts & S., 223, 245 (1843); Union Gold, etc., Co. v. Rocky, etc., Bank, 2 Col., 565 (1875), holding that it is for the directors and not the stockholders to repudiate corporate contracts made by an authorized agent: Gashwiler v. Willis, 33 Cal., 11 (1867). holding that the stockholders have no power to authorize a sale of corporate property. Such authority must come from the directors. There are many decisions to the effect that one or more stockholders cannot contract for or represent the corporation, outside of corporate meetings, unless they do so, not as stockholders, but as individuals and corporate agents, acting under the authority of the directors. Thus. the stockholders, as such, cannot convey the real estate of the corporation, though they all join in the deed, unless the execution is in pursuance of some vote of the corporation. Isham v. Bennington Iron Co., 19 Vt., 230 (1847); Wheelock v. Moulton, etc., 15 Vt., 519 (1843). The misrepresentations of a stockholder inducing a person to purchase stock of the corporation are not binding on the corporation. Burnes v. Pennell, 2 H. L. C., 497, 519 (1849). The circumstance that a person is a member of an incorporated company gives him no authority to release a debt due to the corporation. Harris v. Muskingum, etc., Co., 4 Blackf. (Ind.), 267 (1836). Where all the individuals composing a corpora-

tion covenanted in behalf of such corporation for themselves and their heirs that the corporation should do certain acts, they were held to be bound personally. Tileston v. Newell, 13 Tyng (Mass.), 406 (1816). In a suit to recover damages of a corporation for flooding the plaintiffs' land it was held error to ask a witness whether individual members of the company had employed him to deprive the plaintiffs of their claim. Shay v. Tuolumne, etc., Co., 6 Cal., 74 (1856). Where the plaintiff claims the amount of his disbursements for work on the defendant corporation's road, but the evidence does not prove a request to the plaintiff by the corporation. its directors or authorized agent, or any stipulation, expressed or implied, to authorize a charge against the corporation for such disbursements, no act of an individual member can be held to bind the corporation. Hayden v. Middlesex, etc., Corp., 10 Mass., 397 (1813). The intention of a corporation can only be learned by the language of its recorded acts; and neither the private views nor the public declarations of individual members of such corporation are for this purpose to be inquired after. Thus, a plaintiff resisting a tax may not establish its legality by evidence as to the intent of those voting the levy. Bartlett v. Kinsley, 15 Conn., 327 (1843). A deed of real estate executed by the directors of a corporation separately and at different times, but not formally authorized by them as a board, is not only ineffectual as a conveyance of real property, but equally so as a contract to convey. Baldwin v. Canfield, 26 Minn., 43, 54 (1879). The stockholders cannot by suit in equity compel the directors to enter into a contract of lease. Ives v. Smith, 8 N. Y. Supp., 46 (1889). Stockholders' contracts do not bind the

Although one person owns a majority of the stock,1 or all of it,2

corporation. American Preservers' Co. v. Norris, 43 Fed. Rep., 711 (1890); Wright v. Lee, 51 N. W. Rep., 706 (S. D., 1892). Damages may be recovered by a corporation for a fraud practiced upon it, even though an agent of the corporation who aided in the perpetration of the fraud was a stockholder in the corporation. Grand Rapids, etc., Co. v. Cincinnati, etc., Co., 45 Fed. Rep., 671 (1891).

¹ Hopkins v. Roseclare Lead Co., 72 Ill., 373 (1874). He cannot sell the corporate property. The person owning a majority of the stock cannot contract for the corporation, and a contract in its name made by him is not binding on it. Allemony v. Simmons, 23 N. E. Rep., 768 (Ind., 1890). Where a coustruction contract is signed by an individual in his own name, the corporation is not liable on it, although he owned nearly all the stock and the work was for its benefit. Donoghue v. Indiana, etc., R'y, 49 N. W. Rep., 512 (Mich., 1891). Where, however, a part of the stockholders contract to sell the corporate property to a third person, they are liable in damages for breach of the contract. Curtis v. Watson, 25 Atl. Rep., 478 (Vt., 1892).

2 "The property of a corporation is not subject to the control of individual members, whether acting separately or jointly. They can neither incumber nor transfer that property, nor authorize others to do so. The corporation the artificial being created - holds the property, and alone can mortgage or transfer it; and the corporation acts only through its officers, subject to the conditions prescribed by law." Humphreys v. McKissock, 140 U.S., 304 (1891). Although one railroad owns or controls all the stock of another railroad, yet the former is not personally liable for the negligence, debts, etc., of the latter. Atchison, etc., R. R. v. Cochran, 23 Pac. Rep., 151 (Kan., 1890). A railroad com-

pany owning all the stock and bonds of another company does not own the property of the latter and cannot sue on a cause of action belonging to the latter. Fitzgerald v. Missouri P. R'y, 45 Fed. Rep., 812 (1891). Stockholders who transfer the corporate property are jointly and severally liable to corporate creditors. Graham v. Hoy, 38 N. Y. Sup. Ct., 506. The fact that the manager of a corporation and his brothers own all the capital stock does not make their acts the acts of the corporation. Bank of Monroe v. Gifford, 32 N. W. Rep., 669 (Iowa, 1887). Stockholders owning all the stock and bonds of a road cannot destroy the same and then sell the road to another company. Gulf, etc., R'y Co. v. Morris, 4 S. W. Rep., 156 (Tex., 1887). See, also, Button v. Hoffman, 61 Wis., 20 (1884), where it is held that such a stockholder is not the corporation. Contra, Swift v. Smith, 6 East. Rep., 574; S. C., 3 Cent. Rep., 899 (Md., 1886); 34 Alb. Law Jour., 257. A railroad company owning practically all the stock of another company may lease the line of the latter company to another company. Chicago, etc., R'v v. Union Pac. R'v. 47 Fed. Rep., 15 (1891). A bridge owned by a bridge corporation is not to be taxed as railroad property, even though its stock is owned by the stockholders in a railroad corporation, and the stock has been pledged to such railroad corporation and the bridge itself leased to the latter. St. Louis, etc., R'y v. Williams, 13 S. W. Rep., 796 (Ark., 1890). Where a corporation or person owns all the stock and bonds of another corporation and causes the latter to lease all its property, it is legal to have the rent made payable to the first-named corporation or person. Union Pac. R'y v. Chicago, etc., R'y, 51 Fed. Rep., 309 (1892). If one person buys all the stock of another company, it thereby becomes dormant, and he is liable for the debts incurred thereafter, except as to those or all but two shares, he does not in consequence thereof acquire the right to act for the corporation, or as the corporation, independently of the directors. One person may own all the stock, and yet the existence, relations and business methods of the corporation continue. A single stockholder cannot make a contract for and in the name of the corporation which shall have any binding force or validity, except by subsequent ratification or adoption in the regular manner. A stockholder, however, may of course be appointed its agent.

The rights, liabilities and legal status of the various parties where a "dummy" corporation is organized arc considered elsewhere.

The law seems to be clear that all corporate contracts are to be made by the directors. This includes the original contracts as well as modifications of them. If a contract is within the express or implied powers of the corporation, then the directors need not consult the stockholders nor follow their wishes, even though the lat-

debts which were incurred on the credit of the company only. Louisville, etc., Co. v. Eisenman, 21 S. W. Rep., 530 (Ky., 1893). Specific performance of a contract to sell stock will be decreed where the property of the corporation is real estate—a brewery—and the real transaction is a sale of the entire property. Megibben's Adm'rs v. Perin, 49 Fed. Rep., 183 (1892).

¹ England v. Dearborn, 141 Mass., 590 (1886). Such a stockholder cannot mortgage the corporate property.

² Newton Mfg. Co. v. White, 42 Ga., 148 (1871). See, also, Sharp v. Dawes, 46 L. J. (Q. B.), 104 (1876); Button v. Hoffman, 61 Wis., 20 (1884); Swift v. Smith (Md., 1886), 6 East. Rep., 574; England v. Dearborn, 141 Mass., 509 (1886); Hopkins v. Roseclare Lead Co., 72 Ill., 383 (1874); Bellona Company's Case, 3 Bland (Md.), 442, 446 (1831); Farmers', etc., T. Co. v. Chicago, etc., R'y, 39 Fed. Rep., 143 (1889). The rule is the same where two persons buy all the stock. Russell v. McLellan, 14 Pick., 63 (1833). The corporation still subsists, and the two purchasers do not become partners, or joint tenants, or tenants in common of the corporate property. Cf. Commonwealth v. Cullen, 13 Pa. St., 133 (1850); § 663a.

³ Morelock v. Westminster Water Co., 4 Atl. Rep., 404 (Md., 1886); Mays v. Foster, 10 Pac. Rep., 17 (Oreg., 1886); Rice v. Peninsular Club, 52 Mich., 87 (1883); 4 N. Y. Supp., 836.

⁴Stoddert v. Port Tobacco Parish, 2 Gill & J., 227 (1830), where a religious corporation employed a member of its vestry to make sale of pews; Spear v. Ladd, 11 Mass., 94 (1814), where the president of a bank was appointed its agent to indorse a note; Northampton Bank v. Pepoon, 11 Mass., 288 (1814); Bank Commissioners v. Bank of Brest, Harring. Ch., 106 (1840).

⁵ See §§ 6, 663a, also notes supra. Where a railroad company causes a telegraph company to be incorporated and subscribes to all its stock and appoints all its officers and holds it out as the future owner of a telegraph system which the railroad owns, and then sells that system to some one else, a person contracting with the telegraph company on the faith of the scheme being carried out may hold the railroad company liable on the contract on the principle of a principal being liable on the contracts of its agent. Interstate Tel. Co. v. Balt. & O. T. Co., 51 Fed. Rep., 49 (1892).

ter constitute a majority or a minority, and though these stockholders object in meeting assembled or individually in the courts.¹ However, if the contract is beyond the express and implied powers of the corporation, then any stockholder may have the contract enjoined or set aside. He can do so even though a majority of the stockholders approve the act and ratify it in meeting assembled. He may resort to the courts.²

§ 710. The expulsion of stockholders.— The law forbids the directors or stockholders of a corporation having a capital stock from depriving him of his rights as a stockholder. He certainly cannot be deprived of his right to dividends equally with other stockholders.³ He cannot be deprived of his right to vote.⁴ And it is clear that his various rights as a stockholder cannot be taken from him by any or all of the other stockholders. In this respect a corporation having a capital stock is clearly different from a corporation formed for religious, social, charitable and other similar purposes. The former is for purposes of gain, and the property which is represented by stock cannot be taken from a stockholder by expelling him from the corporation.⁵

§ 711. Stockholders cannot change the directors except at elections.—The term of office of directors is usually fixed by the charter of the corporation or the statutes applying to it. Such being the case, a director having been elected is entitled to hold his position until the expiration of his term of office. He cannot be turned out either

¹ Beveridge v. New York Elevated R'y Co., 112 N. Y., 1 (1889); Flagg v. Metropolitan, etc., R'y Co., 20 Blatch., 142 (1881); People v. Metropolitan R'y Co., 26 Hun, 82 (1881); Nashua, etc., R. R. Co. v. Boston, etc., R. R. Co., 27 Fed. Rep., 821 (1886). Contra, Metropolitan R'y Co. v. Manhattan R'y Co., 15 Am. & Eng. R'y Cas., 1 (N. Y. Com. Pl., 1884). Cf. Harkness v. Manhattan R'v Co., 54 N. Y. Sup. Ct., 174 (1886); Cass v. Manchester, etc., Co., 9 Fed. Rep., 649 (1881); also § 712, infra. The result is that directors are never obliged to consult the stockholders in meeting assembled, nor as a majority, as regards corporate contracts. But the directors must consider that any stockholder may object to ultra vires acts. Thus, stockholders cannot control the direction of the directors when the latter direct an assignment to be made for the benefit of creditors. So held though the directors

were to go out of office in four days. Hutchinson v. Green, 1 S. W. Rep., 863 (Mo., 1886). An extension of a railway cannot be enjoined merely because a majority of stockholders oppose it. Ultra vires must be alleged. Moses v. Tompkins, 4 S. Rep., 763 (Ala., 1888); 21 Pac. Rep., 373.

² Part IV of this work discusses this subject. As regards the relation and rights of stockholders towards suits and compromises of suits by or against the corporation, see § 750, infra.

3 See § 542, supra.

4 See § 618, supra.

⁵ The right to forfeit stock for non-payment of calls may possibly be called an "expulsion," but is a misuse of that term. See ch. VIII, supra. Brokers' associations frequently have by-laws authorizing the expulsion of members. Concerning expulsion in general, see § 700b, supra.

by the stockholders or the directors, or by a court. Sometimes, however, the charter, statutes or by-laws authorize and empower the stockholders to remove directors at any time. And where the stockholders have power by charter or statute to remove directors for cause, the exercise of their discretion therein will not be reviewed in equity. So, likewise, where such a power is given to the stockholders, a court of chancery will not enjoin the holding of a meeting called by the stockholders to consider, among other matters, the removal of the directors. The president of the corporation, duly elected by the board of directors, does not hold his position at the pleasure of the board.

§ 712. Directors — Their power as a board and as individuals to contract for the corporation.— All contracts of a corporation are to be made by or under the direction of its board of directors. The board of directors make corporate contracts by a regular vote of the board; or by authorizing an agent to make them; or by allowing an agent to assume and exercise that power; or by accepting a contract or its benefits after it has been made by an unauthorized agent. But in all cases the board of directors and not the stockholders, nor the president, secretary, treasurer or other agent, is

¹ Imperial, etc., Hotel Co. v. Hampson, L. R., 23 Ch. D., 1 (1882); Nathan v. Tompkins, 82 Ala., 437 (1886), holding, also, that an election is wholly void where part of those elected are to fill the place of officers illegally removed, there being no particular persons designated to fill the legal vacancies. See, also, Berry v. Cross, 3 Sand. Ch., 1 (1845); Gorman v. Guardian Sav. Bank, 4 Mo. App., 180 (1877). Cf. dicta in State of Ohio v. Brice, 7 Ohio (pt. 2d), 82 (1836); Adamantine Brick Co. v. Woodruff, 4 MacArthur, 318; Burr v. McDonald, 3 Gratt., 206 (1846); Bayless v. Orme, Freeman's Ch. (Miss.), 161 (1841). A director, however, may resign, and in such a case the corporation may accept the resignation. Cloutman v. Pike, 7 N. H., 209 (1834), a municipal corporation case. It has not yet been decided whether, when there is no such express power, there is an implied power in the shareholders of a company to remove a director from his office by a resolution duly passed at a meeting properly convened for that purpose, but the better opinion seems to

be that there is where the term of office is not fixed. See Brown v. La Trinidad, 37 Cb. D., 1; Isle of Wight R'y Co. v. Tahourdin, 25 Ch. D., 320.

² Johnston v. Jones, 23 N. J. Eq., 216 (1872). See, also, §§ 620, 746.

³ Such is the law in Ohio, West Virginia and many other states. See Part VII, infra. Snch, also, is the law applicable to national banks. See § 5136, U. S. R. S.; also, Taylor v. Hutton, 43 Barb., 195 (1864). The fact that a secretary's salary is annual does not prevent the company from discharging him at any time, where the by-laws provide for removal at any time. Douglass v. Merchants' Ins. Co., 118 N. Y., 484 (1890). The president may remove the teller. Harrington v. First Nat'l Bank, Thompson's N. B. Cases, 760 (1873).

⁴ Inderwick v. Snell, 2 Mac. & G., 216, (1850).

⁵ Isle of Wight R'y Co. v. Tahourdin, L. R., 25 Chan. Div., 320 (1883).

⁶ Archer v. Whiting, 7 S. Rep., 53 (Ala., 1889).

the original and supreme power in corporations to make corporate contracts. The stockholders, indeed, have very few functions.1 The board of directors have the widest of powers. All of the various acts and contracts which a corporation may enter into 2 are entered into by and through the board of directors. The board of directors make or authorize the making of the notes, bills, mortgages, sales, deeds, liens and contracts generally of the corporation. They appoint the agents, direct the business and govern the policy and plans of the corporation. They institute, prosecute, compromise or appeal suits at law and in equity which the corporation brings or has brought against it.3 But there are limitations on their powers. If the board of directors attempt to do an act or make a contract which the corporate charter does not give the corporation the power to do or enter into, then any stockholder may enjoin that act or contract. Moreover, the directors can contract and act only as a board, duly notified and assembled. The members of the board cannot agree separately and outside of the meeting and thereby bind the corporation. Nor can a minority of the board meet and bind the board. A majority must be present, and then a majority of that majority binds the corporation.6

A single director has no power to contract for the corporation.

7 See the cases under § 716, infra. where the president even, who is nearly always a director, was held not to have power to contract. A director has no authority to contract. Noblesville, etc., Co. v. Loehr, 24 N. E. Rep., 579 (Ind., 1890); Allemong v. Simmons, 23 N. E. Rep., 768 (Ind., 1890); Goodycar, etc., Co. v. George, etc., Co., 11 S. Rep., 370 (Ala., 1892). See, also, Chicago, etc., R. R. Co. v. James, 22 Wis., 194 (1867); Trundy v. Hartford, etc., Co., 6 Rob. (N. Y.), 312 (1868), where a director employed a broker; New Haven, etc., Co. v. Hayden, 107 Mass., 525, where a director, stockholder and overseer contracted to extend the business; Titus

v. Cairo, etc., R. R. Co., 37 N. J. L. 98 (1874), where a director sold bonds; Lockwood v. Thunder, etc., Co., 42 Mich., 536 (1880); Bramah v. Roberts, 3 Bing, N. C., 963 (1837), where a director accepted a bill; Rice v. Peninsular Club, 52 Mich., 87 (1883), where a director said that a purchase was all right. But in Bradstreet v. Bank of Rutland, 42 Vt., 128 (1869), it was held that an employee who was employed by three directors might recover. If the corporation is only an intermediary of title, such as payee and indorser, the indorsee may recover against the maker without making strict proof as to the authority of the directors to indorse. Smith v. Johnson, 3 H. & N., 222 (1858). He is not an agent to discount paper. Washington Bank v. Lewis, 39 Mass., 24 (1839). Nor to agree to give extra pay. Stoystown, etc., Co. v. Craver, 45 Pa. St., 386 (1863); Lindley on Partnership, p. 244 (Callaghan & Co., 1881); 2 N. Y. City Ct. Rep., 269.

¹ See §§ 708, 711, supra.

²See ch. XLI, and in fact most of the preceding chapters of this book.

³ See § 750, infra.

⁴See ch. XL. As to ratification of such acts by the stockholders, see ch. XLIV, *infra*.

⁵ See § 713a, infra.

⁶ Id.

It is perfectly legal, however, for a board of directors to delegate to an agent the power to make a contract, and this agent may, of course, be a director as well as a third person. The board of directors and the corporation are bound also by the contracts of a person who has assumed to contract for the company, and for some time has been allowed by the board to so act and contract. So, also, the board of directors and the corporation are bound by an unauthorized agent's contract when the contract is acquiesced in or the benefits of that contract are accepted; or when the corporation expressly ratifies and confirms the contract.

It is an important principle of law that a corporation is liable on a contract the benefit of which it accepts, even though such contract was not authorized by the board of directors. Thus, a contract signed in the corporate name, but without the authority of the board of directors, may be validated by the corporation acting under it for a year.⁶

¹ Spear v. Ladd, 11 Mass., 94 (1814): Northampton Bank v. Pepoon, 11 Mass., 288 (1814), where a director was authorized to indorse a note; Bank Commissioner v. Bank of Brest, Harring. Cb., 106 (1840); Stevens v. Hill, 29 Me., 133 (1848); Lester v. Webb, 1 Allen, 34 (1861): Abbott v. American H. R. Co., 33 Barb., 578 (1861); United States Bank v. Dana, 6 Pet., 51 (1832); Metropolis Bank v. Jones, 8 Pet., 12, 16 (1834); Percy v. Millaudon, 5 La., 568 (1833); Pennsylvania Bank v. Reed, 1 Watts & S., 101 (1841); Ridgway v. Farmers' Bank, 12 S. & R., 256 (1824); Leavitt v. Yates, 4 Edw. Ch. 134 (1843). As to delegation of discretionary powers, see § 715, infra; 5 N. Y. Supp., 529.

²A director who is authorized to purchase and pay in stock cannot agree to pay in cash. Hayden v. Middlesex, etc., Co., 10 Mass., 403 (1883). Authority to a director to make contract for the sale of land does not authorize him to convey the land. Green v. Hugo, 17 S. W. Rep., 79 (Tex., 1891).

³ See many cases in the following sections. Also Beers v. Phœnix, etc., Co., 14 Barb., 358 (1852), where a director and secretary borrowed money as he was accustomed to do. But unless the custom is known to the directors the

corporation is not bound. Lawrence v. Gebhard, 41 Barb., 575 (1864). And the act must be *intra vires*. Womeu's, etc., Union v. Taylor, 8 Col., 75 (1884).

⁴See many cases in subsequent sections herein. Also New York, etc., Co. v. Phoenix Bank, 3 N. Y., 156 (1849), where loans of the company's money were made by a director.

⁵ See § 706, supra, on promoters' contracts.

⁶ Jourdan v. Long I. R. R., 115 N. Y., 380 (1889). Although a sale of property is not authorized by the board of directors, yet if they accept the pay the sale is valid. Beach v. Miller, 22 N. E. Rep., 464 (Ill., 1889). Where a contractor does extra work upon the assurance of a director that the company will pay for it, and had agreed so to do at a meeting and a majority of the directors knew of the extra work, the company is liable therefor. Tryon v. White, etc., Co., 25 Atl. Rep., 712 (Conn., 1892). Ratification in the case of a land contract may have to be in writing to satisfy the statute of frauds. Salfield v. Sutter, etc., Co., 29 Pac. Rep., 1105 (Cal., 1892). It may he a question of fact for the jury as to whether the company accepted the contract or not. Chapin v. Cambria, etc. Co., 22 Atl. Rep., 1041 (Pa., 1891). Where

An express vote of the directors authorizing a note need not be proved where the corporation whose obligation is in question is engaged in a business the nature of which and the duties in relation to which require or justify the giving of negotiable instruments without the officers being authorized thereto by a special vote to that effect.1

§ 713. De facto directors and officers of a cornoration — The validity of their contracts.— A de facto officer is one who has the reputation of being the officer he assumes to be and yet is not entitled to the office in point of law.2 A de jure officer is one who has the

all the directors and all the stock except such a case that the directors had not one share assent to borrowing money and giving a mortgage, the money being used in the business, the loan and mortgage may be enforced. Witter v. Grand Rapids, etc., Co., 47 N. W. Rep., 729 (Wis., 1891). A board of directors may ratify and thereby validate a mortgage which may have been executed without authority. Allis v. Jones, 45 Fed. Rep., 148 (1891). A corporation is liable for work done, although the officer employing plaintiff had himself contracted to do the work for the corporation. Plaintiff had no notice of this agreement. Salt, etc., Co. v. Mammoth, etc., Co., 23 Pac. Rep., 760 (Utah, 1890). If the corporation admits in its pleading that a contract was entered into, a judgment for plaintiff will not be disturbed although the pleading was not put in evidence. Teall v. Consolidated, etc., Co., 119 N. Y., 654 (1890). A reorganized company may by accepting the benefits of a contract and liability of the old company become liable therefor, although the meeting of the directors authorizing the contract was informal. Baker v. Harpster, 22 Pac. Rep., 415 (Kan., 1889). That the corporation is liable if the work was ordered and done for its benefit, see Grier v. Hazard, 13 N. Y. Supp., 583 (1891). A party accepting the benefit of a contract for a long time cannot repudiate it on the ground that the calls for the meetings of the executive committee and of the stockholders which authorized the contract

authorized the contract. Union Pac. R'y v. Chicago, etc., R'y, 51 Fed. Rep., 309 (1892). Although a mortgage was not authorized, yet where the board of directors subsequently provide for payment of part of it, and do pay part of it. they ratify it. Seal v. Puget Sound, etc., Co., 32 Pac. Rep., 214 (Wash., 1892). It is a ratification of a contract for the corporation to admit its execution in a pleading. Tingley v. Bellingham, etc., Co., 32 Pac. Rep., 737 (Wash., 1893). Ratification by a company of an agent's contract is not binding on the other party, if the ratification rejected one provision of the contract. Crabtree v. St. Paul, etc., Co., 39 Fed. Rep., 746 (1889). Subsequent ratification of the contract in toto is not sufficient unless the other party assents. Id.

¹ Martin v. Niagara, etc., Co., 122 N. Y., 165 (1890).

² "To constitute an officer de facto there must be a color of election or appointment, or an exercise of the functions of the office under such circumstances and for such length of time. without interference, as to justify the presumption of a due election or appointment. The mere exercise of the functions of the office is in itself insufficient." Moses v. Tompkius, 84 Ala., 613 (1888). See, also, King v. Bedford Level, 6 East, 356; Mechanics', etc., Bank v. Burnett, etc., Co., 32 N. J. Eq., 236 (1880). See, also, Hamlin v. Kassafer, 15 Pac. Rep., 778, Jan. 5 (Oreg., 1887). were insufficient; nor can he set up in Contra, Litchfield Iron Co. v. Bennett, 7 lawful right to the office, but who has either been ousted from it or has never actually taken possession of it. An officer is *de facto* when the statute under which he holds office is unconstitutional; or when he was elected but was ineligible, or was irregularly or illegally elected. An officer who holds over by reason of the failure of the corporation to elect his successor is not only a *de facto* but a *de jure* officer.

The contracts of an officer de facto, acting within the sphere of his office, are binding upon the corporation.⁵

Cow., 234 (1827): Clark v. Farmers' Mfg. Co., 15 Wend., 256 (1836); Wait v. Mining Co., 36 Vt., 18 (1863). See, also, Wait on Insolvent Corporations, § 23. Officers are still de facto after judgment of ouster is rendered, but before its entry, even though they acted with knowledge of the decision. Mining Co. v. Anglo. etc., Bank, 104 U.S., 192 (1881); S. C. in U. S. Ct. Ct., 6 Rep., 705. Cf. Walker v. Flemming, 70 N. C., 483 (1874). In McCall v. Byram, etc., Co., 6 Conn., 428 (1827), it is held that a secretary is de facto only where there is at least a pretended election. See Hamlin v. Kassafer, supra. A demand on a corporation for certain property is not proved by showing a demand on those who afterwards became its incorporators and officers. lum v. Purssell, etc., Co., 1 N. Y. Supp., 428 (1888). Directors whose title is contested are not de facto officers as against the old officers holding over. Ellsworth, etc., Co. v. Faunce, 10 Atl. Rep., 250 (Me., 1887).

The following definitions have been given of an officer de facto: "One who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." Parker v. Kett, 1 Lord Raymond, 658; The King v. The Corporation of Bedford Level, 6 East, 368. "One who actually performs the duties of an office, with apparent right and under claim and color of an appointment or election." Brown v. Lunt, 37 Maine, 428. "One who has the color of right or title to the office he exercises; one who has the apparent title of an officer de jure." Brown v. O'Connell, 36

Conn., 451. "On the one hand he is distinguished from a mere usurper of an office, and on the other from an officer 'de jure." Mallett v. Uncle Sam G. & S. M. Co., 1 Nev., 197; Plymouth v. Painter, 17 Conn., 588. In the case of State v. Curtis, 9 Nev., 325 (1874), the court held that in order to make a person an officer de facto he should in some way have been put into the office and have secured such a holding thereof as to be considered in peaceable possession and actually exercising the functions of an officer; an intrusion by force is not sufficient.

¹ Leach v. People, 12 N. E. Rep., 726 (Ill., 1887).

² Dispatch, etc., Co. v. Bellamy, etc., Co., 12 N. H., 205 (1841). Cf. ch. XXXVII.

³ Baird v. Bank of Washington, 11 S. & R., 411 (1824), where a minority of the directors elected him; Delaware, etc., Co. v. Pa., etc., Co., 21 Pa. St., 131 (1853), where the president was not a resident as required hy statute.

⁴ See § 620, supra; Thorington v. Gould, 59 Ala., 461 (1877). Contra. Curling v. Chalklen, 3 M. & S., 496, 510 (1833); Peppin v. Cooper, 2 B. & Ald., 431 (1819); People v. Twaddell, 18 Hun, 427 (1879).

b St. Luke's Church v. Matthews, 4 Dessaus., 578 (1815); Vernon Society v. Hills, 6 Cow., 23 (1826); All Saints Church v. Lovett, 1 Hall, 191 (1828); Lovett v. German Reformed Church, 12 Barb., 67 (1852); Riddle v. Bedford, 7 S. & R., 392 (1821); York County v. Small, 1 Watts & S., 315 (1841); Kingsbury v. Ledyard, 2 id., 41 (1841); Despatch Where corporations allow persons to act publicly as their officers, their right to act in the offices will be presumed in favor of third parties contracting with the corporations through them.¹

Line v. Bellamy Manufacturing Co., 12 N. H., 205 (1841); Smith v. Erb, 4 Gill, 437 (1846); Burr v. McDonald, 3 Gratt., 206, 215 (1846); Granville Charitable Ass'n v. Baldwin, 1 Met., 359 (1840); Green v. Cady, 9 Wend., 414 (1832): Elizabeth City Academy v. Lindsey, 6 Ired., 476 (1846); McCall v. Byram Manuf. Co., 6 Conn., 428 (1827); Lathrop v. Scioto Bank, 8 Dana, 115 (1839); Delaware Canal Co. v. Penn. Coal Co., 21 Pa. St., 131 (1853); St. Mary's Bank v. St. John, 25 Ala., 566 (1854); Baird v. Washington Bank, 11 S. & R., 411 (1824); Ex parte Rogers, 7 Cow., 530, n. (1827); Doremus v. Dutch Reformed Ch., 2 Green, Ch., 332 (1835); Matter of Mohawk & Hudson R. R. Co., 19 Wend., 135 (1838); Matter of Chenango Ins. Co., 19 id., 635 (1838): Blandford v. School District, 2 Cush., 39 (1848): Sampson v. Bowdoinham Co., 36 Me., 78 (1853); Penobscot v. Dunn, 39 Me., 587 (1855); Fairfield Turnpike Co. v. Thorp, 13 Conn., 173 (1839); King v. Bedford Level, 6 East, 356, 368 (1805); Parker v. Kett, 1 Lord Raymond, 658 (1701); Wild v. Passamaquoddy Bank, 3 Mason, 505 (1825); Barrington v. Washington Bank, 14 S. & R., 405 (1826); Minor v. Mechanics' Bank, 1 Pet., 46 (1828); Cahill v. Kalamazoo Ins. Co., 2 Doug., 124 (1845); McGarzell v. Hazelton Coal Co., 4 W. & S., 424 (1842), an action for a penalty, in which evidence was admitted to show that the person representing the company was an officer de faeto; In re County, etc., Co., L. R., 5 Ch., 288 (1870); Mahoney v. East, etc., Co., L. R., 7 H. L., 869 (1875); Partridge v. Badger, 25 Barb., 146 (1857), where the treasurer was only de facto; Doremus v. Dutch, etc., Co., 3 N. J. Eq., 332 (1835), where seceding trustees made a mortgage; Mechanics', etc., Bank v. Burnet, etc., Co., 32 id., 236 (1880), and Charitable Ass'n v. Baldwin, 42 Mass., 359 (1840), where

de facto directors brought suits: Clark v. Town of Easton, 14 N. E. Rep., 794 (Mass., 1888); Cooper v. Curtis, 30 Me., 488 (1849), holding that debtors to the corporation cannot set this up: Susquehanna, etc., Co. v. General Ins. Co., 3 Md., 305 (1852), holding that a president who executes an instrument is presumed to be president; Hackensack, etc., Co. v. De Kay, 36 N. J. Eq., 548 (1883), where de facto directors gave a mortgage. Directors who are elected at a stockholders' meeting not properly called cannot make and enforce calls. Hawbeach, etc., Co. v. Teague, 5 H. & N., 151 (1860). A board of directors who are ineligible cannot revoke an agreement to arbitrate a suit. Richards v. Attleborough Nat'l Bank, 19 N. E. Rep., 353 (Mass., 1889). An exhibition corporation is liable for premiums although the exhibition was conducted by de facto officers, whose title to office was held to be bad a month prior to the exhibition. Richards v. Farmers', etc., Institute, 26 Atl. Rep., 210 (Pa., 1893).

¹United States Bank v. Dandridge, 12 Wheat., 64 (1829); Union Bank v. Ridgely, 1 Harris & G., 392 (1827): Barrington v. Washington Bank, 14 S. & R., 421 (1826); Wild v. Passamaquoddy Bank, 3 Mason, 505 (1825); Perkins v. Washington Ins. Co., 4 Cow., 645 (1825); Troy Turnpike Co. v. M'Chesney, 21 Wend., 296 (1839); Doremus v. Dutch Reformed Church, 2 Green, Ch., 332 (1835); Warren v. Ocean Ins. Co., 16 Me., 439 (1839); Badger v. Cumberland Bank, 26 Me., 428 (1846); Davidson v. Bridgeport, 8 Conn., 472 (1831); Selma & T. R. R. Co. v. Tipton, 5 Ala., 787 (1843); Detroit v. Jackson, 1 Doug., 106 (1843); Farmers' Bank v. Chester, 6 Humph., 458 (1846); Hall v. Carev. 5 Ga., 259 (1848); Conover v. Albany Ins. Co., 1 Comst., 290 (1848); Lohman v. New York & E. R. R. Co., 2 Sandf., 39 (1848); The de facto director cannot avoid a liability by setting up that he was not a de jure director; 1 nor collect a salary as a de facto officer; 2 nor make a note to himself and claim that his office gave him the authority. 3 A de facto officer is ousted by a quo warranto proceeding 4 and not by a suit in equity, 5 nor by an action in trespass, 6 nor a writ of prohibition. 7

§ 713a. Meetings of directors — Place — Notice — Action without meeting — Quorum.— A meeting of the directors of a corporation may be held outside of the state creating the corporation, unless the charter or a statute expressly forbids such a meeting. The acts, proceedings and contracts of a meeting of the board of directors held outside of the state are valid and enforceable.⁸

Beers v. Phœnix Glass Co., 14 Barb., 358 (1852); Alabama Bank v. Comegys, 12 Ala., 772 (1848); Mead v. Keeler, 24 Barb., 20 (1857); Fryeburg Canal Co. v. Frye, 5 Greenl., 38 (1827); Northern Liberties Bank v. Cresson, 12 S. & R., 306 (1824).

¹ Keyser v. McKissam, 2 Rawle (Pa.), 139 (1828), involving a bond; Bank of St. Mary's v. St. John, 25 Ala., 566 (1854); West Bank of Scotland and its Liquidators v. Baird and others, 11 Vol. Cases in Court Sessions (3d series), pp. 96-121.

² Riddle v. Bedford County, 7 S. & R. (Pa.), 386 (1821).

³ Lebanon, etc., Co. v. Adair, 85 Ind., 244 (1882).

⁴See §§ 615, 619, supra. A superintendent elected by de facto directors may be ousted. State v. Curtis, 9 Nev., 325 (1874).

5 Id.

⁶ Kingsbury v. Ledyard, 2 W. & S., 37 (1842).

⁷San Jose, etc., Bank v. Sierra, etc., Co., 63 Cal., 179 (1883).

⁸ Wright v. Bundy, 11 Ind., 398, 404 (1858), where a mortgage of a railway incorporated by Indiana was held valid though executed in Ohio; Bassett v. Monte Christo, etc., 15 Nev., 293, where power to issue bonds and mortgage real property in Nevada was conferred at a meeting of directors held in New York, the corporation having been chartered by Pennsylvania—but here the charter

authorized the corporation to meet and act at any place in the United States: Ohio, etc., R. R. Co. v. McPherson, 35 Mo., 13 (1864), where calls for payment of subscriptions to stock made by a board of directors at meetings held outside of the state creating the corporation were held to be valid: Wood Hydraulic, etc. v. King, 45 Ga., 34 (1872), in which the minutes of a meeting of directors held out of the state chartering their company were held to be evidence of the acts of the board in making contracts in other states. Directors' meeting out of the state may anthorize a mortgage on real estate. Saltmarsh v. Spanlding, 17 N. E. Rep., 316 (Mass., 1888); Richwald v. Com., etc., Co., 106 III., 439 (1883); Galveston R. v. Cowdrey, 11 Wall., 459, 476 (1870), in which it was held that bona fide holders of railroad bonds could not be prejudiced by the fact that the mortgage by which they were secured was executed by virtue of a resolution of directors at a meeting held out of the state which chartered the road; Bellows v. Todd, 39 Iowa, 209, 217 (1874), where a conveyance of real estate was authorized; Armes v. Conant, 36 Vt., 744 (1864); McCall v. Byram Mfg. Co., 6 Conn., 428 (1827); Smith v. Alvord, 63 Barb., 415 (1866). Cf. Ormsby v. Vermont, etc., Co., 56 N. Y., 623 (1874); Aspin wall v. Ohio, etc., R. R. Co., 20 Ind., 492, 497 (1863). Corporations incorporated in New Jersey were formerly required by statute to hold their There has been some controversy and doubt as to the necessity of giving notice of directors' meetings. Many cases apply to directors' meetings the same rules that apply to stockholders' meetings. Other cases hold that less formality and strictness is required in calling a directors' meeting. Probably the former rule is safer, although the latter rule will ultimately prevail.¹

directors' meetings within that state. Hilles v. Parrish, 14 N. J. Eq., 380 (1862). President may call meeting of directors at place other than chief place of business. 'Corbett v. Woodward, 5 Sawyer, 403 (1879). A person who participates in a directors' meeting held out of the state cannot object to it on that ground. Wood v. Boney, 21 Atl. Rep., 574 (N. J., 1891). The directors may hold their meetings outside of the state. Missouri, etc., Co. v. Reinhard, 21 S. W. Rep., 488 (1893).

¹The following decisions will throw light upon this subject: An assignment for the benefit of creditors authorized at a meeting of the board of directors where a part of the directors were absent and had no notice thereof is not valid. Simon v. Sevier, etc., Assoc., 14 S. W. Rep., 1101 (Ark., 1890). Notice of a meeting of directors is presumed. Hardin v. Iowa, etc., Con. Co., 43 N. W. Rep., 543 (Iowa, 1889). Notice of a directors' meeting need not be given to a director who resides abroad, nor to another director who is traveling abroad. The court, however, refused to lay down the broad rule that no notice in any case need be given to directors who are abroad. Halifax, etc., Co. v. Francklyn, 62 L. T. Rep., 563 (1890). Notice of a directors' meeting cannot be waived in advance by a director where the time and purpose of the meeting have not yet been determined upon. Re Portuguese, etc., Mines, 62 L. T. Rep., 88 (1889). A meeting of the directors may be valid although two of them, being absent from the state, did not receive the notice. Chase v. Tuttle, 55 Conn., 455. Where three of seven directors are nonresidents, one having sold his stock, one traveling and one inaccessible for im-

mediate notice, the four remaining directors may hold a meeting and authorize an assignment of the corporate property for the benefit of creditors. The assignment was held to be legal, the traveling director and the inaccessible director having subsequently voted in a meeting for the selection of an assignee. Nat'l Bank of Commerce et al. v. Shumway, 30 Pac. Rep., 411 (Kan., 1892). A mortgage authorized at a directors' meeting at which four were present and the other received no notice is illegal, the giving of notice being possible, and there being no necessity for immediate action. Bank of Little Rock v. McCarthy, 18 S. W. Rep., 759 (Ark., 1892). An assignment for the benefit of creditors made by order of a directors' meeting at which three directors were present and the other two were not notified is invalid, and no bar to a creditor's action to collect unpaid subscriptions. Dosrnbecher v. Columbia, etc., Co., 28 Pac. Rep., 899 (Oreg., 1892). Where a directors' meeting, according to the by-laws, may be called by the president, or if there is no president by two directors, the two directors cannot call it even if the president refuses to do so. The acts of a meeting of the board so called are illegal, a majority of the directors only being present. Smith v. Dorn, 30 Pac. Rep., 1024 (Cal., 1892).

A director is entitled to notice of a meeting to elect a president. Undue haste and failure to give notice will suffice to set the election aside. A subsequent meeting of the board cannot ratify it. The election must be held over again. State v. Smith, 14 Pac. Rep., 814 (Oreg., 1887). Leaving notice of directors' meeting at business place suffices, even though he is known to be ill. Corbett v. Wood-

The law is inclined to tolerate more freedom in the notice, calling and holding of directors' meetings inasmuch as the meetings are more frequent, absences more common, the acts less fundamental, and ratification by acting on the contracts more certain and easy.

ward, 5 Sawyer, 403 (1879). A notice of a school trustees' meeting need not be given to trustees ont of state who could not have attended anyway. Porter v. Robinson, 30 Hun, 209 (1883). Notice by postal card of directors' meeting suffices where it is customary and all received People v. Albany, etc., Coll., 26 Hun, 348 (1882); aff'd, 89 N. Y., 635. See, also, Harding v. Vandewater, 40 Cal., 77 (1870), where a note given for an assessment upon a subscription which was called at a special meeting of the board of trustees of a mining company, of which two of the trustees had no notice, was held to be void; Farwell v. Houghton Copper, etc., 8 Fed. Rep., 66 (1881), in which it was further held that one who had been a shareholder and purchased all the property of the company at a meeting of the directors held without notice, at which he was present and knew that one director was absent, was bound to know that notice to such absent director was necessary, and that he was not a bona fide purchaser without notice: Savings Bank v. Davis, 8 Conn., 192 (1830), holding that a meeting of bank directors was legal for ordinary transaction although the notice did not specify its object, and that mortgaging its real estate to secure a debt was proper at such meeting; Lane v. Brainerd, 30 Conn., 565 (1862), holding that the corporate record of a meeting at which a quorum was present was presumptive proof that all the directors had been duly notified, whether living in the state or elsewhere. So, where the deed of settlement provided for special meetings, the time and place of which were to be fixed by notices countersigned by the secretary, it was held that a meeting of the requisite number of directors without previous agreement to

meet on any fixed day or hour was not a meeting duly convened within the charter provision. Moore v. Hammond, 6 Barn. & C., 456 (1827). To same effect in municipal corporation cases, Smyth v. Darley, 2 H. of L. Cas., 789 (1849); King v. Mayo, etc., 1 Stra., 385.

An adjourned meeting of directors may act to the same extent that the original meeting might have acted. Smith v. Law, 21 N. Y., 296; Wills v. Murray, 4 Exch., 843 (1850). A mortgage authorized by a quornm of directors is valid, though the other directors were not present and were not notified. Bank v. Flour Co., 41 Ohio St., 352 (1885). A by-law enacted by the directors in reference to the calling of a directors' meeting, even if not complied with, does not invalidate the meeting. Samuel v. Holloday, 1 Woolw., 400 (1869). Notice to directors, sent by mail, is sufficient if sent in time so that the director after receiving it would have time to reach the place of meeting. Covert v. Rogers, 38 Mich., 363 (1878). A quorum of directors may bind the corporation, although the other directors are not notified, there being no by-law or charter provision requiring notice. Edgerly v. Emerson, 23 N. H., 555 (1851). Contra, Dispatch, etc., v. Bellamy, etc., Co., 12 N. H., 205 (1841). An assessment made at an irregularlycalled directors' meeting is Thompson v. Williams, 18 Pac. Rep., 153 (Cal., 1888). Two out of three directors cannot authorize a chattel mortgage, the third not having been notified of the meeting. Mortgagee was one of the directors. Doyle v. Mizner, Mich., 332 (1879). A corporate receiver cannot object to a contract on the ground that the directors' meeting authorizing it was not properly convened,

There has also been a question whether directors could vote and act as a board without coming together. Many attempts have been made to sustain a vote of the directors which they had separately and singly agreed to. The law, however, is now clear that

but the receiver may avoid corporate notes issued contrary to express statute. Leavitt v. Yates, 4 Edw. Ch., 134 (1843). Telegraphic notice to two directors out of the state of a meeting to make an assignment is sufficient, though not received by them, a majority having met and ordered the assignment. Chase v. Tuttle, 12 Atl. Rep., 874 (Conn., 1888). Bonds issued under authority of a meeting of two commissioners of a town without notice to a third commissioner are not valid. Pike County v. Rowland, 94 Pa. St., 238 (1880). Notice to all the directors is presumed. Ross v. Crockett, 14 La. Ann., 811 (1859); Chouteau Ins. Co. v. Holmes, 68 Mo., 601 (1878). In Kersev, etc., Co. v. Oil, etc., R. R., 12 Phil., 374 (1877), a lease was declared void because it was authorized only by a meeting of directors of which part of the directors had no notice, and were not present. A special meeting of an executive committee is irregular unless notice is given to each member. Metropolitan, etc., Co. v. Domestic, etc., Co., 14 Atl. Rep., 907 (N. J., 1888). Where a subsequent meeting of directors expressly ratifies the acts of a preceding meeting, any defect in the notice given of the latter meeting is cured. County Court v. Baltimore & O. R. R., 35 Fed. Rep., 161 (1888). A meeting of directors called in the morning for 2 o'clock that day is invalid where one director could not come until 3 o'clock and another received the notice next morning. A quorum was present. Re Hamer, etc., Co., 60 L. T. Rep., 97 (1888). Acts of a board of directors, no notice baving been given to absent directors, may be valid by acquiescence. Reed v. Hoyt, 4 R'y & Corp. L. J., 135 (N. Y., 1888); aff'd, 109 N. Y., 659.

Although an allotment of stock may be illegal by reason of notice not having been given of a directors' meeting. yet the allotment may be confirmed by a subsequent legally called meeting. Re Portuguese, etc., Mines, Limited, 63 L. T. Rep., 423 (1890). A person who commits a trespass on the property of a corporation cannot question the regularity of a contract of such corporation, so far as such regularity turns on the action of a directors' meeting or meeting of an executive committee or assent of three-fifths of the stockholders as required by statute. Farnsworth v. Western, etc., Co., 6 N. Y. Supp., 735 (1889). "The evidence that a day was fixed by common consent is sufficient to show notice to all of the meetings on that day." "It was wholly immaterial in what way the day of the regular meetings was fixed." Atlantic, etc., Ins. Co. v. Sanders, 36 N. H., 252, 269 (1858). In a case where directors were empowered to meet once a week at their office, without notice or summons, but on such day and at such hour as they should from time to time agree upon, it was held that a resolution come to by a quorum assembled without notice was invalid, inasmuch as no day or hour for the meeting of the directors had ever been fixed. Moore v. Hammond, 6 B. & C., 456. If the board meeting be specially convened the general rule is that notice must be served upon every member entitled to be present. Pike County v. Rowland, 94 Pa., 241. Mandamus lies to compel vestrymen to attend a meeting when by reason of dissensions they decline so to do. People v. Winans, 9 N. Y. Supp., 249 (1890). A notice of a special meeting of the trustees of a religious corporation must state the object of the meeting. McClaury v. Hart, 10 N. Y. Supp., 125 (1890). A notice of a special meeting of the board of directors need not specify the business which is to

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such separate assent is void. Directors are elected to meet and confer, and to act after an opportunity for an interchange of ideas. They cannot vote or act in any other manner.¹

be considered. Wills v. Murray, 4 Exch., 843 (1850); also 34 N. E. Rep., 388. Notice to all is necessary, although a quorum is present. Johnston v. Jones, 23 N. J. Eq., 216 (1872), where the meeting was for the purpose of calling a stockholders' meeting. Notice to a director is sufficient if given orally to the director's brother at the director's place of business, where a by-law allowed notice to be given by mail or in other ways. Williams v. German, etc., Ins. Co., 68 Ill., 387 (1873). Concerning the differences between the position of municipal corporation officials and the officers of a private corporation, see Wallace v. Walsh, 125 N. Y., 26, 36 (1890).

1 Separate acquiescence of the directors is not sufficient. Sanderson v. Tinkham, etc., Co., 49 N. W. Rep., 1034 (Iowa. 1891). The directors of a religious corporation cannot act as a board by the senarate assents of the members to the act in question. Columbia Bank v. Gospel, etc., Church, 127 N. Y., 361 (1891). The separate assent of the directors to a mortgage is not good. Duke v. Markham, 10 S. E. Rep., 1017 (N. C., 1890). Directors can act in behalf of the corporation only as a board. Their power is not joint and several, but joint only. Buttrick v. Nashua, etc., R. R., 62 N. H., 413 (1882). Directors cannot act except as a board. North Hudson, etc., Ass'n v. Childs et al., 52 N. W. Rep., 600 (Wis., 1892). Directors can act as such in meeting only. Their individual assent is not sufficient. State v. People's, etc., Assoc., 42 Ohio St., 579 (1885); Junction R. R. v. Reeve, 15 Ind., 236 (1860); Stoystown, etc., Co. v. Craver, 45 Pa. St., 386 (1863). A bargain and sale deed of corporate property, authorized and executed separately and singly by all the directors without a board meeting, is void. Baldwin v. Canfield, 26 Minn., 43 (1879); Gashwiler v. Willis, 33 Cal.,

11 (1867). Separate and single consent of a quorum of directors to the secretary's execution of a bond is void. D'Arcy v. Tamar, etc., R'y, L. R., 2 Ex., 158 (1867). The assent of a mere majority of the board given singly and separately gives no authority to a cashier to do an act outside of his customary duties. Elliot v. Abbot, 12 N. H., 549 (1842). Where a mortgage is executed by order of directors assenting apart and not in a meeting, and is executed by a president and secretary who were elected by the stockholders at a meeting not properly called, the stockholders having no power to elect such officers in any case, the mortgage is not good. In re St. Helen Mill Co., 3 Sawy., 88 (1874). A pledge of corporate securities to raise money is legal where six of the eight directors consented, even though no meeting was held. Hubbard v. Camperwawn Mills, 1 S. E. Rep., 576 (S. C., 1887). Directors may bind the corporation by their separate approval of claims when they have been accustomed so to do. Longmont, etc., Co. v. Coffman, 19 Pac. Rep., 508 (Colo., 1888). The separate assent of the board of trustees of a religious corporation to the execution of a note is void. They must meet. People's Bank v. St. Anthony's, etc., Church, 109 N. Y., 512

Where an officer is sued for malfeasance in office, it is no defense that his acts were authorized by directors who did not meet as a board, but separately and singly assented to acts. Directors bind the corporation by their votes only when they meet as a board. "The law proceeds upon the theory that the directors shall meet and counsel with each other, and that any determination affecting the corporation shall only be arrived at and expressed after a consultation at a meeting of the board at-

Possibly these differences of opinion may be reconciled by the principle of law that the acts of a board of directors may be validated by subsequent acquiescence, even though the board was summoned irregularly or proceeded irregularly.

Directors, of course, cannot act or vote by proxy.1

tended by at least a majority of its members." Nat'l Bank v. Drake, 35 Kan., 576 (1886). A tax which is assessed by two trustees in meeting assembled, who then obtain the separate and private assent of the third trustee, is void. Keeler v. Frost. 22 Barb., 400 (1856); Schumm v. Seymour, 24 N. J. Eq., 143 (1873). The members of a board of highway commissioners cannot authorize or ratify a contract by separate approval. meeting is necessary. Taymouth v. Koehler, 35 Mich., 22 (1876). Majority of a school board cannot act separately and singly, no meeting being held. Harrington v. District, etc., 47 Iowa, 11 (1877). The separate consent of three directors was held not good in Bosanquet v. Shortridge, 4 Ex., 699 (1850). A due-bill running from the corporation to a person and signed by the directors cannot be defeated by showing that the directors did not meet, but signed it separately and singly. Sampson v. Bowdoinham, etc., Corp., 36 Me., 78 (1853); Collins' Claim, L. R., 12 Eq., 246 (1871). The execution of a replevin bond by the president for the corporation is legal, a majority of the directors singly and separately assenting thereto. Bank of Middlebury v. Rutland, etc., R. R., 30 Vt., 159 (1858), where Redfield, Ch. J., said: "The cases are numerous where the consent of a majority of the directors given separately has been held binding upon the company." Probably in these last cases the contract would have been binding even if the directors had not acted at all. See, also, Cammever v. United, etc., Churches, 2 Sand. Ch., 186, 229 (1844), holding that the trustees must meet in order to act, and that their affirmative vote in a stockholders' or general assemblage is not sufficient. Collective action as a board and not in-

dividual action as members of the board is necessary to bind the corporation. Allegheny County Workhouse v. Moore, 95 Pa., 408; Twelfth Street Market v. Jackson, 102 Pa., 273. An insolvent corporation may give a preference by way of mortgage. Where there are but two stockholders and they are directors, and no directors' or stockholders' meeting has been held since the organization meeting, and these two have carried on the business as though it was a partnership concern, a bona fide assignment by these two persons in the name of the corporation to secure preferred creditors of the corporation is good, although no corporate seal was used and no meetings were held authorizing the act. Teitig v. Boesman, 31 Pac. Rep., 371 (Mont., 1892). When all the officers assent to a money obligation being given in the corporate name by the chief officer, the prioress, the educational corporation is bound. Louisville, etc., R. R. v Literary, etc., 15 S. W. Rep., 1065 (Ky., 1891). See, also, Re Great Northern. etc., Co., 62 L. T. Rep., 231 (1890), drawing a distinction where all of the directors assent. Where some of the directors agree privately among themselves to pay for certain things needed by the corporation and the latter uses them, they alone are liable for the price thereof. Lyndon, etc., Co. v. Lyndon, etc., Inst., 22 Atl. Rep., 575 (Me. 1891).

¹ A director cannot vote by proxy. Perry v. Tuscaloosa, etc., Co., 9 S Rep., 217 (Ala., 1891). A director cannot vote or act by proxy. Craig Medicine Co. v Merchants' Bank, 59 Hun, 561 (1891); Re Portuguese, etc., Co., 60 L. T. Rep., 857 (1889); Attorney-General v. Scott, 1 Vesey, 413 (1749), where the election of a minister was committed to trustees. It was held that they could not delegate

A majority of the whole board of directors constitute a quorum. When the meeting is properly called and a majority attend, that majority may proceed to transact business. If a majority are present, a majority of that majority bind the board and the corporation, although they are a minority of the whole board.

to proxies their right to vote. A vote by letter on a particular question would, of course, be the same as voting separately and singly. Although one of the directors illegally voted by proxy and his vote was necessary, yet the court in Dudley v. Kentucky High School, 9 Bush, 576 (1873), refused to set the vote aside, the court saying that only one stockholder objected, and that the majority might ratify.

¹ Wells v. Rahway, etc., Co., 19 N. J. Eq., 402 (1869); Cram v. Bangor, etc., 12 Me., 354 (1835); Cahill v. Kalamazoo, etc., Ins. Co., 2 Doug. (Mich.), 124 (1845); Ex parte Willcocks, 7 Cowen, 402 (1827); People v. Walker, 2 Abb. Pr., 421; Sargent v. Webster, 54 Mass., 497 (1847). If only a minority of the board are present the acts are not valid. Lockwood v. Mechanics' Nat'l Bank. 9 R. I., 308 (1869); Ernest v. Nicholls, 6 H. L. C., 401, 417 (1857); Price v. Grand, etc., R. R., 13 Ind., 58 (1859); Ridley v. Plymouth, etc., Co., 2 Ex., 711 (1848). A director who is present but does not vote is counted in the negative. Commonwealth v. Wickersham, 66 Pa. St., 134 (1870). The majority of a board of directors constitute a quorum, and a majority of the quorum decide the action of the board. Leavitt v. Oxford. etc., Co., 3 Utah, 265 (1883). A majority of a quorum of directors bind the corporation. Buell v. Buckingham, 16 Iowa, 284 (1864). Where the charter says five shall constitute a quorum of directors, a mortgage executed under the authority of a directors' meeting when only four are present is void. Holcomb v. Managers, etc., Bridge Co., 9 N. J. Eq., 457 (1853). Quorum of directors are presumed to have been pres-Sargent v. Webster, 54 Mass., 497 (1847). Majority of trustees are neces-

sary to constitute a quorum. State v. Porter, 14 N. E. Rep., 874 (Ill., 1888). A by-law cannot authorize less than a majority to act when the charter requires a majority. State v. Curtis, 9 Nev., 325 (1874). A by-law of the corporation authorizing a quorum of five directors, with the president, to transact ordinary business is valid, though there are twenty-three directors. Hoyt v. Thompson, 19 N. Y., 207 (1859). Where by resolution of the board four constitute a quorum, an act at a board of three is not binding. Ducarry v. Gill, 4 C. & P., 121 (1830). Where there are eight vestrymen and the statute requires five to constitute a quorum, four cannot act, although there are three vacancies in the board. Moore v. Rector, etc., 4 Abb. N. C., 51 (1873). When the presence of the president is by law necessary to the meeting of an executive committee, a meeting without him cannot bind the corporation. Corn Ex. Bank v. Cumberland Coal Co., 1 Bosw., 436 (1857).

Where two out of six directors have been accustomed to act as a quorum a forfeithre of stock by two is legal. Lyster's Case, L. R., 4 Eq., 233 (1867). The acts of less than a quorum are valid if they are subsequently ratified by a quorum. Austin's Case, 24 L. T. Rep. (N. S.), 932 (1871). A lease taken by a meeting of board of directors at which no quorum was present is ratified by acquiescence of two boards elected in subsequent years, with knowledge and no objection. Oregon R'y Co. v. Oregon R'y & Nav. Co., 28 Fed. Rep., 505 (1886). "Where there is a definite body in a corporation a majority of that definite body must not only exist at the time when any act is to be do ie by them, but a majority of that body must attend the The question of whether the directors may delegate their authority to an executive committee has given rise to much controversy.

assembly where such act is to be done." Rex v. Miller, 6 T. R., 268, per Lord Kenyon. It is held, in Faure, etc., Co. v. Phillapart, 58 L. T. Rep., 525 (1888), that where the board of directors was to consist of from three to seven, but the quorum to consist of two, and where by resignation the whole board is reduced to two, these two cannot act; nor can they elect one or more to fill the vacancies. The quorum can act only when the board consists of the requisite number. This objection, however, caunot be raised by one who takes part as director. Where by charter the board of directors is to be from five to seven, and three may act, three cannot act when there are but four directors. The act is not binding on the corporation. Kirk v. Bell, 16 Q. B., 290 (1851). See, also, Bottomley's Case, L. R., 16 Ch. D., 681 (1880). A company whose directors are to be twelve may act, although by resignation or death the number is less than Thames, etc., R'v v. Rose, 4 Man. & G., 552 (1842). Where a majority of directors may fill vacancies, and of seven directors only two remain, they cannot fill the vacancies. Moses v. Tompkins, 4 S. Rep., 763 (Ala., 1888). A custom is legal which allows three to constitute a quorum of a board of nine directors. In re Regents', etc., Co., W. N., 1867, p. 79 (1867). An allotment of shares by a board of two when the statute requires three is void. Subscription not collectible. Ex parte Ross, 59 L. T. Rep., 291 (1888). Where the charter provided that two directors might act, although vacancies existed in the board, it is immaterial that the number of directors is less than the minimum charter number. In re Scottish, etc., Co., L. R., 23 Ch. D., 413 (1883). Where the charter makes a majority of directors a quorum, a minority cannot fill a vacancy in the board. State v. Curtis, 9 Nev., 325 (1874). An attaching cred-

itor of a corporation cannot claim that a certain vote of the directors to pay another debt was void because there were less directors than the charter required. Castle v. Lewis, 78 N. Y., 131 (1879). Managing committee of eight cannot act at meeting of six only. Brown v. Andrew, 13 Jur., 938 (1849). A quorum of the directors must be present to act, and this quorum consists of a majority. Craig Medicine Co. v. Merchants' Bank, 59 Hun, 561 (1891). In a municipal corporation if all of the board are present and four vote one way while the other four do not vote at all, the vote prevails. It is a majority of a quorum. State v. Dillon, 25 N. E. Rep., 136 (Ind., 1890). Where the record shows that two of the four directors present voted aye and one nay, and the other director was in the chair, and the motion was declared carried, the law presumes that the chairman voted aye. Rollins v. Shaver, etc., Co., 45 N. W. Rep., 1037 (Iowa, 1890). If all six members of a city council are present, three may pass a resolution, although the other three do not vote. Rushville, etc., Co. v. Rushville, 23 N. E. Rep., 72 (Ind., 1889).

A director who is chosen by the board when less than a quorum is present may be treated as not a director, even though he has met with the board frequently when a majority was present. His remedy is not mandamus. People v. N. Y., etc., Asylum, 7 N. Y. St. Rep., 277 (1887). The president is not entitled to a casting vote, in case of a tie, where he has already voted once. A by-law cannot give him this right. State v. Curtis, 9 Nev., 325 (1874). A meeting of four legally elected and three illegally elected directors of a corporation is not such a meeting as sustains an action for salary by the president who was elected by them. Waterman v. Chicago, etc., R. R., 29 N. E. Rep., 689 (Ill., 1892). The confirmation by the board of directors of

Such a delegation of authority has become very common, and will be sustained by the courts. This question is discussed elsewhere.

Although there are less stockholders and less directors than the statute or charter requires, yet the acts of these are sufficient to sustain obligations incurred by the corporation with third persons.²

§ 714. Minute-book of directors' meetings and other books of the corporation as evidence of acts and contracts of the corporation and authorization of agents.— The minute-book of the proceedings of the directors' meetings is the proper evidence to prove a corporate contract or the authority of a corporate agent to act or contract for it.³

resolutions passed by a meeting not containing a quorum relates back and is as if the resolutions were regularly passed in the first place. Re Portuguese, etc., Mines, 62 L. T. Rep., 179 (1889). Two directors cannot transact business when there are four directors. Re Portuguese, etc., Co., 60 L. T. Rep., 857 (1889). A bylaw may make five a quorum out of twenty-three directors where the statute is silent on the subject. Hoyt v. Sheldon, 3 Bosw., 267 (1858). In an action by an insurance company to collect an assessment, it is no defense that losses were allowed at meetings of the directors where no quorum was present. Atlantic, etc., Ins. Co. v. Sanders, 36 N. H., 252, 269 (1858). A majority of the quorum may decide a question and a plurality may elect any officer, unless otherwise provided by charter or by-laws or by law. Ex parte Wilcox, 7 Cowen, 410; Cooley's Const. Lim. (4th ed.), *141; Oldknow v. Wainwright, 2 Burr., 1017; Booker v. Young, 12 Gratt., 303. Where twelve are present, and one candidate receives six votes, another four, and another one, and one blank, there is no election. People v. Conklin, 7 Hun, 188 (1876).

¹ See § 715, infra.

Welch v. Importers', etc., Bank, 122
 N. Y., 177 (1890).

³ Where the appointment of an agent is by resolution of the directors or iu any other manner requiring a record of the matter, the entry upon the minutes or books of the corporation may be in-

troduced in evidence of the appointment. Buncombe Turnpike Co. v. Mc-Carson, 1 Dev. & B., 306 (1835); Owings v. Speed, 5 Wheat., 420, 424 (1820); Thaver v. Middlesex Ins. Co., 10 Pick., 326 (1830); Narragansett Bank v. Atlantic Silk Co., 3 Met., 282 (1841); Clark v. Farmers' Mfg. Co., 15 Wend., 256 (1836); Methodist Chapel v. Herrick, 25 Me., 354 (1845); Haven v. New Hampshire Asylum, 13 N. H., 532 (1843), A. contract duly accepted and agreed to in a directors' meeting and entered on the minutes, which are duly signed, is a contract in writing. Texas, etc., R'y v. Gentry, 8 S. W. Rep., 98 (Texas, 1888). An entry on the corporate minutes of a resolution to form a corporate contract is sufficient on notice of the same to the other party, and suffices to form the coutract. It satisfies the statute of frauds. Argus Co. v. Mayor, etc., 55 N. Y., 495 (1874). An entry on the directors' minute-book, duly signed, is sufficient to prevent a contract being void by the statute of frauds. Jones v. Victoria, etc., Co., L. R., 2 Q. B. D., 314 (1877). Directors' minutes are evidence of a contract, though written up after the meeting. Wells v. Rahway, etc., Co., 19 N. J. Eq., 402 (1869). Person purchasing mortgage from savings bank through its treasurer and secretary may rely upon a copy of a resolution passed by the trustees authorizing such sale, and duly signed by the secretary. So though the secretary had intentionally made the copy different from the orig. A corporation may enter into a written contract under seal without a formal vote or written entry of a vote by the directors. Where the directors are present, and all assent to the execution of the contract, this is sufficient.

Whiting v. Wellington, 10 Fed. Rep., 810 (1882). In a suit by an emplovee of a corporation for pay for services, the defendants' books, properly kept by its proper officers, are admissible in evidence to prove payments to plaintiff on account of services. Gunther v. James, etc., Co., 43 N. W. Rep., 600 (Mich., 1889). A resolution of the board of directors authorizing the assignment for the benefit of creditors is sufficient. Tripp v. Northwestern, etc., Bank, 48 N. W. Rep., 4 (Minn., 1891). The minutes of directors' meetings as they appear in a corporate book will not be excluded as evidence merely because the secretary swears that they were written up several years after the meetings and were made partially from the recollections of the president. Mc-Illienny v. Binz, 13 S. W. Rep., 655 (Tex., 1890).

¹Zihlman v. Cumberland Glass Co., 22 Atl. Rep., 271 (Md., 1891). "The entry of a resolution in a minute is not essential to the validity of the resolution. which is proved aliunde." Re Great Northern, etc., Co., 62 L. T. Rep., 231 (1890). Although a resolution is not inserted in the minutes of the meeting, it may be proved by other evidence. So held as to a resolution authorizing the secretary to borrow money. Bank of Yolo v. Weaver, 31 Pac. Rep., 160 (Cal., 1892). "Parol evidence is admissible to prove the action of the board of directors or stockholders where the record fails to state it." Allis v. Jones, 45 Fed. Rep., 148 (1891). "Where a corporation consists of a small number of persous, like a partnership, they may transact all their business by conversation, without formal votes; and it would be a violation of the plainest principles of justice to hold those who deal with them to prove all their acts by written votes,

which they do not keep or do not produce." Melledge v. Boston, etc., Co., 59 Mass., 158, 179 (1849). Parol evidence may be given to prove a vote of a salary to an officer where the secretary is dead and the minute book does not contain a record of the vote. Pickett v. Abnev. 10 S. W. Rep., 859 (Tex., 1892). A vote of the directors employing a person is not a contract. It must be known to and accepted by the person employed. It may be shown by parol that the contract was to be binding only in case certain negotiations were carried out. A statement by the treasurer, showing the liabilities and making no mention of his salary, is admissible as evidence. Sears v. Kings, etc., R. R., 25 N. E. Rep., 98 (Mass., 1890). See, also, on this subject, United States Bank v. Dandridge, 12 Wheat. 64, 95 (1827); Union Bank v. Ridgly, 1 Har. & G., 324, 425 (1827); St. Mary's Church v. Cagger, 6 Barb., 576 (1849); Maxwell v. Dulwich College, 1 Fonbl. Eq., 296 (1834); Magill v. Kaufman, 4 S. & R., 317 (1818); Brady v. Brooklyn, 1 Barb., 584 (1847); Essex Turnpike, etc., v. Collins, 8 Mass., 292, 298 (1811); Marshall v. Queensborough, 1 Sim. & S., 520 (1823); Elysville Mfg, Co. v. Okisko Co., 1 Md. Ch., 392 (1849); Garvey v. Colcock, 1 Nott & McC., 231. (1815); Bates v. Bank of Alabama, 2 Ala., 452 (1841). Corporate secretary's letters to vendor are admissible as evidence. Scott v. Middleton, etc., R. R. Co., 86 N. Y., 200 (1881). Authority to agent given by board of directors may be proved by oral evidence, there being no record of the same in the corporate books. There is no law requiring a board of directors to keep a record of their proceedings. Morrill v. C. T., etc., Co., 32 Hun, 543 (1884). Contra, Andover, etc., Turnpike Co. v. Hay, 7 Mass., 102, 107 (1810); Garvey v. ColThe question of whether the books are evidence against officers, and whether the officers are conclusively presumed to have notice of all that is contained in the corporate books, is considered elsewhere. The books, of course, are not admissible as evidence against strangers dealing with the corporation.

Proof of corporate resolutions or votes, and of votes of the directors, is made by producing the original minutes or record-book of the corporation. But where the record-book is lost, or no record was ever made, secondary evidence may be resorted to.³

cock, 1 Nott & McC., 231 (1815); Peek v. Detroit, etc., Works, 29 Mich., 313 (1874); but see Taymouth v. Koehler, 35 Mich., 22 (1876). Acts of directors need not be formally entered on corporate minutes. Nashua, etc., R. R. Co. v. Boston, etc., R. R. Co., 27 Fed. Rep., 821 (1886); Morrill v. Segar, etc., Co., 32 Hun, 543 (1884); Moss v. Averell, 10 N. Y., 449 (1853). Parol evidence may show that corporate records have beeu burned. Baptist House v. Webb, 66 Me., 398 (1877). Or lost. Wallace v. First Parish, etc., 109 Mass., 263 (1872); Prothro v. Meriden, etc., 2 La. Ann., 939 (1847). May prove by parol that the board of directors authorized an agent to draw a bill of exchange. No corporate seal necessary, nor record evidence. Preston v. Missouri, etc., Co., 51 Mo., 43 (1872). Directors' votes may be proved by parol when they were not recorded. Edgerly v. Emerson, 23 N. H., 555 (1851); Wait on Insolvent Corporations, § 529. It may be for the jury to say whether a subsequent meeting changed the minutes. Delano v. Trustees, etc., 138 Mass., 63 (1884). The company is not bound by fraudulent insertions, at least where strangers have not relied thereon. Holden v. Hoyt, 134 Mass., 181 (1883).

¹ See § 727.

2 Id.

³ Secondary evidence of the records is not admissible unless the officers are first examined and the originals are not to be found. Mullanphy Bank v. Schott, 26 N. E. Rep., 640 (Ill., 1891). Entries in the corporate books should be proved by the books themselves, and not by the

clerk, unless an excuse is given for their non-productiou. National Bank v. Navassa, etc., Co., 56 Hun, 136 (1890). Where the original minutes have been destroyed, the minutes as they have been copied into the minute-book are admissible. Brower v. East. etc., Co., 10 S. E. Rep., 629 (Ga., 1890). The books of the company are the best evidence, and not the testimony of officers as to what they had seen on the books. Dial v. Valley, etc., Assoc., 8 S. E. Rep., 27 (S. C., 1888). A copy of a resolution of the directors of au alien corporation is not evidence until proof of a reasonable effort to obtain the original is given. Bowick v. Miller, 26 Pac. Rep., 861 (Oreg., 1891). Sworn copies taken from corporate books are incompetent unless evidence is given of the loss of the book itself. Latourette v. Clark, 51 N. Y., 639 (1872). Copy of directors' resolution is evidence, not when merely certified to by the secretary, but when sworn to by him. Hallowell, etc., Bank v. Hamlin, 14 Mass., 178 (1817). Entries need not be proven by the clerk who made the entries. First Nat'l Bank v. Tisdale, 84 N. Y., 655 (1881). Books of board of directors, in which their proceedings are recorded, proved by proving handwriting of the clerk and president, are competent evidence to prove the facts therein recorded. Owings v. Speed, 5 Wheat., 420 (1820). Acts and resolutions of directors, if not recorded, may be proved by parol. Langsdale v. Bonton, 12 Ind., 467 (1859); Bay, etc., Ass'n v. Williams, 50 Cal., 353 (1875). Minutes not signed by the chairman are A resolution adopted at a stockholders' meeting is valid, although only a pencil memorandum was made of it and no formal record made until long afterwards. The proceedings may be proved by parol.¹

§ 715. Executive committee.— There is some doubt as to whether the powers of a board of directors may be delegated to an executive committee. The right of the board of directors to delegate to agents the transaction of the ordinary and routine business of the corporation is unquestioned, and indeed is absolutely necessary.² But in matters involving discretion there are decisions

not evidence of a call: nor is a subsequent ratification of those minutes. Cornwall, etc., Co. v. Bennett, 5 H. & N., 423 (1860). After notice to the corporation to produce its records is given, secondary evidence may be introduced. Thayer v. Middlesex, etc., Co., 27 Mass., 325 (1830); Elems v. Ogle, 15 Jur., 180 (1850); Lohman v. N. Y., etc., R. R. Co., 2 Sand., 39, bolding that the failure to produce may send the question to the To same effect, Narragansett Bank v. Atlantic, etc., Co., 44 Mass., 282. The presumption is that a suit in the corporate name was authorized by it. Bangor, etc., R. R. Co. v. Smith, 47 Me., 34 (1859). In proving employment, notice to produce must be given. Haven v. N. H. Asylum, 13 N. H., 532 (1843). So, also, in proving agency. Clark v. Farmers', etc., Co., 15 Wend., 256 (1836); Montgomery R. R. Co. v. Hurst, 9 Ala., 513 (1846). As to proving subscription to stock, see ch. IV, supra. Parol evidence cannot explain the minutes. Gould v. Norfolk, etc., Co., 63 Mass., 338 (1852). The rough minutes are evidence if not subsequently written out. Waters v. Gilbert, 56 Mass., 27 (1848). It may be shown that the minutes are incorrect. Van Hook v. Somerville, etc., Co., 5 N. J. Eq., 137, 169 (1845). If on production of books no resolution is found, proof of acts, etc., may be given. Boston, etc., Co. v. Barton, 59 Mass., 158, 179 (1849). Proof that the book is a corporate record is made by the person having custody of the book. Smith v. Natchez, etc., Co., 2 Miss., 479, 492 (1837). Must

prove that it is a corporate book, kept as such, and by the proper officer. Turnpike Co. v. McKean, 10 Johns., 154 (1813); Whitman v. Granite Church, 24 Me., 236 (1844). Proof may be by the secretary. Stebbins v. Murrill, 64 Mass., 27 (1852). The book-keeper may prove his entries. Union Bank v. Knapp, 20 Mass., 96 (1825). Or if he is dead, his hand writing may be proved. Id.; also Chenango, etc., Co. v. Lewis, 63 Barb., 111 (1872). Where a corporation is disproving agency it is held to strict proof. Its records are inadmissible unless proof is given that they were kept by the proper officer, and unless he testifies to them. Union, etc., Co. v. Rock, etc., Bank, 2 Colo., 565 (1875). See Gafford v. American, etc., Co., 42 N. W. Rep., 550 (Iowa, 1889). For a very full note on the admissibility of corporate books as evidence, see 23 Cent. L. J., 468-473. An examination before trial, to ascertain whether the defendant corporation authorized a person to make a contract for it, was granted in Bloom v. Pond's, etc., Co., 18 N. Y. Supp., 179 (1891).

¹ Handley v. Stutz, 139 U. S., 417 (1891). The records of the stockholders' meetings may be used to show the purpose of a stockholder's resolution. Wiley v. Inhabitants, etc., 23 N. E. Rep., 311 (Mass., 1890).

² Directors may authorize two of their number to execute corporate notes to a person. Leavitt v. Oxford, etc., Co., 3 Utah, 265 (1883). Or appoint an agent to execute a deed. Arms v. Conant, 36 Vt., 744 (1864). Directors having power to the effect that the directors cannot delegate that discretion.¹ The clear weight of authority, however, holds that the powers of a board of directors may be delegated to an executive committee of that board and the acts and contracts of such a committee may be made binding on the corporation.²

to fix the rates of their railroad may delegate that power to ageuts. Manchester, etc., R. R. v. Fisk, 33 N. H., 297 (1856). See, also, many cases in the following sections of this work. The corporation may authorize its president to sell and assign its negotiable paper. Stevens v. Hill, 29 Me., 133 (1848); Northampton Bank v. Pepoon, 11 Mass., 288 (1814). Nearly all corporate acts are done by means of subordinate agents. Such delegations of authority are necessary. See Manchester R'v v. Fisk. 33 N. H., 297 (1856). Difficulty occurs in defining the line which separates powers that may be delegated from those which may not be. See Lyon v. Jerome. 26 Wend., 485 (1841); Gillis v. Bailey, 21 N. H., 149 (1850). See, also, § 712,

¹ The directors' duty to pass on paper offered for discount cannot be delegated in Louisiana. Percy v. Millaudon, 3 La., 568 (1832). Cf. Morse on Banking, 108. Directors having power to purchase stock cannot delegate that power to a general manager. No ratification arises from the fact that the purchase was entered on the books. Cartuell's Case. L. R., 9 Ch., 691 (1874). Directors cannot delegate to two of their number the question of whether a conditional subscription to shares should be accepted. Howard's Case, L. R., 1 Ch., 561 (1866). Two directors acting as agents to receive calls have no power to waive a forfeiture of stock and receive the calls thereon. Card v. Carr, 1 C. B. (N. S.), 197 (1856). Directors cannot delegate to a committee the power to forfeit and sell stock for non-payment of calls. York, etc., R. R. v. Ritchie, 40 Me., 425 (1855). In Gillis v. Bailey, 21 N. H., 149 (1850), it was held that a board of directors could not delegate to an agent the power to lease various pieces of property owned by the corporation. Power to make assessments cannot be delegated by the directors. Farmers', etc., Ins. Co. v. Chase, 56 N. H., 341 (1876); Silver, etc., Road v. Greene, 7 Rep., 187 (R. I., 1878), where the delegation was to the treasurer. But see Read v. Memphis, etc., Co., 9 Heisk. (Tenn.), 545 (1872), where such delegation to the president was upheld. Cf. Lindley on Partnership, pp. 245–247 (Callaghan & Co., 1881).

² An executive committee may be appointed under the statutory power of the company "to appoint such subordinate officers and agents as the business of the corporation shall require." The executive committee may delegate to one of their number the indorsing of checks, etc. Sheridan, etc., Light Co. v. Chatham Nat'l Bank, 127 N. Y., 517 Where a by-law gives to the directors the "whole charge and management of the property," and the directors are also authorized to have an executive committee to do any business which the board itself might do, and the board authorize the executive committee to exercise all the powers of the board when the board is not in session, a contract of the executive committee. ratified at a meeting of the stockholders, to allow another railroad to have the joint use of the company's bridge and terminals, is legal and binding. Union Pac. R'y v. Chicago, etc., R'y, 51 Fed. Rep., 309 (1892); Id., 47 Fed. Rep. 15. See, also, Hoyt v. Thompson's Executor, 19 N. Y., 207 (1859), where the committee consisted of any five or more directors who attended meetings of which notice was given to all. See, also, Hoyt v. Sheldon, 3 Bosw., 267. The right of a board of directors to delegate its powers Where the board of directors delegates to a committee the power to act for it, due notice of meetings of the executive committee must be given to all of its members; but a majority of the committee suffices to constitute a meeting and proceed to business, and

to an executive committee was raised but not fully passed upon in Metropolitan, etc., Co. v. Domestic, etc., Co., 14 Atl. Rep., 907 (N. J., 1888), where it was remarked that the rigidity of the old rule prohibiting such delegation has been somewhat relaxed. "The managers might, undoubtedly, clothe a committee, in the intervals between the sittings of the board, with all their own authority to conduct the ordinary business of the company." But it seems that this executive committee could not delegate its power to one of their number. Olcott v. Tioga R. R. Co., 27 N. Y., 546, 558 (1863). The by-laws may authorize the directors to delegate their powers to a committee. Harris' Case, L. R., 7 Ch., 587 (1872), where the committee allotted shares. Directors may delegate to a committee power to sell corporate property, and a mortgage given by the committee is valid. Certainly so where the board of directors subsequently accepted the papers counected with it. Burrill v. Nahaut Bank, 43 Mass., 163 (1840). Where the by-laws authorize the directors to transact business through a committee, that committee may consist of one person. In re Tourine Co., L. R., 25 Ch. D., 118 (1883). An employee of a company who sues for services, under a written contract made with the "chairman" and "managing director, may collect; their authority is presumed as agents or executive committee. Totterdell v. Fareham, etc., Co., L. R., 1 C. P., 674 (1866). In New York it is clearly held that the directors of a banking or loan and trust company may appoint au executive committee and authorize it to act for the board of directors, and that the acts of this committee are as binding, valid and effective as though they had been authorized by the board of directors di-

rectly. Palmer v. Yates. 3 Sand. Rep., 137 (1849). Cf. Bank Com'rs v. Bank of Buffalo, 6 Paige, 497 (1837). In the case of Bank of Columbia v. Patterson's Adm'r. 7 Cranch. 299 (1813), the right of the directors to delegate their power to contract to a committee was not ques-Stockholders cannot elect a committee and compel the directors to act with that committee in corporate matters. Boot, etc., Co. v. Dunsmore, 60 N. H., 85 (1880). It is fraudulent for an executive committee to vote large compensation to themselves for services as promoters. Blatchford v. Ross, 54 Barb., 42 (1869). In the case of St. Louis, etc., Assoc. v. Augustin, 2 Mo. App., 123 (1876), a loan committee contracted for the corporation. But where the executive committee can act only when the president is present, action without his presence is void. Corn, etc., Bank v. Cumberland, etc., Co., 1 Bos., 436 (1857). As to committees of municipal corporations, see Dillon on Munic. Corp., §§ 60, Contracts, etc., by an executive committee have often been recognized See Tracy v. Guthrie, etc., as valid. Soc., 47 Iowa, 27 (1877). A stockholder's request to such a committee to bring an action to remedy a corporate wrong is sufficient. Hazard v. Durant, 11 R. I., 196 (1875). The committee's consent to an arbitration may be ratified by the company. Proprietors, etc., v. Frye, 5 Me., 38 (1827). Although a contract is irregularly made by the executive committee of a corporation, there being no notice and no quorum, yet by accepting the benefits of the contract afterwards the company is bound. Metropolitan, etc., Co. v. Domestic, etc., Co., supra. In Curtiss v. Leavitt, 15 N. Y., 1 (1857), a finance committee had authorized the issue of bonds. The charter required a. resolution of the board of directors.

a majority of that majority binds the committee, the directors and the corporation by its vote.1

§ 716. President — His power to contract for the corporation.— The president of a corporation has no power to buy, sell or contract for the corporation, nor to control its property, funds or management.² This is a rule which prevails everywhere, excepting possibly the state of Illinois. Both the decisions and the reasoning of the Illinois courts tend to relax the rule given above.3

The court held that acquiescence cured the defeat. In Taylor v. Agricultural Assoc., 68 Ala., 229 (1880), the executive committee was provided for by charter. A committee authorized to settle with a person cannot also settle with a firm in which he is interested, but the company may ratify. Merchants', etc., Co. v. Rice, 29 N. W. Rep., 784 (Iowa, 1886). The acts of the executive committee may be construed to be subject to the approval of the next meeting of the board of directors. Indianapolis, etc., R. R. v. Hyde, 23 N. E. Rep., 706 (Ind., 1890). An executive committee having the general direction and superintendence of the affairs of the company have no power to issue stock, the whole capital stock being already issued. Ryder v. Bushwick R. R., 134 N. Y., 83 (1892). A Pennsylvania railroad corporation cannot authorize its board of directors to delegate to an executive committee the location of the route. Weidenfeld v. Sugar, etc., R. R., 48 Fed. Rep., 615 (1892). A person sued on a tort cannot raise the objection that the proceedings of an executive committee or board of directors were irregular, or that stockholders did not consent to a contract. Farnsworth v. Western, etc., Co., 6 N. Y. Supp., 735 (1889): 55 N. W. Rep., 418.

¹ Burleigh v. Ford, 61 N. H., 360 (1881); Metropolitan, etc., Co. v. Domestic, etc., Co., supra. Such, also, is the case with municipal corporations. State v. Jersey City, 27 N. J. L., 493 (1859); Junkins v. Union, etc., District, 39 Mei, 220 (1855). The directors may delegate to a committee the power to procure plans and let a contract. A majority of that com-(68)

mittee may act and bind the corporation. A third party is justified in acting on the ostensible authority of the committee. McNeil v. Boston Cham. of Com., 28 N. E. Rep., 245 (Mass., 1891). A committee appointed by the directors cannot act unless all are present, although a majority may govern. Re Liverpool, etc., Ass'n, 62 L. T. Rep., 873 (1890). Where many persons authorize eight to act as a managing committee. they are not liable for debts contracted by a meeting of six of that committee. Brown v. Andrews, 13 Jur., 938 (1849). Power to executive committee of directors "to do all acts necessary for the prosperity "does not authorize purchase of real estate by majority of executive committee. The company is not bound by same majority improving the land. Tracy v. Guthrie, etc., Soc., 47 Iowa, 27 (1877). The minority of the committee certainly cannot act. Trott v. Warren, 11 Me., 227 (1834). The managing committee of an unincorporated association may legally resolve that checks signed by any three of them shall bind all. Maitland's Case, 4 De G., M. & G., 769 (1853). The executive committee cannot delegate their powers to one of their number. Cook v. Ward, L. R., 2 C. P. Div., 225 (1877). See, also, Lyon v. Jerome, 26 Wend., 485 (1841), where canal commissioners delegate their powers to an engineer. One of two supervisors cannot contract. Cooper v. Lampeter, 8 Watts (Pa.), 125 (1839).

² See notes sub.

3 The president and general manager may together bind an insurance company to an agreement that its mortIt is true that the board of directors may expressly authorize the president to contract; or his authority to contract may arise from his having assumed and exercised that power in the past; or the corporation may ratify his contract or accept the benefits of it and thereby be bound. But the general rule is that the president cannot act or contract for the corporation any more than any other one director. This question has frequently been before the courts, and many decisions have been rendered in regard to it.²

gagor may redeem even after foreclosure. Union Mutual, etc., Ins. Co. v. White, 106 Ill., 67 (1883). The president of a railroad company has power to contract for the transportation of railroad iron. Chicago, etc., R. R. Co. v. Coleman, 18 Ill., 297 (1857). A deed of land executed by the president and secretary is valid where all the stockholders join also in the deed. Hull v. Glover. 18 N. E. Rep., 198 (III., 1888). The president of a railroad company may assign notes and mortgages given to it to aid in constructing the road. Irwin v. Bailev. 8 Biss., 523 (Ill. Circuit, 1879). A judgment note of a corporation may be executed by its president and secretary. It is good as a mere note, even though not as a judgment note. Matson v. Alley, 31 N. E. Rep., 419 (Ill., 1892). A duly executed contract of a corporation to give a judgment note is authority to the president to give that note. McDonald v. Chisholm, 23 N. E. Rep., 596 (Ill., 1890). The president has no power to agree that an absolute subscription for stock shall be changed so as to be conditional. Morgan County v. Thomas, 76 Ill., 120 (1875).

1 See notes sub.

2 "In the absence of anything in the act of incorporation bestowing special power upon the president, he has from his mere official station no more control over the corporate property and funds than any other director." Titus v. Cairo, etc., R. R. Co., 37 N. J. L., 98 (1874). The president has no authority to direct the treasurer to refuse to receive payments of subscriptions. Potts v. Wallace, 146 U. S., 689 (1892). The

president has no power to employ an architect to prepare plans, and the company is not liable therefor. Wait v. Nashua, etc., Assoc., 28 Atl. Rep., 53 (N. H., 1891). The fact that a person buying land is president of a company and gives a draft on the company in part payment does not make it a purchase by the company for which it is liable. In re Seymour, 47 N. W. Rep., 321 (Mich., 1890). The president of a literary and biblical institution has nopower to buy lumber for it, and it is not. liable therefor although it has used it. where some of the directors had agreed among themselves to pay for the lumber. Lyndon Mill Co. v. Lyndon, etc., Inst., 22 Atl. Rep., 575 (Vt., 1891). A president of a bank cannot agree that sureties on paper given to the bank will not be held liable. First Nat. Bank v. Bennett, 33 Mich., 520 (1876). "It is not within the authority of the president of a bank, when he discounts paper for the bank, to promise the maker that he need not pay it." (Cases.) First Nat. Bank v. Tisdale, 18 Hun, 151 (1879); aff'd, 84 N. Y., 655. The president cannot borrow money for company unless charter authorizes or board of directors authorize him. Life, etc., Ins. Co. v. Mechanics', etc., Co., 7 Wend., 31 (1831). Although a note is signed by the president, secretary and treasurer of a religious corporation, yet it may be shown that they were not authorized by the board of trustees to sign. People's Bank v. St. Anthony's, etc., Church, 109 N. Y., 512 (1888). The president and cashier cannot agree with an indorser that he will not be held liable.

A large number of the cases are given in the notes below. The question seems to have arisen in many forms, and the great weight of authority holds that a president has no inherent power to represent or contract for the corporation. His duties are confined to

Bank of U. S. v. Dunn, 6 Peters, 51 (1832); Bank of Metropolis v. Jones, 8 Peters, 12 (1834). The president of a bank has no power to release a claim. Olney v. Chadsey, 7 R. I., 224 (1862); Hodges' Ex'r v. First Nat. Bank. 22 Gratt., 51 (1872). President and cashier have no power to execute a mortgage. Leggett v. N. J., etc., Co., 1 N. J. Eq., 541 (1832). Nor has the president alone that power. Corbett v. Woodward, 5 Sawyer, 403 (1879). President of a bank has no power to sell and assign a note held by it. Hallowell, etc., Bank v. Hamlin, 14 Mass., 178 (1817). The president of a national bank cannot bind it by his purchase of bonds and stock for it. First Nat. Bank v. Hoch, 89 Pa. St., 324 (1879). The president of a railroad corporation has no power to let a construction contract. Templin v. Chicago. etc., R. R., 35 N. W. Rep., 634 (Iowa, 1887); Griffith v. Chicago, etc., R. R., 36 N. W. Rep., 901 (Iowa, 1888). The president and a director of a miner's water supply company have no power to purchase land for an extension of the works, but the board of directors may ratify the purchase. Blen v. Bear, etc., Co., 20 Cal., 602 (1862). The president of a ditch company has no power to exchange half of its ditch for half of the ditch of another company. Bliss v. Kaweah, etc., Co., 65 Cal., 502 (1884). A railroad president cannot sell its ties. Walworth, etc., Bank v. Farmers', etc., Trust Co., 14 Wis., 325 (1861). The president cannot execute a note for the company. Bacon v. Miss., etc., Ins. Co., 31 Miss., 116 (1856). The 'president of a railroad company cannot give a chattel mortgage on one of its engines, even though he is also its "business and financial agent." Luse v. Isthmus, etc., R'y Co., 6 Oreg., 125 (1876). If the president of a bank sells its securities he is liable to it for any

loss incurred thereby. First Nat. Bank v. Lucas, 21 Neb., 280 (1887). The president of a bank has no power to compromise a debt due to it from an insolvent firm. Wheat v. Bank of Louisville, 5 S. W. Rep., 305 (Ky., 1887).

The president of a lumber company has no power to employ a general agent in another part of the country. latter can hold the company liable for his salary only by proving that at least a majority of the directors knew thereof and acquiesced, Murray v. Nelson, etc., Co., 9 N. E. Rep., 634 (Mass., 1887). The president of a railroad cannot sell its bonds. Titus v. Cairo, etc., R. R. Co., 37 N. J. L., 98 (1874). The president has no power to sell goods unless he is specially authorized or has made similar sales without objection. Pittsburgh. etc., Co. v. Reese, 12 Atl. Rep., 362 (Pa., 1888). The president of a company cannot agree for it to redeem certain outstanding claims against it - "labor tickets." Stanley v. Sheffield, etc., Co., 4 S. Rep., 34 (Ala., 1888). The president cannot increase the pay allowed to a director by a vote of the directors. Hodges v. Rutland. etc., R. R. Co., 29 Vt., 220 (1857); Bailey v. Buffalo, etc., R. R. Co., 14 Hun, 483 (1878). A president authorized to execute a mortgage cannot insert unusual terms - such as that the principal sum should become due at the option of the bondholder in case of non-payment of interest. Jesup v. City Bank, etc., 14 Wis., 331 (1861). The president and secretary cannot issue drafts in the company's name. Dabney v. Stevens, 40 How. Pr., 341 (1870). Misrepresentations of the president as to property which the company sells are not binding upon it. Crump v. United States Min. Co., 7 Gratt., 352 (1851). The president and cashier cannot even conjointly sell the safe of a bank. Asher v.

presiding and to voting as a director. The fact, however, that he is almost always the corporate officer who is directed to sign the corporate contracts that have been authorized by the board of direct-

Sutton, 31 Kan., 286 (1884). One who is president, treasurer and general manager cannot confess judgment for the company even though be owns all but two shares of the stock. Stokes v. N. J., etc., Co., 46 N. J. L., 237 (1884). Nor give a mortgage. England v. Dearborn. 141 Mass., 590 (1886). Nor give accommodation or renewal notes. McClellan v. Detroit, etc., Works, 56 Mich., 579 (1885). The president of a bank has no power to transfer its paper. Smith v. Lawson, 18 W. Va., 212, 228 (1881). The president of a manufacturing company cannot buy goods for it. Westerfield v. Radde, 7 Dalv. 326 (1877). Cf. Silva v. Metropolitan, etc., Co., 42 N. Y. Super. Ct., 307 (1877). Where a contract to build a railroad is made by contractors with a committee of directors duly authorized to make it, a provision against subletting cannot be waived by the president of the railroad and a director. Western R. R. Co. v. Bayne, 11 Hun, 166 (1877); affirmed, 75 N. Y., 1. A director is liable to his bank on a note given to it by him, although the president, who has purchased stock of the director, cancels the note in payment for the stock and considers himself indebted to the bank for that amount. There was no ratification by the bank. Rhodes v. Webb, 24 Minn., 292 (1877). A bank receiving funds from its president in payment of his debts to it, which funds he had fraudulently obtained from another bank by using his standing as president of the former, is bound to pay over the same to the defrauded bank, where such president had complete control of the former bank. City Nat'l Bank v. Nat'l Park Bank, 32 Hun, 105 (1884).

Brokers employed by the president cannot hold the corporation liable, even though the corporation has had the benefit of their services, the board of directors having no knowledge thereof. Twelfth Street Market Co. v. Jackson. 102 Pa. St., 269 (1883); De Bost v. Albert P. Co., 35 Hun, 386 (1885); Allegheny Co. Workhouse v. Moore, 95 Pa. St., 408 (1880); in the last case the superintendent joined in employing the broker. Not even the president, secretary and treasurer can give a note in the name of a religious corporation. People's Bank v. St. Anthony's, etc. Church, 39 Hun, 498 (1886). A president authorized by resolution of the board of directors to sell bonds cannot loan them: if he does so it is a conversion of the property of the corporation. Second Ave. R. R. Co. v. Mehrback, 46 N. Y. Super. Ct., 267 (1883). The president of an insurance company cannot indorse and transfer notes. Marine Bank, etc., v. Clements, 3 Bosw. Rep., 600 (1858). But in an earlier case it was held that the indorsee in good faith was protected. Caryl v. McElrath, 3 Sandf. Rep., 176 (1849). A bank president has no implied " authority from the bank to agree to pay interest on a particular deposit, there being no evidence of special authority nor of a bank custom to that effect. The president of a corporation has no implied authority to check corporate funds out of bank unless there is an established usage to that effect. Fulton Bank v. N. Y., etc., Canal Co., 4 Paige, 127 The president, secretary and general agent cannot issue the corporate notes. McCullough v. Moss, 5 Denio, 567 (1846). Cf. Moss v. Rossie, etc., Co., 5 Hill, 137 (1843). A railroad president cannot contract to pay a commission to a promoter who induces a contractor to build the road. Risley v. Indianapolis, etc., R. R. Co., 1 Hun, 202 (1874); rev'd on other points, 62 N. Y., 240. The president caunot employ workmen. Mt. Sterling, etc., Co. v. Looney, 1 Metc. (Ky.), 550 (1858). Nor agree to pay a salary. Murray v. Nelson & Co., 9 N. E.

ors has led to an enlargement of his importance as a corporate officer. Hence the rule has arisen in New York that a contract, which apparently is a corporate contract, being duly signed by the

Rep., 634 (Mass., 1887); Wood's Railway Law, pp. 436-439. President may accept a constitutional subscription to stock. Pittsburgh, etc., R. R. Co. v. Stewart, 14 Pa. St. 54 (1861). A president of a bank may bind it by his agreement with an indorser of a note that the maker of a note will not give a mortgage and that the indorser will not be held liable. Cake v. Pottsville Bank, 9 Atl. Rep., 302 (Pa., 1887). Tender of calls on stock may be made to the president in order to avoid forfeiture. Mitchell v. Vt., etc., Co., 67 N. Y., 280 (1876). Where the corporation is merely an intermediary of title to a note, less strict proof is required. Brown v. Donuell, 44 Me., 421 (1860). The company is liable to an architect who has done work at the instance of the president and two direct-Hooker v. Eagle Bank, 30 N. Y., 83 (1864). The president cannot lease Yellow, etc., Co., v. Stevenson, 5 Nev., 224 (1869). A telegram from the president authorizing an agent to contract is insufficient proof of authority. Felton v. McClane, 46 N. Y. Super. Ct., 53 (1880). Where he is authorized to discharge one mortgage, the company is not bound by his mistake in discharging two mortgages. Smith v. Smith, 117 Mass., 72 (1875); 5 S. Rep., 138.

The president of a national bank has no power inherent in his office to execute a note in the name of the bank. Nat'l Bank, etc., v. Atkinson, 55 Fed. Rep., 465 (Kan., 1893). The president cannot be held personally liable for plans which he orders for the corporation, unless want of authority to give the order is shown. Johnson v. Armstrong, 18 S. W. Rep., 594 (Tex., 1892). The president has no power to modify a resolution of the board that certain notes shall be subject to the joint order of himself and the secretary. Trademen's Nat'l Bank v. Manhattan, etc.,

Co., 18 N. Y. Supp., 920 (1892). The president of a national bank has power to take property in payment of a debt and bind the bank to pay off a liep on it. Panhandle, etc., Bank v. Stevenson, 15 S. W. Rep., 23 (Tex., 1890). The president of a national bank has no power to bind it to accept drafts in the future drawn by a railroad company where the party relying thereon knew that the bank directors objected. Stallcup v. Nat'l Bank, 15 N. Y. St. Rep., 39 (1888). The president and managing agent renders his corporation liable for a honus of stock in another corporation which he gives secretly and corruptly to the agent of the latter corporation in order to get a contract for the former corporation. Grand Rapids, etc., Co. v. Cincinnati, etc., Co., 45 Fed. Rep., 671 (1891), holding the former corporation liable for the par value of the stock, inasmuch as it was the original issue of that stock. Where an executor is president of a corporation, no formal demand for payment of a claim by the corporation against the estate need be made. Brown & Bros. v. Brown, 19 Atl. Rep., 236 (Conn., 1889). The president and secretary of a corporation are presumed to have authority to execute a promissory note in the name of the corporation, and the holder of such note will not be affected by the fact that such authority did not exist unless he is shown to have had notice thereof. American, etc., Bank v. Oregon, etc., Co., 55 Fed. Rep., 265 (Ore., 1892). A bank may reclaim money paid by the cashier on overdrafts of the president to pay his private debts, such overdrafts not having been authorized by the board of directors. Dowd v. Stephenson, 10 S. E. Rep., 1101 (N. C., 1890). A corporate deed by the president conveying what he owns personally does not estop him from claiming the property. Capresident, is presumed to be a corporate contract until the want of authority of the president is shown by the corporation.

A person taking a company's note from the president in payment of an individual debt is bound to inquire into the regularity of the issue of the note.²

A president, however, may employ an attorney for the company, and authorize him to prosecute or defend a case.³ And in all cases the president binds the corporation by his acts and contracts when he is expressly authorized to so act or contract,⁴ or when

rothers v. Alexander, 12 S. W. Rep., 4 (Tex., 1889). Where the president of a bank receives money on deposit from himself as attorney and subsequently withdraws it and misappropriates it the hank is liable. Smith v. Anderson, 57 Hun, 72 (1890). An offer of a corporation to sell out in consideration of stock in another corporation, the latter to pay all existing debts, is not enforceable by the former company where the latter company accepted the offer on condition that the debts should not exceed a certain amount. Not even the assent of the president of the former company to the condition is sufficient. Bi-Spool, etc., Co. v. Acme, etc., Co., 26 N. E. Rep., 991 (Mass., 1891).

1 "Where a contract made in the name of a corporation by its president is one the corporation has power to authorize its president to make, or to ratify after it has been made, the burden is upon the corporation of showing that it was not authorized or ratified." Patterson v. Robinson, 116 N. Y., 193 (1889); Chemical National Bank v. Kohner, 85 N. Y., 189; Lee v. Pittsburg Coal & Mining Company, 56 How., 373; aff'd, 75 N. Y., 601. Where a bank and a mill company have the same individual as president, his action as representing the bank in regard to the application of moneys to particular paper due from the mill to the bank is valid and binding on the bank, if fair and reasonable. Patterson v. Robinson, supra. The signature of the president and secretary of a religious corporation does not raise any presumption as to its being the vote of the corporation. Columbia Bank v. Gospel, etc., Church, 127 N. Y., 361 (1891).

² Wilson v. Metropolitan, etc., R'y, 120 N. Y., 145 (1890).

³ American Ins. Co. v. Oakley, 9 Paige, 496 (1842); Mumford v. Hawkins, 5 Denio, 355 (1848); Potter v. N. Y., etc., Asylum, 44 Hun, 367 (1887). He may also employ special counsel. Davis v. Memphis, etc., R'v Co., 22 Fed. Contra, Bright v. Rep., 883 (1883). Metairis, etc., Assoc., 33 La. Ann., 58 (1881). The president may bring a writ of entry to foreclose a mortgage. Trustees of Smith Charities v. Connelly, 31 N. E. Rep., 1058 (Mass., 1892). The president cannot authorize an attorney to accept service where the board of directors were accustomed to vote on the employment of attorneys. Bridgeport Sav. Bank v. Eldredge, 28 Conn., 556 (1859). President and secretary authorized to execute mortgage have no authority to insert provision to pay attorney fee in case of foreclosure. Ratification of the mortgage by the directors without knowledge of such provision is not ratification thereof. Pacific, etc., Mill v. Dayton, etc., R'y Co., 5 Fed. Rep., 852 (1881). The case of Ashuelot, etc., Co. v. Marsh, 55 Mass., 507 (1848), holds that the president cannot cause an action to be commenced. the president is dead the vice-president may employ an attorney. Colman v. West, etc., Co., 25 W. Va., 148 (1884); 5 N. Y. Supp., 648.

⁴ Under express power to have full control of the business the president may purchase materials. Castle v. Belhe has been permitted by the corporation for some time to act and contract for it; 1 or when the company ratifies or accepts the con-

fast, etc., Co., 72 Me., 167 (1881). Under power to adjust and pay losses he may Baker v. Cotter, 45 transfer papers. Me., 236 (1858). Howland v. Meyer, 2 Sand. Rep., 186; 3 N. Y., 290 (1850). where the express power was very general. Express authority, of course, may be given to the president to sell and assign the securities of the corporation. Mitchell v. Deeds, 49 Ill., 416 (1867). Authority to president to borrow includes authority to give ordinary securities. i. e., bonds, notes, acceptances and collaterals. Person dealing with him may rely on it. He is not bound to know that the president's authority has been revoked. Hatch v. Coddington, 95 U.S., 48 (1877). Where the president has, by by-laws, authority to make a contract, and does make one, and it is signed by him as such, though no corporate seal and no resolution are recited, the president may compromise and release the same. Six months' delay by directors in repudiating the compromise after knowledge is a fatal delay. Rolling Mill v. St. Louis, etc., R. R. Co., 120 U. S., 256 (1886). Parol authority to the president suffices to enable him to pay out money. New Orleans Building Co. v. Lawson, 11 La., 34 (1837). Although the president is given power to make a contract, yet the directors may make it, and their action overrules his. East, etc., Co. v. Brown, 7 S. E. Rep., 273 (Ga., 1888). Authority to sell gives authority to contract to sell. Augusta Bank v. Hamblet, 35 Me., 491 (1853). Officers authorized to give a note cannot agree to pay attorney fees. Hardin v. Iowa, etc., Co., 43 N. W. Rep., 543 (Iowa, 1889). Authority of a president to sell or lease gives him power to point out and make representations as to the boundaries. Holmes v. Turner's, etc., Co., 23 N. E. Rep., 305 (Mass., 1890). The president who makes an assignment of the company's assets for the benefit of creditors under a resolution of the board of directors cannot afterwards attack it. In re George, etc., Co., 48 N. W. Rep., 864 (Mich., 1891). Authority of the president to buy property gives authority also to buy on credit. Arapahoe, etc., Co. v. Stevens, 22 Pac. Rep., 823 (Colo., 1889). Under a by-law giving him authority, the president may purchase on credit. Siebe v. Joshua, etc., Works, 25 Pac. Rep., 14 (Cal., 1890).

1 Where the president of a construction company takes entire charge of its business, and is allowed so to do by the directors, the company is bound by notes given in the corporate name by him for the company's business. execution of the paper could not be held to be in excess of the powers given, and it was clearly the duty of the directors to give contrary justructions, if they wished to withdraw the general management from the president; and to disaffirm the action of their agents promptly and at once, if they objected to it." Fitzgerald Can. Co. v. Fitzgerald, 137 U.S., 98, 109 (1890). The president binds the company when he does all the business with the knowledge and consent of the directors. McComb v. Barcelona, etc., Ass'n, 134 N. Y., 598, 608 (1892). Where for eight years the president has been allowed to manage and carry on the whole business of the company and to indorse its name to notes in order to raise money for the business, and the company had no cash capital and no other way of obtaining mouey, it is for the jury to say whether the company is bound by such an indorsement by him. Fifth Nat. Bank v. Navassa, etc., Co., 119 N. Y., 256 (1890). Cf. National Bank v. Navassa, etc., Co., 56 Hun, 136 (1890). Where for many years the president has managed a company, the company's note executed by him binds the company without

tract after it is made, or accepts the benefit of the contract. Having knowingly received the benefit of a contract, made and carried

special authority. Martin v. Niagara, etc., Co., 122 N. Y., 165 (1890). Where the president for several years has run the company, borrowed money for it and given its notes, etc., and the bylaws give him "general supervision over the property and affairs of the corporation," the company's note made by him, and an assignment of "\$150,000 of such good and collectible accounts now existing or that shall hereafter accrue or be acquired in the conduct of the business," are valid. Preston Nat. Bank v. George, etc., Co., 47 N. W. Rep., 502 (Mich., 1890). A president who has been accustomed to issue corporate notes may bind the corporation by a similar note. McDonald v. Chisholm. 23 N. E. Rep., 596 (Ill., 1890). A general understanding that the president and secretary shall manage the business and make contracts, and their open and public assumption of that power, with the knowledge and acquiescence of the directors, is equal to a vote of the directors authorizing them to make contracts. Sherman, etc., Co. v. Morris, 23 Pac. Rep., 569 (Kan., 1890). Where the president and secretary of a mining company have for a long time signed checks, and they have been paid by a bank, they may continue to draw checks and the bank must pay them. The corporation is liable for overdrafts caused thereby. Mining Co. v. Anglo, etc., Bank, 104 U. S., 192 (1881). A uniform practice of a company for several months previous to transfer of a corporate note by its president, in cases of notes negotiated for the purpose of raising money to carry on its legitimate business, where such notes were payable to the company, to have them indorsed by the president, is sufficient authority for bis indorsement. Marine Bank v. Clement, 31 N. Y., 33 (1865). See, also, in general, Chicago, etc., R'y Co. v. James, 24 Wis., 388 (1869); First

Nat., etc., Bank v. North, etc., Co., 86 Mo., 125 (1885), where the president and secretary were accustomed to make Where the board of directors for three years relinquishes to the president the exclusive management of the business of the corporation and the purchase of all classes of articles, giving corporate notes, bills and securities therefor, and then the directors took charge and for several years continued business without repudiating his acts. his purchase of locomotives and giving corporate notes therefor while he was in charge binds the corporation. v. Tioga R. R. Co., 27 N. Y., 546 (1863.) If accustomed so to do, the president may settle an account and take a duebill in payment. Dougherty v. Hunter, 54 Pa. St., 380 (1867). Where the president has been accustomed to make and indorse paper, the corporation will be bound, even though the directors supposed that all business had been stopped. National Park Bank v. German, etc., Co., 53 N. Y. Super. Ct., 367 (1886). The authority of one who is the president and general manager to borrow money for the corporation and give its paper therefor "may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he was allowed without interference to conduct the affairs of the company." Martin v. Niagara. etc., Co., 44 Hun, 130 (1887). Where the president, who is also general manager and financial agent, is accustomed to borrow money for the corporation, he binds the company by a loan, even though he misapplies the proceeds. Kraft v. Freeman, etc., Co., 87 N. Y., 628 (1881). If he has been accustomed for a long time to sign notes, a person taking a note without his signature is not protected. Davis, etc., Co. v. Best, 105 N. Y., 59 (1887). The president has no implied power to sell the lands of out by the president, even without authority, the corporation must perform on its part. The law seeks to attain substantial justice in these matters.

the company, and the power given by usage to former presidents to sell and take a purchase-money lien does not give power to sell without retaining that lien. Fitzhugh v. Franco, etc., Co., 16 S. W. Rep., 1078 (Tex., 1891). The president, even though he is also manager, head and majority stockholder. cannot bind the corporation by his statement that the corporation was to indemnify him from loss on certain indorsements made by him. Minnesota T. Co. v. Clark, 49 N. W. Rep., 386 (Minn., 1891). Where the board of directors allow one of its officers the exclusive management of its affairs, the company is bound by its acts. Davies v. New York Concert Co., 13 N. Y. Supp., 739 (1891); Sparks v. Dispatch, etc., Co., 15 S. W. Rep., 417 (Mo., 1891). Although the president has been accustomed to issue corporate notes, vet, if the bank taking the note in question knew that the proceeds were to be used by him in his private business, the note cannot be enforced. Third Nat. Bank v. Marine. etc., Co., 46 N. W. Rep., 145 (Minn., 1890).

1 Where the president bought railroad iron without authority so to do, but the directors stood by and allowed the corporation to use it, the company is liable for the price. Scott v. Middleton, etc., R. R. Co., 86 N. Y., 200 (1881). A railroad contractor may enforce his construction coutract with a railroad corporation, although he made it with the president, and the board of directors did not pass upon it, where the contractor proceeded to perform. The contractor was justified in stopping work when he was not paid according to the contract. Cunningham v. Massena, etc., R. R., 63 Hun, 439 (1892). Acquiescence in sales by the president, where a vendor's lien was retained, does not sustain a sale by him without retaining such a lien. Fitz-

hugh v. Franco, etc., Co., 16 S. W. Rep., 1078 (Tex., 1891). Although the president accepts in the corporate name a draft drawn on him personally, yet where the bank of the corporation pays the draft and charges it to the corporation and the latter acquiesces for nine months it cannot hold the bank liable. McLaren v. First Nat'l Bank, 45 N. W. Rep., 223 (Wis., 1890). Ratification of the president's contract with an attornev. Merrill v. Consumers' Coal Co., 114 N. Y., 216 (1889). A transfer of all the property by the president is valid where the directors and all the stockholders knew of it and assented to it. Worth, etc., Co. v. Hitson, 14 S. W. Rep., 843 (Tex., 1890). The company by accepting and using the property purchased by the president without authority thereby ratifies the purchase. West, etc., Land Co. v. Montgomery Land Co., 15 S. E. Rep., 524 (Va., 1892). That stockholders may ratify and validate notes given by the president, see Martin v. Niagara, etc., Mfg. Co., 44 Hun, 130 (1887). The contracts of the president may be ratified subsequently by the board of directors. Wehrhane v. Nashville, etc., R. R., 4 'N. Y. St. Rep., 541 (1886). For a clear statement of this principle, see Dabney v. Stevens, 40 How. Pr., 341 (1870): 131 U. S., 371 (1889). Rates as advertised by the president bind the railroad when it continues to accept them. Willard v. Gould, 32 N. H., 230 (1856). The president's unauthorized contracts, when known to and acted upon by the directors and corporation, are binding. Perry v. Simpson, etc., Co., 37 Conn., 520 (1871). Where the president of a bank instructs its correspondent bank to charge to the former a debt due by him to the latter bank, and the accounts of the latter to the former bank showed to that effect. and no objection is made, the former bank is bound. Burton v. Burley, 9

The same rules apply to a vice-president that apply to the president on this subject.

§ 717. Secretary and treasurer — Their power to contract for the corporation.— The secretary of a corporation has no power, merely as secretary of the company, to make contracts for it.² But the

Biss., 253 (1880). Lease by the president and treasurer without authority may be ratified by the stockholders. Washington Hotel Co. v. Marsh, 63 N. H., 230 (1884). Or a mortgage. Martin v. Niagara, etc., Co., 44 Hun, 130 (1887). A bank is liable on an agreement of its president to give a person ten shares of stock if he would deposit with it, the deposit having been made. Rich v. State Nat'l Bank, 7 Neb., 201 (1878). Where the company acquiesces in work done by contract with the president it is liable. Grape Co. v. Small, 40 Md., 395 (1874). The company may ratify a mortgage given by him. Krider v. Trustees, etc., 31 Iowa, 547 (1871); Sherman v. Fitch, 98 Mass., 59 (1867), where all but one of the directors knew and acquiesced. The acquiescence of a minority of the directors is insufficient. Yellow, etc., Co. v. Stevenson, 5 Nev., 224 (1869). Acceptance of the property purchased, with knowledge, is ratification. Dent v. North, etc., Co., 49 N. Y., 390 (1872). The failure of the president to repudiate at once an agent's unauthorized act is ratification. First Nat'l Bank v. Fricke, 75 Mo., 178 (1881); Alabama, etc., R. R. Co. v. Kidd, 29 Ala., 221 (1856). See, also, § 727, infra. on Notice. Ratification of a president's acts may arise by long use of the results, even though the directors expressly repudiated the acts, but did not notify the other party. Belleville Sav. Bank v. Winslow, 35 Fed. Rep., 471 (1888). It is a sufficient ratification if the directors discuss the matter at a meeting, though they take no action. Walworth, etc., Bank v. Farmers', etc., Co., 16 Wis., 629 (1883). A corporate agent with full powers may ratify the president's act. Perry v. Simpson, etc., Co., 37 Conn., 520 (1871). Acquiescence of the board of directors may cure the

omission of a previous resolution as required by the charter in the issue of the bonds. Curtis v. Leavitt, 15 N. Y., 1 (1857), the court saying of the board (p. 49): "They may previously resolve; they may subsequently acquiesce; they may expressly ratify; they may intentionally receive and appropriate the proceeds of the unauthorized transaction, and so put it out of their power to dispute its validity."

¹ The vice-president may sign a corporate deed if the president refuses to do so. Smith v. Smith, 62 Ill., 492 (1872). The fact that a vice-president swears to a complaint does not raise a presumption that the company authorized its service. American Waterworks Co. v. Venner, 18 N. Y. Supp., 379 (1892). The vice-president may make an assignment for the benefit of creditors, where he is authorized "to use all means and do all acts and make all deeds by him deemed necessary or proper to serve the best interest of the association, and to use the corporate seal for such purpose." Huse v. Ames, 15 S. W. Rep., 965 (Mo., 1891). The vicepresident has no power to sell the bonds of the company, even though he is a director, member of the executive committee and one of the two persons who "run" the company. The purchasers are not bona fide. American L. & T. Co. v. St. Louis, etc., R'y, 42 Fed, Rep., 819 (1890). It may be proved that the vice-president had authority to accept a draft, although drawn by himself upon the company. Rumbough v. Southern, etc., Co., 11 S. E. Rep., 528 (N. C., 1890). The vice-president of a bank may negotiate a loan. Chemical Nat'l Bank v. Armstrong, 50 Fed. Rep., 798 (1892).

²The secretary has no power to assign the company's claims for goods sold by corporation may, of course, expressly authorize the secretary to contract for it, or may accept and ratify his contracts after they are made.¹

The treasurer of a corporation has no power, merely by reason of his office as treasurer, to contract for the corporation.² But if

it. The assignee's rights are not perfected by the director's resolution made after he sues on the account. Read v. Buffum, 21 Pac. Rep., 555 (Cal., 1889). Notice to one acting for the secretary in his absence, and at his place of business, is as effectual as though given to the secretary himself. McKenney v. Diamond, etc., Assoc., 18 Atl. Rep., 905 (Del., 1889). He cannot sell and assign its notes, Blood v. Marcuse, 38 Cal., 590 (1869); nor sign a draft for it, First Nat'l Bank v. Hogan, 47 Mo., 472 (1871); nor purchase iron for it, Williams v. Chester, etc., R. R. Co., 15 Jur., 828 (1850); nor accept a bill of exchange, Neale v. Turton, 4 Bing., 149 (1827); nor bind it to pay a debt of an old company whose property it purchased upon a reorganization, American, etc., R'y Co. v. Miles, 52 Ill., 174 (1869); nor rent a place for the company, Ridley v. Plymouth, etc., Co., 2 Ex., 711 (1848): nor accept accommodation paper, Farmers', etc., Bank v. Empire, etc., Co., 5 Bosw., 275 (1859); nor purchase, Kings Bridge, etc., Co. v. Plymouth, etc., Co., 3 Ex., 718 (1848). Where the assistant secretary signs a mortgage instead of the secretary, it is sufficient to prove that he was the de facto assistant secretary. Augusta, etc., R. R. v. Kittel, 52 Fed. Rep., 63 (1892).

¹ Hill v. Manchester, etc., Co., 5 B. & Ad., 866 (1833), where the secretary was authorized to affix the corporate seal; New Eng., etc., Ins. Co. v. De Wolf, 25 Mass., 56 (1829), where the company accepted the benefits. A note signed by the corporate secretary as directed by the president, the money therefor being used by the corporation, is enforceable against it. Jansen v. Otto, etc., Co., 1 N. Y. Supp., 605 (1888).

² The treasurer has no power to bor-

row money and give the corporate note therefor, and the company is not liable where the money was paid into the corporate treasury and immediately embezzled by the treasurer. Craft v. South Boston R. R., 22 N. E. Rep., 920 (Mass., 1889). A treasurer has no power to sign the corporate name to promissory notes unless he is expressly given that power. If the note is made payable to his own order the purchaser of it must take notice that it was issued without authority. Chemical, etc., Bank v. Wagner, 20 S. W. Rep., 535 (Ky., 1892). Notes of a cattle company purporting to be signed by it through its treasurer are presumed to have been authorized. Corcoran v. Snow, etc., Co., 23 N. E. Rep., 727 (Mass., 1890). Where a corporation repudiates a pledge of stock made by its treasurer, it cannot sue the pledgee for the money received by the pledgee : upon a sale of the stock by the latter. Holden v. Metropolitan, etc., Bank, 23 N. E. Rep., 733 (Mass., 1890). The treasurer cannot, upon the sale of a note held by the company, indorse the note so as to render the company liable, even though a trustee was aware thereof, the opening of an account with the bank being unknown to the company. Columbia Bank v. Gospel, etc., Church, 6 N. Y. Supp., 537 (1889). A treasurer has no power to issue corporate notes, and where he does so, the proceeds being used to pay his personal debt to the corporation, the notes are not binding on the company. First Nat'l Bank v. Council Bluffs, etc., Co., 9 N. Y. Supp., 859 (1890). The corporate indorsement of a note by the treasurer without authority and for accommodation does not bind the cor-Wahlig v. Standard, etc., Co., poration. 9 N. Y. Supp., 739 (1890). A demand for rent may properly be made on the

the treasurer has been accustomed to make certain contracts for the corporation and the corporation acquiesced in them, it is bound by a new contract of that kind entered into by him.¹ It is for the jury to decide whether such a custom exists.² If the treasurer is accustomed to act as the managing agent of the corporation he can sell its property,³ and borrow money and give security.⁴ The treasurer binds the corporation by a contract which he is expressly authorized to make.⁵ The secretary and treasurer cannot even conjointly bind the corporation by their purchases of the article in which it deals;⁵ nor can they borrow money for the corporation;⁻ nor release the maker of a note to the corporation.⁵ But if the company acquiesces in a contract made by either or both of these off cers it is bound.⁵

secretary and treasurer. State v. Felton. 19 Atl. Rep., 123 (N. J., 1889). He cannot compromise or relinquish its claims. Carver Co. v. Manuf'rs, etc., Co., 72 Mass., 214 (1856); nor sell and indorse its paper, Bradley v. Warren, etc., Bank, 127 Mass., 107 (1879); Holden v. Upton, 134 id., 177 (1883). Contra, Perkins v. Bradley, 24 Vt., 66 (1851); nor assume the debt of a third person, Stark Bank v. U. S. Pottery Co., 34 Vt., 144 (1861); nor sell and assign a mortgage owned by the corporation, even though he uses the corporate seal. Jackson v. Campbell, 5 Wend., 572 (1830). He may employ an attorney to collect unpaid bills. Bristol, etc., Bank v. Keary, 128 Mass., 298 (1880). He cannot assign a mortgage even upon payment of a debt. Jackson v. Campbell, 5 Wend., 572 (1830). Cannot give release under seal. Dedham Inst. v. Slack, 60 Mass., 408 (1850). May accept money. Brown v. Wiunissimmet Co., 93 Mass., 326 (1865).

¹ The treasurer has no inherent power to sign and indorse corporate notes, but long usage may constitute such authority. Page v. Fall River, etc., R. R., 31 Fed. Rep., 257 (1887); Lester v. Webb, 83 Mass., 34 (1861), where the treasurer indorsed a note; Bank of Attica v. Pottier, etc., Co., 1 N. Y. Supp., 483 (1888); Partridge v. Badger, 25 Barb., 146 (1857); Foster v. Ohio, etc., Co., 17 Fed. Rep., 130 (1883), where he gave a note.

²Foster v. Ohio, etc., Co., 17 Fed. Rep., 130 (1883); Fifth, etc., Sav. Bank v. First Nat'l Bank, 7 Atl. Rep., 318 (N. J., 1886), where the treasurer pledged securities.

³ Phillips v. Campbell, 43 N. Y., 271 (1870).

⁴Fay v. Noble, 12 Cush., 1 (1853); Fifth, etc., Bank v. First, etc., Bank, 7 Atl. Rep., 318 (N. J., 1886).

⁵ Odd Fellows v. Bank of Sturgis, 42 Mich., 461 (1880), where the authority was oral; 42 N. W. Rep., 550. Funds drawn out by the treasurer on the express authority of the directors and kept apart from his funds are held by him at the risk of the corporation. Butler v. Duprat, 51 N. Y. Super. Ct., 77 (1884).

⁶ Alexander v. Cauldwell, 83 N. Y., 480 (1881), where a coal company was held not liable for coal so purchased, there being no evidence that the corporation authorized it, or used it, or ratified it. Cf. Alexander v. Brown, 9 Hun, 641 (1877).

Adams v. Mills, 60 N. Y., 533 (1875).
 Moshannon, etc., Co. v. Sloan, 7 Atl.
 Rep., 102 (Pa., 1885).

⁹ St. James, etc., v. Newbury, etc., R. R. Co., 141 Mass., 500 (1886), where the treasurer gave an obligation under seal and reported it in his reports, and a committee approved. If the company ratifies a contract made by the president and secretary the company may

§ 718. Cashier — The extent of his powers.— The cashier of a bank has greater inherent powers than any other corporate authority excepting the board of directors. By virtue of his office he performs many and important acts for the bank. He may borrow money and pledge the bank's securities; and sell and assign its paper; and extend the payment of a note; and certify checks; and may bind the bank by various other acts. But a cashier can-

compel its officers to give it the benefit of the contract. Church v. Sterling, 16 Conn., 388 (1844). Accepting the benefit of an insurance contract made by the secretary and president accepts the contract itself. Emmet v. Reed, 8 N. Y., 312 (1853). An indorsement by the secretary, with the knowledge and acquiescence of the directors, is binding, Williams v. Chenev, 69 Mass., 215 (1855). So, also, where he pledges bonds with their knowledge and acquiescence. Darst v. Gale, 83 Ill., 136 (1876). And see Durar v. Insurance Co., 24 N. J. L., 171 (1853), in insurance contracts, and Conover v. Mutual Ins. Co., 1 N. Y., 290 (1848), where he was accustomed to contract for the company; Chicago Building, etc., Co. v. Crowell, 65 Ill., 453; Talledega Ins. Co. v. Pencock, 67 Ala., 253 (1880), where the secretary was accustomed to sign notes. Where the secretary and treasurer have been accustomed to manage the entire business and make contracts, a contract entered into by them for the company is legal and enforceable. Moore v. H. Gaus & Co., 20 S. W. Rep., 973 (Mo., 1892). Where a corporation uses a wharf under a contract made by its treasurer, it is liable for the contract price. Taylor v. Albemarle, etc., Co., 10 S. E. Rep., 897 (N. C., 1890). Taking the benefit of a piece of statuary for advertising purposes binds it to pay therefor, though the treasurer made the contract. Ellis v. Howe, etc., Co., 12 Daly, 78 (1880).

¹ Coats v. Donnell, 94 N. Y., 168 (1883); Barnes v. Ontario Bank, 19 id., 152 (1859); Donnell v. Lewis, etc., Bank, 80 Mo., 165 (1883).

²Smith v. Lawson, 18 W. Va., 212, 227

(1881); Wild v. Bank, 3 Mason, 505 (1825); Lafayette Bank v. State Bank, 4 McLean, 208 (1847); Everett v. United States, 6 Porter, 166 (1837); Crocket v. Young, 9 Miss., 241 (1843). May indorse paper in private bank after banking hours. Bissell v. First, etc., Bank, 69 Pa. St., 415.

³ Wakefield Bank v. Truesdall, 55 Barb., 602 (1864).

⁴ Merchants' Bank v. State Bank, 10 Wall., 604 (1870); Cooke v. State Nat'l Bank, 52 N. Y., 96 (1873). A bona fide holder of a certificate of indebtedness issued by him is protected. Citizens', etc., Bank v. Blakesley, 42 Ohio St., 645 (1885).

⁵ A bank is liable for the embezzlement by a cashier of a special deposit of bonds. First Nat'l Bank v. Dunbar. 9 N. E. Rep., 186 (Ill., 1886). See, also, Caldwell v. Nat'l Mohawk Bank, 64 Barb., 333 (1869), and § 682, supra. He may sell assets to pay a debt and may guaranty the priority of a mortgage. Peninsular Bank v. Hanmer, 14 Mich., 208 (1866). He may employ an attorney. Root v. Olcott, 42 Hun, 536 (1886); Potter v. N. Y., etc., Asylum, 44 id., 367 (1887); Western Bank v. Gilstrap, 45 Mo., 419 (1870), where the other officers were absent; Mumford v. Hawkins, 5 Denio, 355 (1848). The president and cashier are presumed to have authority to compromise a debt. Chemical Nat'l Bank v. Kohner, 85 N. Y., 189 (1881). May transfer stock held in pledge. Matthews v. Mass. Nat'l Bank, 1 Holmes, 396 (1874). A bona fide holder may enforce accommodation paper indorsed by him. City Bank v. Perkins, 29 N. Y., 554 (1864); Bank of Genesee v. Patchin Bank, 19

not authorize a person to loan money to the bank, and deliver it to an agent to carry it to a distant city; I nor any other act which is not in the regular course of business. However, though if a cashier does an act in excess of his powers, yet if the board of directors ratify it or accept its benefits the corporation is bound.

§ 719. General manager, superintendent and general agent— Their power to contract for the corporation.— The general manager of a corporation has no power to make and deliver the promissory note of the company; or can he indorse the company's

N. Y., 312 (1859); Faneuil, etc., Bank v. Bank of Brighton, 16 Gray, 534 (1860).

¹ In no case has the term "ordinary business" "been judicially allowed to comprehend a contract made by a cashier, without an express delegation of power from a board of directors to do so, which involves the payment of money, unless it be such as has been loaned in the usual and customary way. Nor has it ever been decided that a eashier could purchase or sell the property or create an agency of any kind for a bank which he had not been authorized to make by those to whom had been confided the power to manage its business, both ordinary and extraordinary." United States v. City Bank, etc., 21 How., 356 (1858).

² Cannot bind bank by indorsing bank as accommodation indorser to his own note. West, etc., Bank v. Shawnee, etc., Bank, 95 U. S., 557. A cashier may indorse bank paper to any one except himself. Preston v. Cutter, 13 Atl. Rep., 874 (N. H., 1888).

³ Martin v. Webb, 110 U. S., 7 (1884), where the cashier had canceled a deed of trust; Payne v. Commercial Bank, etc., 14 Miss., 24 (1846); Bank of Pa. v. Reed, 1 Watts & S., 101 (1841); Ryan v. Dunlop, 17 III., 40 (1855), where he satisfied a mortgage; Kelsey v. Nat'l Bank, 69 Pa. St., 426 (1871), where he offered a reward with the knowledge and acquiescence of the directors; Medomak Bank v. Curtis, 24 Me., 36 (1844), where the bank claimed the benefit of a contract; United States Bank v. Dandridge, 12 Wheat, 64 (1827), where a cashier's

bond in possession of a bank was held to have been accepted by the bank, though no vote accepting it was to be found in its records: Bank of Lyons v. Demmon, Hill & Denio, Supp. (N. Y.), 398 (1844), where the president and secretary sold stock and agreed to purchase it if the vendee desired. Cannot assign non-negotiable paper. Barrick v. Austin, 21 Barb., 241 (1855). Cashier and president together cannot pledge paper for antecedent debt. State of Tenn. v. Davis, 50 How. Pr., 447 (1874). Cashier cannot take payment in other notes, etc. Sandy, etc., Bank v. Merchants', etc., Bank, 1 Biss., 146 (1857). A cashier has no power to agree with an indorser of a note to a bank that he shall not be liable. Thompson v. McKee, 37 N. W. Rep., 367 (Dak., 1888); Bank of Metropolis v. Jones, 8 Peters, 12 (1834); Bank of U.S. v. Dunn, 6 Peters, 51 (1832). Person taking note from cashier on latter's personal debt cannot hold bank liable on latter's indorsement of note as cashier. West St. Louis S. Bank v. Shawnee, etc., Bank, 3 Dill., 403 (1874); 95 U. S., 557. A cashier cannot assign corporate notes to a depositor in payment of a deposit. Schneitman v. Nohle, 39 N. W. Rep., 224 (Iowa, 1888). He cannot render the charter forfeitable by taking payment on subscriptions in an illegal manner. State v. Commercial Bank, 14 Mass., 218 (1846).

⁴ New York, etc., Mine v. Negaunee Bank, 39 Mich., 644 (1878), in which case the note was held not enforceable, although the general manager had often drawn drafts on the company. See Simpson's Claim, 58 L. T. Rep., 16 (1887). name on commercial paper,¹ except in payment of debts;² nor can he change the terms of a sealed contract of the corporation;³ but he may give a note in payment of wages due;⁴ and he may accept a draft.⁵ There is grave doubt as to whether he may borrow money and give a lien or chattel mortgage therefor.⁶

It has been held that he may waive demand and notice of a note

1 Accommodation acceptances, accepted in the corporate name by the manager of the corporation without the knowledge of the directors, are not enforeable though the manager had at times drawn notes to meet expenses. Merchants', etc., Bank v. Detroit, etc., Works, 36 N. W. Rep., 696 (Mich., 1888). The power of a manager to borrow money for the company by giving his own note and indorsing the company's name to it is a question for the jury. The books of the company are evidence to prove that the company received the money. The jury may decide that his authority might be "either authority or subsequent ratification, and that it could be evidenced by general course of business as well as by resolution." Huntington v. Attrill, 118 N. Y., 365 (1890). The manager of a manufacturing company has no implied power to indorse the company's name to a promissory note. Proof must be given that the note concerned the corporate business, or that the corporation received the benefit therefrom, or that the manager had express power to sign. Middlesex, etc., Bank v. Hirsch, etc., Co., 4 N. Y. Supp., 385 (1888, City Court). But he may accept a draft if he is accustomed so to do. Munn v. Commission Co., 15 Johns., 44 (1818). And the general agent of a bank may indorse. Merchants' Bank v. Central Bank, 1 Ga., 418 Where there is no treasurer the general manager or a director may sign the corporate name to negotiable paper for collection. Craig Medicine Co. v. Merchants' Bank, 59 Hun, 561 (1891). Where the power to indorse notes is given by the by-laws to the president and vice-president, a general manager does not have that power, although he has drawn checks and previously indorsed two notes, but without the knowledge of the board of directors. Davis v. Rockingham Investment Co., 15 S. E. Rep., 547 (Va., 1892).

² McKiernan v. Lusgan, 56 Cal., 61 (1880); Seeley v. San Jose, 59 Cal., 22 (1881).

³ Boynton v. Lynn, etc., Co., 124 Mass., 197 (1878).

⁴ Bates v. Keith, etc., Co., 48 Mass., 224 (1843).

⁵ Hascall v. Life, etc., Ass'n, 5 Hun, 151 (1875); aff'd, 66 N. Y., 616.

⁶ The general agent and treasurer may borrow money and give a chattel mortgage as security. Fay v. Noble, 66 Mass., 1 (1853). The superintendent of a mine cannot borrow money for the company. Union, etc., Co. v. Rocky, etc., Bank, 1 Col., 531 (1872). Where a superintendent borrows money for himself, giving a lien on corporate property as security, the parties loaning the money with knowledge of these facts cannot hold the company liable. Planters', etc., Co. v. Olmstead, 3 S. E. Rep., 647 (Ga., 1887). The well-considered case of Whitwell v. Warner, 20 Vt., 425 (1848), holds that the general manager cannot give a lien to secure the price of goods which he purchases; but it is held that if the company uses the goods even without knowledge of the lien, the vendors may pursue the goods or the proceeds realized therefrom. In Leonard v. Burlington, etc., Ass'n, 55 Iowa, 594 (1881), it is held that he may borrow money, and the company is liable if it has used the money. A superintendent's mortgage was upheld in Poole v. West, etc., Ass'n, 30 Fed. Rep., 513 (1887).

indorsed by the company; 1 may also employ an attorney; 2 may render the company liable for overpayment of a check by mistake of the bank; 3 may contract for the use of a patent; 4 may render the company liable for an illegal use of the word "patented;". 5 and may enter into various contracts which pertain to the regular course of his business. 6

¹ Whiting v. Smith, etc., Co., 39 Me., 316 (1855).

² St. Louis, etc., R. R. v. Grove, 18 Pac. Rep., 958 (Kan., 1888); Frost v. Domestic, etc., Co., 133 Mass., 563 (1882); Southgate v. Atlantic, etc., R. R. Co., 61 Mo., 89 (1875). A general manager may employ an attorney. Gulf, etc., R'y v. James, 10 S. W. Rep., 744 (Tex., 1889).

³ Kansas, etc., Co. v. Central Bank, 34 Kan., 635 (1886).

⁴ Eureka Co. v. Bailey Co., 11 Wall., 488 (1870).

 5 Tompkins v. Butterfield, 25 Fed. Rep., 556 (1885).

⁶ A general manager authorized to pay commissions on receipts from sales may agree to pay commissions on sales irrespective of the receipts. American, etc., Co. v. Maurer, 10 Atl. Rep., 762 (Pa., 1887). A contract for a corporation by its general superintendent to give a right of way to another railroad may become binding by acquiescence. Alabama, etc., R. R. v. South, etc., R. R., 3 S. Rep., 286 (Ala., 1887). President and manager of a milling company cannot purchase flour. Getty v. Barnes, etc., 19 Pac. Rep., 617 (Kan., 1888). As to insurance agents, see Ins. Co. v. McCain, 96 U. S., 84 (1877). A treasurer of a corporation not authorized to sell any part of its property, but who was its sole managing agent, may pass a valid title of personal property to a vendee as against the claim of one who levied upon it under judgment. Phillips v. Campbell, 43 N. Y., 271 (1870). The managing agent may employ a person, but not for a long time in the fut-Smith v. Cook, etc., Assoc., 12 Daly, 304 (1884). He cannot employ a broker. Allegheny, etc., Co. v. Moore,

95 Pa. St., 412 (1880). The general manager of a mining company has no inherent power to contract for it for machinery. Victoria, etc., v. Fraser, 29 Pac. Rep., 667 (Col., 1892). The general manager of a live-stock company has implied power to sell a part of such stock. Hamm v. Drew, 18 S. W. Rep., 434 (Tex., 1892). Long acquiescence in a person's assuming to act for the company is the same as expressly authoring his action. Craig Medicine Co. v. Merchants' Bank, 59 Hun, 560 (1891). A general manager has no power to deed the company's real estate, and a purchaser other than a bona fide one from the vendee cannot retain the title. Allowance was made for improvements. Especially is the deed invalid where the grantee was a director. Schetter v. Southern, etc., Co., 24 Pac. Rep., 25 (1890). The president and general manager of a lumber company may engage a lawyer for the season. Ceeder v. Load, etc., Co., 49 N. W. Rep., 575 (Mich., 1891). Where the president carries on the negotiations in regard to a contract, and also the modifications of that contract, and is the manager and in control, and as the manager assents to the modifications, the company is bound thereby. Nichols v. Scranton, etc., Co., 33 N. E. Rep., 561 (N. Y., 1893). A general manager has no power to sell rights for a particular state, and a power of attorney which has been revoked is insufficient to be relied upon. Johnson v. Ala., etc., Co., 8 S. Rep., 101 (1890). Where the by-laws give the general manager power to sell he has power to sell the product for a certain space of time in the future. Robert, etc., Min. Co. v. Omaha, etc., 26 Pac. Rep., 326 A railroad superintendent may employ a physician in cases of accidents, and may offer rewards for the conviction of persons obstructing the tracks. It has been held that a superintendent has not the powers of a general manager. The superintendent may, of course, be given express powers to contract. If the company ratifies the contract or accepts its benefits the contract becomes binding.

(Col., 1891). For a discussion of what constitutes the appointment of a resident general agent by a corporation, see Rathbun v. Snow, 123 N. Y., 343 (1890). A general manager has no power to employ a person on a long-time contract. Smith v. Co-operative, etc., Assoc., 12 Daly, 304 (1884). Where a superintendent negotiates sales and the president fixes the price, the corporation is responsible for the superintendent's representations. Decker v. Gutta Percha, etc., Co., 61 Hun, 516 (1891).

Pacific R. R. Co. v. Thomas, 19 Kan., 257 (1877); Toledo, etc., R. R. Co. v. Rodregues, 47 Ill., 188 (1868); Atlantic, etc., R. R. Co. v. Reiser, 18 Kan., 458 (1877). Contra, Stephenson v. N. Y., etc., R. R. Co., 2 Duer, 341 (1853); Shriver v. Stevens, 12 Pa. St., 258 (1849). holding that the agent of a stage line cannot. A vard-master cannot employ a physician for the company. Marquette, etc., R. R. Co. v. Taft, 28 Mich., 289 (1873). Nor an engineer. Cooper v. N. Y., etc., R. R. Co., 6 Hun, 276 (1875). Nor a station agent. Tucker v. St. Louis, etc., R. R. Co., 54 Mo., 177 (1873); Cox v. Midland, etc., R. R. Co., 3 Ex., 268 (1849). Unless the superintendent ratifies it by silence upon being notified thereof. Cairo, etc., R. R. Co. v. Mahoney, 82 Ill., 73 (1876); Toledo, etc., R. R. Co. v. Prince, 50 Ill., 26 (1869). general manager cannot render the company liable for medical services rendered on an occasion of a private brawl. Dale v. Donaldson, etc., Co., 2 S. W. Rep., 703 (Ark., 1887); Wood's Railway Law, pp. 439-444.

² Central, etc., Co. v. Chatham, 4 S. Rep., 828 (Ala., 1888).

³Adriance v. Roome, 52 Barb., 399 (1868), holding that the superintendent cannot borrow money and agree to-make payment in iron.

⁴ Where the by-laws give the president and superintendent power to make a contract, they bave power to release that contract. Directors knowing of release must act promptly if they intend to question its validity. Indianapolis, etc., Co. v. St. Louis, etc., R. R. Co., 26 Fed. Rep., 140 (1886); aff'd, 120 U. S., 256. A general power authorizes the purchase of a house and the giving of a mortgage. Shaver v. Bear, etc., Co., 10 Cal., 396 (1858).

⁵ Kechland v. Menasha, etc., Co., 31 N. W. Rep., 471 (Wis., 1887), where the superintendent and a director took a deed and agreed to pay an extra price: Despatch, etc., v. Bellamy, etc., Co., 12 N. H., 205 (1841), where he gave a mortgage and the company received the money; Lyneborough, etc., Co. v. Mass... etc., Co., 111 Mass., 315 (1873), where he bought glass and the directors acquiesced; Seeley v. San Jose, etc., Co., 59 Cal., 22 (1881), where he and the president gave a note; Goodwin v. Union. etc., Co., 34 N. H., 378 (1857), where he and the president employed workmen; Starr v. Gregory, etc., Co., 13 Pac. Rep., 195 (Mont., 1887), where he accepted a mill; Union, etc., Co. v. Rocky, etc., Bank, 2 Col., 565 (1875); affirmed, 96 U. S., 640, where a loan of the bank's money was made by him and the presi-Ratification cannot be by the same persons who assume power to contract. Tracy v. Guthrie, etc., Soc., 47 Iowa, 27 (1877).

(69)

§ 720. Subordinate agents — Their power to contract.—It is a general rule that a corporate agent, like the agent of an individual, can make only such contracts as he is expressly authorized to make, or such contracts as pertain to the duties which the corporation imposes upon him. It is true, also, that the corporation may ratify and confirm a contract which an unauthorized agent has made in its name; and this ratification may be by express vote of the directors, or it may be implied by an acceptance of the benefits to the corporation. The subordinate agents of a corporation may be of great variety: tellers, engineers, stewards, station agents, local agents, freight agents, roadmasters, clerks, attorneys and miscellaneous agents. Various decisions on their powers are given in the notes.¹ These decisions show that a corporation is bound by its

1 An inquiry by a purchaser of stock of corporate officers as to whether it was full-paid stock must be made to officers having authority to speak for the corporation. Browning v. Hinkle, 51 N. W. Rep., 605 (Minn., 1892). The financial agent may give notes in accordance with a corporate contract. Case Manuf. Co. v. Coxman, 138 U. S., 431 (1891); Wilson v. Kings, etc., R'y Co., 21 N. E. Rep., 1015 (N. Y., 1889). The cashier and clerk of a lumber company cannot agree to give a cuatomer a carload of lumber in case certain other lumber is not satisfactory. Delta, etc., Co. v. Williams, 40 N. W. Rep., 940 (Mich., 1888). Local manager of branch bank renders it liable for his embezzlement of depositor's funds, which he induces the depositor to give to him to pay a lien of the bank on property. Thompson v. Bell, 26 Eng. L. & Eq., 536 (1854). Receiving teller of savings bank has no power to bind bank not to pay out money deposited in one name, except upon the order of three other persons. Bank is protected in paying on check of person in whose name deposit is made. Riley v. Albany Sav. Bank, 36 Hun, 513 (1885). A teller's certification of a check in had faith does not bind the bank, Mussey v. Eagle Bank, 50 Mass., 806 (1845); unless it is in the hands of a bona fide iudorsee. Farmers', etc., Bank, v. Butchers', etc., Bank, 16 N. Y., 125 (1857); Farmers', etc., Bank v. Same, 14 N. Y., 624 (1856). As to certification of check, see, also, Meads v. Merchants'. Bank, 25 N. Y., 143 (1862); Cooke v. State, etc., Bank, 52 N. Y., 96 (1873); in the latter case the certification being by the cashier. Where a depositor sends deposits by the bank's book-keeper without the bank-book, the bank is not liable for the book-keeper's fraud. Manhattan Co. v. Lydig, 4 John., 377 (1809). A teller may receive a special deposit of valuables. Patterson v. Syracuse Nat'l Bank, 80 N. Y., 82 (1880). It may be a question for the jury as to whether the foreman of the works of a foreign corporation may employ workmen on long time. Tunison v. Detroit, etc., Co., 41 N. W. Rep., 502 (Mich., 1889). Where a bank owning railroad bonds allowa its agent to exchange them for stock in a reorganized company, it is bound. Deposit Bank v. Barrett, 13 S. W. Rep., 337 (1890). A caterer may hold a club responsible for food, etc., fnrnished to its guests under the authorized contract of the house committee. Deller v. Staten Island, etc., Club, 9 N. Y. Supp., 876 (1890),

The following decisions are concerning railroad agents: The engineer of a railroad company may have authority to modify a construction contract or enter into a new contract. Henderson Bridge Co. v. McGrath, 184 U. S.,

agents' acts only when a partnership would be bound under similar circumstances. And in general the corporation may ratify and adopt

260 (1890). The civil engineer of a railroad cannot employ a station agent. Willis v. Toledo, etc., R'y Co., 40 N. W. Rep., 205 (Mich., 1888). The engineers of a railroad company cannot bind it to an agreement to pay the construction contractors extra pay. Woodruff v. Rochester, etc., R. R., 108 N. Y., 39 (1888). The construction engineer of a railroad has no power to vary the construction contract. Campbell Trustees, 6 S. W. Rep., 337 (Ky., 1888). A person whom a railroad holds out as the general freight agent of the company may bind it by his contracts relative to freight. Baker v. Kansas, etc., R. R., 3 S. W. Rep., 486 (Mo., 1887). A roadmaster of a railway has power to purchase such material as he uses, and the company is liable therefor where the material has been used. Walker v. Wilmington, etc., R. R., 1 S. E. Rep. (S. C., 1887). A station agent may contract that goods will be delivered at a certain time. Blodgett v. Adams, 40 N. W. Rep., 491 (Wis., 1888). See, also, Wood's Railway Law, pp. 444-454.

The following decisions concern miscellaneous agents and powers: Agent with power to give and indorse notes may waive notice of protest, etc. Whitney v. South, etc., Co., 39 Me., 316 (1855). A resident agent of a mining company has no implied authority to borrow money on account of the corporation to pay arrears of wages due the workmen in the mines. Hawtayne v. Bourne, 7 M. & W., 595 (1841). An agent attending to the daily routine of the business of a corporation cannot create a general lien upon its property to secure a creditor, unless by the approval of the board of directors. Whitewell v. Warner, 20 Vt., 425. An agent employed to promote the interests of a corporation in every way has no authority to purchase land for it. Bocock's Ex'rs v. Alleghany, etc., Co., 1 S. E. Rep., 325 (Va., 1887). Where a corporation agent buys land for the company at a certain price, and agrees that the company will pay also the vendor one-half of its profits upon sale of said land, the company is bound by this latter parol agreement. Kirkland v. Menasha, etc., Co., 31 N. W. Rep., 471 (Wis., 1887), Persons expending money for a corporation under the direction of authorized corporate officers may hold the corporation liable. Topeka, etc., v. Martin, 18 Pac. Rep., 941 (Kan., 1888). A sewing-machine company's agent to sell machines has no power to trade the company's horse, but ratification suffices. Singer, etc., Co. v. Belgart, 4 S. Rep., 400 (Ala., 1888). Acts of local insurance agents appointed by general agent of foreign insurance company are binding on company, such acts being within the express powers given him by the general agent therein to solicit or take insurance. Kavev v. Amazon Ins. Co., 36 Hun, 66 (1885). In Rice v. Peninsular Club, 52 Mich., 87 (1883), Cooley, J., says: "A party dealing with the agent of a corporation must at his peril ascertain what authority the agent possesses, and is not at liberty to charge the corporation by relying upon the agent's assumption of authority." The club is not liable for the steward's purchases. The powers of an agent appointed for a special purpose cease when the object of his appointment is accomplished. Seton v. Slade, 7 Ves., 265, 276 (1802). A subordinate agent cannot employ an attorney for the company. Maupin v. Virginia. etc., Co., 78 Mo., 24 (1883). Nor can he make the corporation liable for the debt of another. Rehm v. King, etc., Co., 16 Kan., 277 (1876). Nor make a note for the company. Benedict v. Lansing, 5 Denio, 283 (1848). If the purchaser of corporate bonds knows that the agent is selling for his own purposes he is not protected. Chew v. Henrietta, etc., Co.,

the unauthorized acts of an agent.¹ There are no arbitrary rules as to the mode of making a corporate contract. A contract may be inferred from corporate acts and customs without a vote or

2 Fed. Rep., 5 (1880). Secret instructions to a general insurance agent do not bind a person dealing with him. Ins. Co. v. McCain. 96 U. S., 84 (1877). So also as to a cashier. Merchants' Bank v. State Bank, 10 Wall., 604, 650 (1870). A grantor to a corporation cannot deny the authority of the corporate agent to accept the deed. Case v. Benedict, 63 Mass., 540 (1852). An agent who is accustomed to contract for the company may bind it. Christian University v. Jordan, 29 Mo., 68 (1859); Mead v. Keiler, 24 Barb., 20 (1857). Acceptance of services known to officers binds the company. Lee v. Pittsburgh, etc., Co., 66 How. Pr., 375 (1877). But the use of a building has been held not to constitute an acceptance of debts incurred in building it. Ruhy v. Abyssinian Soc., 15 Me., 806 (1839). Use of goods with knowledge is acceptance. Smith v. Hull, etc., Co., 11 C. B., 897, 925 (1852); 8 id., 668. Even if the agent gave a note which is not binding. Emerson v. Providence, etc., Co., 12 Mass., 237 (1815). Acceptance is presumed where a written statement is placed before a directors' meeting. State Bank v. Comegys, 12 Ala., 772 (1848). Satisfaction by subsequent officers is good. Chouteau v. Allen, 70 Mo., 290 (1879). If an agent with authority to give a note embezzles the funds the company is liable. Bird v. Daggett, 97 Mass., 494 (1867). A suit on a note is a ratification of its execution. Planters' Bank v. Sharp, 12 Miss., 75 (1844). An actuary of a bank, who is accustomed so to do, may give the note of the bank, especially where the directors acquiesce. Creswell v. Lanahan, 101 U.S., 347 (1879). As to insurance agents, see Perkins v. Washington Ins. Co., 4 Cowen, 645 (1825). Knowledge of the president of drafts by an agent, and acquiescence therein, binds the company. Gold, etc., Co. v.

Nat'l Bank, 96 U.S., 640 (1877). See § 727, infra, on Notice; also Lindley on Partnership, p. 248 (Callaghan & Co., 1881). An agent's authority to act for a corporation is not terminated by the fact that the members of the board of directors or other body which appointed have gone out of office by the expiration of their terms or by removal. Anderson v. Longden, 1 Wheat, 85 (1816): Brown v. Somerset, 11 Mass. 221 (1814); Northampton Bank v. Pepoon, 11 id., 294 (1814); Dedham Bank v. Chickering, 8 Pick., 335 (1825); Exeter Bank v. Rodgers, 7 N. H., 21, 33 (1834); Thompson v. Young, 2 Ohio, 334 (1825). It has been held that a mortgage of corporate property which is illegal for want of authority may be rendered valid by subsequent ratification by acts of the legislature. White Water Valley, etc., v. Vallette, 21 How., 414 (1858); Shepley v. Atlantic & St. L. R. R., 55 Me., 395 (1868); Richards v. Merrimack, etc., R. R., 44 N. H., 127 (1862), where an act authorizing the trustees of a mortgage to sell the mortgaged property was held to be a ratification; Shaw v. Norfolk Co. R. R., 5 Gray, 162 (1855); Whitney v. Union Trust Co., 65 N. Y., 576 (1875), where bonds signed by the treasurer instead of the secretary were held ratified by a subsequent act referring to them as "now a valid lien on said property." Power to act as agent of corporation may be conferred by a general resolution. Elwell v. Dodge, 33 Barb., 336 (1861).

¹Essex Turnpike Co. v. Collins, 8 Mass., 292 (1811); Hayden v. Middlesex Turnpike Co., 10 Mass., 403 (1813); White v. Westport Cotton Mfg. Co., 1 Pick., 220 (1822); Bulkley v. Derby Fishing Co., 2 Conn., 252 (1818); Peterson v. New York, 17 N. Y., 449 (1858); Canal Bridge v. Gordon, 1 Plck., 297 deed.¹ It is not necessary that such assent and acceptance should be under seal or in writing or be spread upon their records.² The acceptance of the consideration of an unauthorized contract by the corporation, however, without knowledge of the terms of the contract or of the account upon which it is paid, is not in itself a ratification of the contract.³

(1823); Baker v. Cotter, 45 Me., 236 (1858); Bennett v. Md., etc., Ins. Co., 14 Blatch., 422 (1878): Church v. Sterling, 16 Conn., 388 (1844); Pennsylvania Bank v. Reed. 1 Watts & S., 101 (1841): Hayward v. Pilgrim Soc., 21 Pick., 270 (1838); Despatch Line v. Bellamy Mfg. Co., 12 N. H., 205 (1841); Planters' Bank v. Sharp, 4 Sm. & M., 75 (1844); Burrill v. Nahant Bank, 2 Met., 167 (1841): Fox v. Northern Liberties, 3 Watts & S., 103 (1841); New Hope Bridge Co. v. Phœnix Bank, 3 Comst., 156 (1850); Alabama, etc., R. R. Co. v. Kidd, 29 Ala., 221 (1856); Everett v. United States, 6 Port. (Ala.), 166 (1837); Medomak Bank v. Curtis, 24 Me., 38 (1844); Whitwell v. Warner, 20 Vt., 425 (1848); Trott v. Warren, 2 Fairf., 227 (1834); Detroit v. Jackson, 1 Doug., 106 (1842); Merchants' Bank v. Central Bank, 1 Kelly, 428 (1846); Hoyt v. Bridgewater Copper Co., 2 Halst., 253 (1847); Durar v. Insurance Co., 4 Zab., 171 (1853); Moss v. Rossie Lead Co., 5 Hill, 137 (1843); Brown v. Winnissimmet Co., 11 Allen, 326 (1865); Sherman v. Fitch, 98 Mass., 59 (1867); Lyndeborough Glass Co. v. Massachusetts Glass Co., 111 Mass., 315 (1873); Moss v. Averell, 6 Seld., 449 (1853); Olcott v. Tioga R. R. Co., 27 N. Y., 546 (1863); Shaver v. Bear River, etc., Co., 10 Cal., 396 (1858).

¹ Columbia Bank v. Patterson. 7 Cr., 299, 306 (1813); Randall v. Van Vechten, 19 Johns., 60, 65 (1821); Haight v. Sahler, 30 Barb., 218 (1859); Canal Bridge v. Gordon, 1 Pick., 296 (1823); Dunn v. St.

Andrew's Ch., 14 Johns., 118 (1817): Mendham v. Losev. 1 Pennington, 252 (1808): Saddle River v. Colfax. 1 Halst.. 115 (1821): Baptist Church v. Mulford, 3 Halst., 182 (1824): Powell v. Newburgh, 19 Johns., 284 (1821); Chestnut Hill Turnpike v. Rutter, 4 S. & R., 6 (1818); American Ins. Co. v. Oakley, 9 Paige 496 (1842); Fister v. La Rue, 15 Barb., 323 (1853), where a contract was inferred from the acts of the corporate officers; Bulkley v. Derby Fishing Co., 2 Conn., 252 (1819); Witte v. Derby Fishing Co., 2 Conn., 260 (1817); Petrie v. Wright, 6 Sm. & M., 647 (1846); Lime Rock Bank v. Macomber, 29 Me., 564 (1849); Bank of Metropolis v. Guttschlick, 14 Pet., 19 (1840) (contract inferred from acts of officers); New York & H. R. R. Co. v. New York, 1 Hilton, 587 (1858); Wood's Railway Law, pp. 454-457.

² Dedham Bank v. Chickering, 3 Pick., 335 (1825); Union Bank v. Ridgeley, 1 Har. & G., 324 (1827); Burgess v. Pue, 2 Gill, 11 (1844); Apthorp v. North, 14 Mass., 167 (1817); Smith v. Bank of Scotland, 1 Dow. P. C., 272 (1841); Monomoi Great Beach v. Rogers, 1 Mass., 159 (1804); Amherst Bank v. Root, 2 Met., 522, 533 (1841); Western R. R. v. Babcock, 6 Met., 346 (1843), and the many cases supra.

³Pennsylvania Co. v. Dandridge, 8 Gill & J., 248 (1836); Christian University v. Jordan, 29 Mo., 68 (1859); Hilliard v. Goold, 34 N. H., 280 (1856), and cases supra.

B. THE FORM OF CORPORATE CONTRACTS — "HE CORPORATE SEAL IS NECESSARY ONLY WHEN THE SAME INSTRUMENT BY AN INDIVIDUAL MUST
BE UNDER SEAL — FORMS OF THE BODY OF THE CONTRACT; ALSO
THE METHOD OF SIGNING AND SEALING — LIABILITY OF OFFICERS
AND AGENTS ON CORPORATE CONTRACTS WHICH ARE INFORMALLY
EXECUTED.

§ 721. The corporate seal need not be attached to a corporate contract unless a similar contract when made by an individual would require a seal.—This is now the well-established rule, although formerly it was supposed that a corporation could not enter into a contract except by attaching the corporate seal to a written statement of that contract.¹

¹ A corporate contract need not be in writing nor under the corporate seal. Leinkauf v. Calman, 110 N. Y., 50 (1888). A corporation need not necessarily have or use a seal in making its contracts. Muscatine, etc., Co. v. Muscatine, etc., Co., 52 N. W. Rep., 108 (Iowa, 1892). "The English rule that a corporation cannot expressly bind itself except by deed, unless the act establishing it authorizes it to contract in another mode. has been broken in upon, and indeed entirely overturned, as a general proposition, throughout the United States: and it is here well settled that the acts of a corporation, evidenced by vote, written or unwritten, are as completely binding upon it, and are as complete authority to its agents, as the most solemn acts done under the corporate seal; that it may as well be bound by express promises through its authorized agents as by deed; and that promises may as well be implied from the acts of its agents as if it had been an individual," citing many cases. City of Davenport v. Peoria, etc., Co., 17 Iowa, 276 See, also, Bank of U.S. v. Dandridge, 12 Wheat., 64 (1827); Gottfried v. Miller, 104 U. S., 521 (1881); Barry v. Merchants' Exchange Co., 1 Sandf. Ch., 280 (1844); Hoag v. Lamont, 60 N. Y., 96 (1875); McCullough v. Talladega Ins. Co., 46 Ala., 376 (1871); Ruerbach v. La Soeur Mill Co., 28 Minn., 291 (1881); Racine & M. R. R. Co. v. Farmers' Loan & T. Co., 49 Ill., 331

(1868); Bulkley v. Briggs, 30 Mo., 452 (1860): New England F. & M. Ins. Co. v. Robinson, 25 Ind., 535 (1865); Hamilton v. Lycoming Ins. Co., 5 Pa. St., 339 (1847); Muir v. Louisville & P. Canal Co., 8 Dana (Ky.), 161 (1839); Henning v. U. S. Ins. Co., 47 Mo., 425 (1871); Salem Bank v. Gloucester, 17 Mass., 1 (1820); Gloucester Bank v. Salem Bank, 17 Mass., 33 (1820): Foster v. Essex Bank. 17 Mass., 479 (1821): Smith v. Lowell Meeting-house, 8 Pick., 178 (1829); Limerick Academy v. Davis, 11 Mass., 113 (1814); Farmington Academy v. Allen, 14 Mass., 172 (1817); Amherst Academy v. Cowels, 6 Pick., 427 (1828); Kennedv v. Baltimore Ins. Co., 3 Har. & J., 367 (1813); Stone v. Berkshire, etc., Soc., 14 Vt., 86 (1842); Episcopal, etc., Society v. Needham, etc., Church, 1 Pick., 372 (1823); Banks v. Poitiaux, 3 Rand. (Va.), 136 (1825); Columbia Bank v. Patterson, 7 Cr., 299 (1813); Randall v. Van Vechten, 19 Johns., 60 (1821); Gooday v. Colchester R'y Co., 17 Beav., 132 (1852); Magill v. Kauffman, 4 S. & R., 317 (1818); Dunn v. St. Andrew's Church, 14 Johns., 118 (1817); Waller v. Bank of Kentucky, 3 J. J. Marsh., 201 (1830). Crawford et al. v. Longstreet et al., 43 N. J. Law, 325, held that, to bind a corporation under a lease for years, execution under its corporate seal is not necessary. See, also, in general, Moss v. Averill, 10 N. Y., 449 (1853). The corporate seal to a note is superfluous. St. James, etc., v. Newburyport, etc., R. R., 141 Mass., 500 (1886).

It is settled law that it is not necessary to use a seal in appointing agents or entering into ordinary contracts for the corporation.

The corporate seal must be used in deeds and other instruments which would require a seal if they were the deeds or instruments

Contra, Benoist v. Carondelet, 8 Mo., 50 (1843); Clark v. Farmers', etc., Co., 14 Wend., 256 (1836). So, also, as to other contracts. It is considered to be the company's signature. Levering v. Mayor, etc., 7 Humph., 553 (1847). See, also, § 722, infra. Despatch, etc., v. Bellamy, etc., Co., 12 N. H., 205 (1841), a chattel mortgage. The officers' seal to the contract may be disregarded. Bank, etc., v. Guttschlick, 14 Peters, 19 (1840); Eureka Co. v. Bailey Co., 11 Wall., 488 (1870); Dubois v. Delaware, etc., Co., 4 Wend., 285 (1830).

¹ Pennsylvania R. R. Co. v. Vandiver, 42 Pa. St., 365, 369 (1862): Bank of Columbus v. Patterson, 7 Cranch, 299 (1813); Lathrop v. Commercial Bank, 8 Dana, 114 (1839). Where all the stockholders. being directors, agree informally and without meeting that a certain person shall be the corporate agent and take entire control, he is authorized to bind the corporation by his acts. Wood v. Wiley, etc., Co., 13 Atl, Rep., 137 (Conn., 1888). See, also, Perkins v. Washington Ins. Co., 4 Cowen, 645 (1825); Hoag v. Lamont, 60 N. Y., 96 (1875); Fleckner v. Bank of U.S., 8 Wheat, 338 (1823); Elysville Mfg. Co. v. Okisko Co., 1 Md. Ch., 392 (1849), holding that an appointment need not be entered upon the records of the corporation; White v. Westport Mfg. Co., 1 Pick., 215 (1822), holding that an agent cannot bind a corporation for a debt contracted before it was incorporated without express authority; Buncombe Turnpike Co. v. McCarsou, 1 Dev. & B., 310 (1835), holding that the appointment need not be under the corporate seal; Bates v. Bank of Alabama, 2 Ala., 452 (1841), where the appointment was by vote of the corporation; Maine Stage Co. v. Longley, 14 Me., 444 (1837), holding that the fact of agency may be proved by parol; Union Mfg.

Co. v. Pitkin, 14 Conn., 174 (1841); State Bank v. Bell. 5 Blackf., 127 (1839); Brookville Ins. Co. v. Records, 5 Blackf., 170 (1839); Bridgeton v. Bennett, 23 Me., 420 (1844), retaining an attorney proved by his statement: Randall v. Van Vecliten, 19 Johns., 60 (1821); Baptist Church v. Mulford, 3 Halst., 182 (1824); Perkins v. Washington Ins. Co., 4 Cowen, 645 (1825); Lathrop v. Scioto Bank, 8 Dana, 115 (1839); Savings Bank v. Davis, 8 Conn., 191 (1830), vote of directors without evidence under seal: Columbia Bank v. Patterson, 7 Cranch, 299 (1813); Andover Turnpike Co. v. Hay, 7 Mass., 102 (1810); Hayden v. Middlesex Turnpike Co., 10 Mass., 397 (1813); Essex Turupike v. Collins, 8 Mass., 292 (1811); Wright v. Lanckton, 19 Pick., 288 (1837); Bancroft v. Wilmington, etc., 5 Houst, (Del.), 577 (1876); Dunn v. St. Andrew's Church, 14 Johns., 118 (1817); Union Bank v. Ridgley, 1 Har. & G., 324 (1827); Kennedy v. Baltimore Ins. Co., 3 Har. & J., 367 (1813); Garrison v. Coombs. 7 J. J. Marsh., 85 (1831); Legrand v. Hampden-Sidney College, 5 Munf., 324 (1817): Bates v. Alabama Bank, 2 Ala., 451 (1841); Stamford Bank v. Benedict, 15 Conn., 437, 445 (1843); Detroit v. Jackson, 1 Doug., 106 (1843); St. Andrew's Bay L. Co. v. Mitchell, 4 Fla., 192 (1851); Topping v. Bickford, 4 Allen, 120 (1862). Parol evidence may prove the creation of a debt by the company. Borland v. Haven, 37 Fed. Rep., 394 (1888). Appeal bond given by a corporation may be signed without the corporate seal. Campbell v. Pope, 10 S. W. Rep., 187 Corporations may enter (Mo., 1888). into contracts through agents duly authorized, and such contracts may be by writing not under seal or by parol, as though made by natural persons. Section 714, supra; also American Ins. Co. v. Oakley, 9 Paige, 496 (1842); Watson

of individuals.¹ A corporation, consequently, may become bound by a contract which is executed in any of the following ways: By a written instrument sealed with the corporate seal; by an unsealed written instrument signed with the corporate name; by a written record of a resolution of its directors;² by an unwritten resolution of its directors;² by the oral agreements of its authorized agents;⁴ or by ratifying, acquiescing in or accepting the benefits of contracts made in its name by unauthorized agents.

§ 722. Method of drafting, signing, sealing and acknowledging a corporate deed or contract.— A deed or contract of a corporation should be drawn so that the name of the corporation appears in the body of the instrument, and not the name of the officer or agent who signs, seals or acknowledges it.⁵ The name of the cor-

v. Bennett, 12 Barb., 196 (1851); Hamilton v. Lycoming Ins. Co., 5 Pa. St., 344 (1847); Union Bank v. Ridgely, 1 Har. & G., 324, 413 (1827): Havden v. Middlesex Turnpike Co., 10 Mass., 401 (1813); Shotwell v. McKown, 5 N. J. L., 828 (1820); and an agent is not personally liable on a note signed by him as agent. Merrick v. Burlington & W. P. R. Co., 11 Iowa, 74 (1860), a verbal contract made by an agent; Buckley v. Briggs, 30 Mo., 452 (1860); Dunn v. Rector, etc., of Church, 14 Johns., 118 (1817). In England a contrary rule has been upheld. Homersham v. Wolverhampton Waterworks, 6 Exch., 137 (1851); Diggle v. London R'v Co., 5 Exch., 442 (1850); Copper Miners v. Fox, 16 Q. B., 229 (1851); Clark v. Crickfield Union, 11 Law & Eq., 462 (1852), citing and reviewing other authorities. In England. by statute 8 and 9 Vict., ch. 16, sec. 97, directors may contract by parol on behalf of a corporation where private persons may make a valid parol contract. See, also, Pauling v. London & N. W. R'y Co., 8 Ex., 868 (1853). Cf. Crampton v. Varna R'y Co., L. R., 7 Ch., 562 (1872). But after a contract for necessary work or goods is executed by the other party, and accepted by the corporation, it must pay for the same notwithstanding the irregularity. Clark v. Crickfield Union, supra; Doe v. Tainere, 12 Q. B., 1011 (1848). Cf. Lindley on

Partnership, pp. 352-361 (Callaghan & Co., 1881).

¹Stinchfield v. Little, 1 Me., 231 (1821); Savings Bank v. Davis, 8 Conn., 191 (1830); Hatch v. Barr, 1 Ohio, 390 (1824); Brinley v. Mann, 2 Cush., 337 (1848); Kinzie v. Chicago, 2 Scam. (Ill.), 187 (1839), in which it is also held that the mode of executing an instrument by a corporation "is to affix the seal with a declaration that it is the seal of the corporation, and to verify the act by the signature of the president and secretary of the corporation." Koehler v. Black River, etc., Co., 2 Black, 715 (1862).

² See § 714, supra.

3 Id.

⁴See §§ 716-720 relative to the inherent powers of the president and various other corporate agents to contract. A parol contract with a corporation may be proved although the director with whom it was made is dead. South, etc., Co. v. Muhlbacb, 16 Atl. Rep., 117 (Md., 1888).

⁵ A mortgage made in the president's name, signed by bim and sealed with his own seal, is not a mortgage although authorized by the corporation. It operates, however, as an equitable mortgage as regards subsequent mortgagees with notice. Miller v. Rutland, etc., R. R. Co., 36 Vt., 452 (1863). See Hatch v. Barr, 1 Ohio, 180 (1823). A corporate chattel mortgage is good if it runs in

poration should be signed to the instrument, and then should follow the word "by" and the name of the officer or person who makes the signature.¹

The courts will hold any device or form to be the corporate seal if there was an intent to bind the corporation and a seal of some kind was used.²

the corporate name, even though the president signs only his own name. Sherman v. Fitch, 98 Mass., 59 (1867); Hamilton v. McLaughlin, 12 N. E. Rep., 424 (Miss., 1887). If so drawn it is immaterial as to who signs or seals. Wiley v. Board of Education, 11 Minn., 371 (1866), involving a bond. If the statute authorizes the trustees to convey, their personal deed suffices. De Zeng v. Beekman, 2 Hill, 489 (1842). Where the president has title in his name he may convey as president. Vilas v. Reynolds, 6 Wis., 214 (1858). A deed made before incorporation to be delivered to the corporation after incorporation is good. Spring, etc., Bank v. Hulings, etc., Co., 9 S. E. Rep., 243 (W. Va., 1889). A deed to the "trustees of the First Baptist Church" passes title to the corporation. Keith, etc., Co. v. Bingham, 10 S. W. Rep., 32 (Mo., 1888). Although the body of the deed reads, "the president, directors, etc., of," followed by the name of the corporation as grantor, the deed would be construed as a deed of the corporation. Shaffer v. Hahn et al., 15 S. E. Rep., 1033 (N. C., 1892). The contract is signed sufficiently to satisfy the statute of frauds where the name of the corporation appears in the body of the instrument. Tingley v. Bellingham, etc., Co., 32 Pac. Rep., 737 (Wash., 1893). Where a mortgage purports to be by a corporation, but is signed by the president, treasurer and secretary personally, with their official titles following their names, and is acknowledged the same as they would acknowledge a personal mortgage, and the corporate seal is not attached, the mortgage is at most only an equitable mortgage, and in order to be foreclosed must be alleged to be such. Brown v. Farmers', etc., Co., 32 Pac. Rep.,

548 (Oreg., 1893). A deed of a corporation not under seal is not a deed and is void. Danville Seminary v. Mott, 28 N. E. Rep., 54 (Ill., 1891). The corporate seal must be used in the conveyance of corporate real estate in Texas. Shropshire v. Behrens, 13 S. W. Rep., 1042 (Tex., 1890). A corporation may by its charter be given the power to act as an attorney in fact, and it may execute a deed as such attorney. Killingsworth v. Portland Trust Co., 23 Pac. Rep., 66 (Oreg., 1890).

¹ Clark v. Farmers', etc., Co., 15 Wend., 256 (1836). The indorsement of a note by signing the corporate name, without adding by whom the name is signed, is good. Second Nat'l Bank v. Martin, 48 N. W. Rep., 735 (Iowa, 1891). A deed of corporate land properly drawn in the body of the deed, sealed with the corporate seal and properly acknowledged. but signed "M. Brayman, president, C. & F. R. R. Co." etc., is nevertheless good. Chouteau v. Allen, 70 Mo., 290 (1879). Cf. Taylor v. Agricultural, etc., Ass'n, 68 Ala., 229 (1880). A corporate mortgage signed by the officers with their own names, followed by their titles and scrolls for seals, is good. Johnston v. Crawley, 25 Ga., 316 (1858). A lease running to the company is good though only its officers' names were signed. Clark v. Gordon, 121 Mass., 330 (1876); Carroll v. St. Johns, etc., 125 Mass., 565 (1878). A sealed instrument to pay money signed by an individual's name, followed by the words "President of the New York Banking Company," is enforceable against it. Boisgerard v. New York Banking Co., 2 Sandf., 23 (1844).

² Christie v. Gage, 2 T. & C., 344 (1873), where the private seals of trustees

It is no longer necessary that the impression of a corporate seal shall be made upon wax or other adhesive substance—an impression upon the paper itself being held sufficient.¹ It is not necessary that express authority or authority under seal be given to an officer or agent to affix the corporate seal to an instrument; such powers may be inferred from the general powers of the officer or agent, the usual course of business and similar circumstances.²

of a church were held to be the corporate seal to a deed of its property. To same effect, Johnston v. Crawley, 25 Ga., 316 (1858); Porter v. Androscoggin R. R. Co., 37 Me., 349 (1853); Taylor v. Higgie, 83 N. C., 244 (1880). Cf. Saxton v. Texas, etc., R. R., 16 Pac. Rep., 851 (New Mex., 1888); South Baptist Church v. Clapp, 18 Barb., 35 (1853); Tenney v. Lumber Company, 43 N. H., 350 (1861). Sec. also, Ransom v. Stonington, etc., Bank, 13 N. J. Eo., 212 (1860); Mill-dam Foundry v. Hovey, 21 Pick., 417 (1839); Stebbins v. Merritt, 10 Cush., 27 (1852); Sherman v. Fitch, 98 Mass., 59 (1867): McDaniels v. Flower, etc., Co., 22 Vt., 274 (1850); Woodman v. York, etc., R. R. Co., 50 Me., 549 (1861), where an imprint in red ink upon bonds was held valid: Ontario Salt Co. v. Merchants' Salt Co., 18 Grant's Ch. (U. C.), 551 (1871), where simple wafer seals used by corporations in executing a decd were held sufficient in the absence of evidence that they were not their proper corporate seals: Hamilton v. Dennis, 12 Grant's Ch. (U. C.), 325 (1866), in which a ribbon woven through slits in the paper, so as to appear at intervals opposite the signatures, was held sufficient; Bates v. New York Central R. R., 10 Allen, 251 (1865), where, however, it was held that a fac-simile printed in ink when the blank instrument was printed is a mere scroll and not a valid seal. Cf. Royal Bank v. Junction, etc., R. R. Co., 100 Mass., 444 (1868), in which a seal printed upon bonds by direction of the officers of a corporation after they had been otherwise executed, and which purported to bear the corporate seal, was held valid. Contra, Mitchell v.

Union, etc., Co., 45 Me., 104 (1858). The corporation may have several seals. Bank of Middleberry v. Rutland, etc., R. R. Co., 30 Vt., 159 (1858), aud cases supra. An official may, while out of the state, cause a new seal to be made and attach it to bonds of the cornoration out of the state. Lynde v. County. 15 Wall., 6 (1872). A blank wafer will do for a seal. Brinley v. Mann, 56 Mass., 337 (1848). A scroll has been held good. City of Kansas v. Hannibal. etc., R. R. Co., 77 Mo., 180 (1882). Any seal is presumed to be the corporate seal, the signature of the agent executing the instrument being proved. Pennsylvania, etc., Co. v. Cook, 16 Atl. Rep., 762 (Pa., 1889). Where a deed is executed by the president and secretary under their private seals, there is a flaw in the title to the land. McCrosky v. Ladd, 28 Pac. Rep., 216 (Cal., 1891).

¹ Hendee v. Pinkerton, 14 Allen, 381 (1867), holding that a distinct and visible impression of a corporate seal upon and into the substance of the paper is sufficient and valid - a scroll is not a seal of a corporation; Pillow v. Roberts, 13 How., 472 (1851): Allen v. Sullivan, etc., R. R. Co., 32 N. H., 446 (1855); Corrigan v. Trenton, etc., Co., 5 N. J. Eq., 52 (1845). But see, contra, Farmers' & Manufacturers' Bank v. Haight, 3 Hill, 493 (1842). A seal printed on the instrument is not good. See preceding note. The company cannot object to a seal which it uses. Haven v. Grand, etc., R. R. Co., 94 Mass., 337 (1866).

² Union Gold Mining Co. v. The Bank, 2 Colo., 226 (1873); Merchants' Bank v. Goddin, 76 Va., 503 (1882); Hill v. Manchester, etc., Co., 5 B. & Ad., 866 (1883); The mere affixing of the corporate seal is of itself sufficient execution of a contract or deed, when properly affixed by a person duly authorized, and no signature at all need be made or used.¹

If an instrument or contract appears to be signed by the proper officer and the corporate seal appears to be affixed, the courts will presume that the seal is the corporate seal and was affixed by proper

Berks, etc., Railroad Co. v. Myers, 6 S. & R., 12 (1820), holding that the question of authority to affix a corporate seal is for the jury; Haven v. Adams, 86 Mass., 80 (1862); Gordon v. Preston, 1 Watts, 385 (1833), saying that power to affix a seal carries with it the power to acknowledge the execution of the instrument. See, however, Hoyt v. Thompson, 5 N. Y., 320 (1851), holding that the usual duties and powers of the president and cashier of a bank are not such as will justify them in affixing its corporate seal without express authority from the directors. A corporate officer may execute a mortgage for it without being authorized under the corporate seal. A mere resolution suffices. Hopkins v. Gallatin, etc., Co., 4 Humph. (Tenn.), 403 (1843); Fitch v. Lewiston, etc., Co., 12 Atl. Rep., 732 (Me., 1888); Sav. Bank v. Davis, 8 Conn., 191 (1830); Howe v. Keiler, 27 Conn., 538 (1858); Hutchins v. Bynum, 75, Mass., 367 (1857); Beckwith v. Windsor, 14 Conn., 594 (1842). Members of the board of directors may affix the corporate seal to a mortgage and acknowledge the execution. Gordon v. Preston, 1 Watts, 385 (1833). An employee may be directed to affix the seal. Royal Bank v. Grand, etc., R. R. Co., 100 Mass., 445 (1868), where it was affixed by the printer.

¹Union Bridge Co. v. Troy & L. R. R. Co., 7 Lans., 240 (1872); Clark v. Farmers', etc., Co., 15 Wend., 256 (1836). Affixing the corporate seal is the regular mode of executing a corporate mortgage. Savannah, etc., R. R. v. Lancaster, 62 Ala., 555 (1878); Whiting v. Union Trust Co., 65 N. Y., 576 (1875), where authority was given to the secretary to sign an instrument, and it was held that signature by the treasurer did not ren-

der it invalid, since the seal of the corporation was sufficient execution: Mc-Daniels v. Flower, etc., Co., 22 Vt., 274 (1850); Baron v. Kings Mountain Mining Co., 90 N. C., 417 (1884), holding that a deed concluding "in witness whereof the said corporation has caused this indenture to be signed by the president and attested by its secretary, and its common seal to be affixed," signed "G. C. W., president," with the seal affixed, is a valid common-law deed; Shewalter v. Pirner, 55 Mo., 218 (1874); Miners' Ditch Co. v. Zellerbach, 37 Cal., 543 (1869); President Union Bridge Co. v. Troy & L. R. R. Co., 7 Lans., 240 (1872), saving, "it seems a corporate seal being properly affixed, no signature is necessary; "Lowett v. Steam Saw-mill Ass'n. 6 Paige, 54, 60 (1836); Bank of Vergennes v. Warren, 7 Hill, 91 (1845); Whitney v. Union Trust Co., 65 N. Y., 576 (1875); Campbell v. James, 17 Blatch., 42 (1879); rev'd on other grounds, 104 U.S., 357; Lamson, etc., Co. v. Russell, 112 Mass., 387 (1873); Levering v. Mayor, 7 Humph. (Tenn.), 553 (1847); Memphis v. Adams, 9 Heisk. (Tenn.), 518 (1872). Where three directors, as a committee, are authorized to make a lease, and the lease is signed by two, and the corporate seal is affixed by them, it is sufficient, the third acquiescing. Union, etc., Co. v. Troy, etc., R. R. Co., 7 Lans., 240 (1872). But see Isham v. Bennington, etc., Co., 19 Vt., 230 (1847), holding that affixing a corporate seal will not excuse default in signing a deed when signing is necessary by statute. Mandamus to an officer to attach the corporate seal will be denied if there is any doubt as to the legal rights of the parties. People v. Blackhurst, 11 N. Y. Supp., 675 (1890).

authority, and that the execution was duly authorized, when proof is given that the officer signed and sealed the instrument; but this presumption may be overthrown by proof that the seal was affixed

¹ Underhill v. Santa Barbara, etc., Co., 28 Pac. Rep., 1049 (Cal., 1892); McDonald v. Chisholm, 23 N. E. Rep., 596 (Ill., 1890); Sherman, etc., Co. v. Morris, 23 Pac. Rep., 569 (Kan., 1890); Mullanphy Bank v. Schott, 26 N. E. Rep., 640 (Ill., 1891); Union Pac. R'v v. Chicago, etc., R'v, 51 Fed. Rep., 309 (1892): Bowers v. Hechtman. 47 N. W. Rep., 792 (Minn., 1891); Boyce v. Montauk, etc., Co., 16 S. E. Rep., 501 (West Va., 1892): Gorder v. Plattsmouth, etc., Co., 54 N. W. Rep., 830 (Neb., 1893); Reed v. Bradley, 17 Ill., 321 (1856); Blackshire v. Iowa, etc., Co., 39 Iowa, 624 (1874); Southern California C. Asso. v. Bustamente, 52 Cal., 192 (1877); Wood v. Whelen, 93 Ill., 153 (1879); Mickey v. Stratton, 5 Saw., 475 (1879; Thorington v. Gould, 59 Ala., 461 (1877); Morris v. Keil, 20 Minn., 531 (1874); Abbott's Trial Evidence, 35; Trustees of Canandaigua Academy v. McKechnie, 19 Hun, 62 (1879); 90 N. Y., 628; Union Gold Mining Co. v. The Bank, 2 Colo., 226 (1873); Mill-dam Foundry v. Hovey, 21 Pick., 417, 428 (1839); Malone v. Crescent, etc., Co., 18 Pac. Rep., 858 (Cal., 1888); Johnson v. Bush, 3 Barb, Ch., 207 (1848); Leggett v. New Jersey M. & B. Co., 1 N. J. Eq., 541 (1832); Parker v. Washoe Mfg. Co., 49 N. J. Law, 465 (1888); Hoyt v. Thompson, 5 N. Y., 320 (1851); Hill v. Manchester, etc., Co., 5 B. & Ad., 866 (1833); Chicago, etc., R. R. Co. v. Lewis, 53 Iowa, 101 (1880); Morse v. Beale, 68 Iowa, 463 (1886); Bliss v. Kawcah, etc., Co., 65 Cal., 502 (1884); Goodnow v. Oakey, 68 Iowa, 25 (1885); Evans v. Lee, 11 Nev., 194 (1876); Cincinnati, etc., R. R. Co. v. Harter, 26 Ohio St., 426 (1875); Whitney v. Union, etc., Co., 64 N. Y., 576 (1875); President, etc., v. Myers, 6 S. & R., 12 (1820); Adams v. Creditors, 14 La., 454 (1840); Darnell v. Dickens, 4 Yerg. (Tenn.), 7 (1833); Burrill v. Nahant Bank, 43 Mass., 163 (1840); Flint v. Clinton, etc., Co., 12 N. H., 434 (1841);

Indianapolis, etc., R. R. v. Morganstown, 103 Ill., 149 (1882); Solomon's Lodge v. Montmoclin, 58 Ga., 548 (1877): St. Louis v. Risley, 28 Mo., 415 (1859); St. Johns v. Steinmetz, 18 Pa. St., 273 (1852): Lovell v. Steam, etc., Assoc., 6 Paige, 54 (1836); Bank of Vergennes v. Warren, 7 Hill, 91 (1845); New Eng., etc., Co. v. Gilbert, etc., R. R. Co., 91 N. Y., 153 (1883). A corporate deed twentyfive years old, reciting that it is under seal, is presumed to have been under seal, though none is present. Catlett v. Starr, 7 S. W. Rep., 844 (Tex., 1888). The seal is not proof per se. Must prove the signature of the officer. Southern, etc., Assoc. v. Bustamente, 52 Cal., 192 (1877). The seal of a corporation, like the seal of an individual, must be proved in establishing the assignment of a mortgage. Jackson v. Pratt, 10 John., 381 (1813). Must prove that the seal is the company's seal. Den v. Vreelandt, 7 N. J. L., 352 (1800); Leazure v. Hillegas, 7 S. & R., 313 (1821). "A corporate deed can be proved only by proving that the seal affixed is the seal of the corporation, or that it was affixed as the corporate seal by an officer of the corporation or other person thereunto duly authorized." Osborne v. Tunis, 25 N. J. L., 633, 658 (1856). A mortgage with the corporate seal attached is presumed to have been regularly sealed. It is not invalidated by proof that the directors passed no resolution authorizing the use of the seal. Fidelity, etc., Co. v. Shenandoah, etc., R. R. Co., 9 S. E. Rep., 180 (West Va., 1889). The signature of the president and the seal of the corporation does not prove the deed. It is necessary to prove that it was executed by the president. Walsh v. Barton, 24 Obio St., 28, 41 (1873). The execution and recording of a deed by a corporation is prima facie evidence of delivery and acceptance. Stokes v. Detrick, 23 Atl. without proper authority. The corporation, by ratification and otherwise, may easily cure a defect as to the sealing.

A defect in the attestation clause is overlooked by the courts if there is sufficient to indicate the intent to acknowledge. The acknowledgment is made by one of the officers who executed it.³

Rep., 846 (Md., 1892). The presence of the seal is prima facie evidence that the corporation duly authorized the contract (Berks Turnpike v. Myers, 6 S. & R., 16; Parkinson v. The City, 85 Pa., 813), and that it was affixed by competent authority. St. John's Church v. Steinmetz, 18 Pa., 273: Solomon's Lodge v. Montmoclin, 58 Ga., 547: Morris v. Keil, 20 Minn., 531: Conine v. Railroad Co., 3 Houston, 288. Where a contract is signed by the second vice-president and assistant secretary, and has the seal attached, it is presumed to have been properly executed. Gutzeil v. Pennie. 30 Pac. Rep., 836 (Cal., 1892).

¹Koehler v. Black River Falls Iron Co., 2 Black, 715 (1862); Parker v. Washoe Mfg. Co., 49 N. J. L., 465 (1888), holding also that the testimony of a single officer that he had no knowledge of any authority having been given by the corporation to execute the instrument in suit was not sufficient to overcome the presumption of proper execution raised by the fact that the corporate seal was affixed to it. Union Gold Mining Co. v. The Bank, 2 Colo., 226 (1873), Where deeds are duly sealed with a corporate seal, the testimony of a director that he knew nothing thereof does not invalidate the sealing. Parker v. Washoe, etc., Co., 9 Atl. Rep., 682 (N. J., 1887). The execution of a corporate deed, apparently perfect on its face, may be overthrown by proof that the board of directors never authorized it: that the president signed it before the description was filled in; and that the description was to be other than that which was written in. Vaca, etc., R. R. v. Mansfield, 24 Pac. Rep., 145 (Cal., 1890). Where it is proven that the proper agents of a corporation signed a deed, and the seal attached to the deed

is presumed to be the corporate seal, such presumption is not overcome by proof that no vote of the directors was had authorizing the execution of the deed. Ruffner et al. v. Welton, etc., Co. et al., 15 S. E. Rep., 48 (W. Va., 1892). Although the proper signatures and seal attached to corporate contracts, deeds and mortgages raises a presumption of authority on the part of the officers to sign, yet the want of authority may be shown. Leggett v. N. J., etc., Co., 1 N. J. Eq., 541 (1832).

² Wood v. Whelan, 93 Ill., 153 (1879), where a mortgage executed by corporation officers under its seal without proper authority was held to be adopted by a simple resolution without again affixing the seal; Royal Bank of Liverpool v. Grand Junction R. R. & D. Co., 100 Mass., 444 (1868); Parish. etc.. v. Newburyport & A. Horse Railroad Co., 141 Mass., 500 (1886), in which the facts that two directors had examined corporate notes under seal and pronounced them genuine, and that the treasurer had paid interest upon them, were held to constitute a ratification. A court of equity may compel a corporation to affix its seal. Missouri River F. S. & G. R. Co. v. Commissioners of Miami Co., 12 Kans., 483 (1874). Mandamus sometimes lies. Rex v. Vice-Chancellor, 3 Burr., 1647.

³ The officer or agent who, in behalf of the corporation, affixes the common seal to an instrument is, in the absence of any statutory provision, deemed the agent executing it. He also stands in the relation of a subscribing witness to the execution of the deed by the corporation, and is the proper party to be examined or to make affidavit to prove that the seal affixed by him was the corporate seal, and that it was affixed by

§ 723. Corporate instruments made out in the name of an officer or agent instead of in the name of the corporation may be enforced by or against the corporation.— This is now the well-established rule. Thus, although a contract under seal is executed by the

authority of the board of directors. Bowers v. Hechtman, 47 N. W. Rep., 792 (Minn., 1891). The deed of a corporation is capable of being acknowledged. Proving the execution is not the only way of preparing it for record. Hopper v. Lovejov. 21 Atl. Rep., 298 (N. J., 1891). Authority to execute gives authority to acknowledge the instrument. Wright v. Lee, 51 N. W. Rep., 706 (S. D., 1892). The deed is good though there is no attestation as to the seal. Smith v. Smith, 62 Ill., 492 (1872). If the president signs the deed he is the proper person to acknowledge it. Lovett v. Steam, etc., Assoc., 6 Paige, 54 (1836). An acknowledgment similar in form to that of an individual suffices. Hoopes v. Auburn, etc., Co., 37 Hun, 568 (1885). Cf. Howe, etc., Co. v. Avery, 16 Hun, 555 (1879). See, also, Kelly v. Calhoun, 95 U. S., 710 (1877); Frostburg, etc., Assoc. v. Bruce, 51 Ind., 508 (1879); Muller v. Boone, 63 Texas, 91 (1885); Eppricht v. Nickerson, 78 Mo., 482 (1883); City of Kansas v. Hannibal, etc., R. R. Co., 77 Mo., 180 (1882); Tenney v. Lumber Co., 43 N. H., 350 (1861). A deed should conclude with the words "In testimony whereof the common seal of said company is hereunto affixed." Bason v. Min. Co., 90 N. C., 417 (1884); Gerard, Titles to Real Estate.

An approved form of attestation is: "In witness whereof the said party of the first part has hereunto caused its corporate seal to be affixed, and these presents to be subscribed by its president and secretary" [or other corporate officers, as the case may be].

[Seal.] [Signatures.]
The New York form of proof of the deed of a corporation by the president is as follows: "On this — day of —... in the year 18—, before me personally came A. B., the president of the —...

company, with whom I am personally acquainted, who, being by me duly sworn, said that he resided in the city of —; that he was the president of the — company; that he knew the corporate seal of said company; that the seal affixed to the above instrument was such corporate seal; that it was affixed by order of the board of directors of said company; and that he signed his name thereto by the like order as president of said company." See Abbott's Clerks' and Conveyancers' Assistant.

1 See p. 1097, supra, and notes. Where the president loans corporate funds and takes notes in his own name, the corporation is considered to be the payee. New Eng., etc., Co. v. Gay, 33 Fed. Rep., 636 (1888); Elwell v. Dodge, 33 Barb., 336 (1861). A bond running to the treasurer may be sued on by the New York, etc., Soc. v. company. Varick, 13 Johns., 38 (1816). So, also, as to a note running to a cashier. Baldwin v. Bank, etc., 1 Wall., 234 (1863); Com. Bank v. French, 38 Mass., 486 (1839). Or to a manager. Societe, etc., v. Mackintosh, 18 Pac, Rep., 363 (Utah, 1888), The company is liable on an order for goods though the order is signed by an officer as such officer. Rogers, etc., Co. v. Uniou, etc., Co., 134 Mass., 31 (1883). The case of Farmers', etc., Bank v. Haight, 3 Hill, 493 (1842), holds a corporation not liable on a note informally made out. See, also, Steele v. Oswego, etc., Co., 15 Wend., 266. It is not liable on a deed to the manager. Pickering's Claim, L. R., 6 Cb., 525 (1871). Suit lies against a bank on its check signed by its cashier in its own name. Mechanics' Bank, etc., v. Bank of Columbia, 5 Wheat, 326 (1820). See, also, Edwards v. Cameron's, etc., R'y Co., 11 Eng. L. & Eq., 565 (1852), where directors signed a note; Olcott v. Tioga R. R. Co.,

corporate officers in their individual names, it may be proved by parol that it was a corporation contract; that the corporation adopted and ratified it and attempted to carry it out and is liable on it.¹

§ 724. Liability of officers and agents on corporate securities which are not properly drawn, signed or sealed in the corporate name.— The rule that an officer or agent, to bind the corporation, must have an instrument made out in the corporate name applies

27 N. Y., 546 (1863); Bank, etc., v. Hooper, 71 Mass., 567 (1856); Morrill v. Segar Co., 32 Hun. 543 (1884), where the secretary signed a contract; Van Leuven v. First Nat'l Bank, 54 N. Y., 671 (1873), where the president signed; Bank of Genesee v. Patchin Bank, 19 N. Y., 312 (1859); S. C., 13 N. Y., 308 (1855); Many v. Beekman, etc., Co., 9 Paige, 188 (1841). But see De Witt v. Walton, 9 N. Y., 570 (1854). A sealed contract to sell land running to the president cannot be enforced by the Buffalo, etc., Institute v. corporation. Bitter, 87 N. Y., 250 (1881). A cashier may transfer a note by signing his own name as cashier. McIntyre v. Preston. 10 Ill., 48 (1848); 12 S. W. Rep., 4; § 724, notes. A note payable to and indorsed by "E. S. Hubbell, agent for Buffalo Colliery Company," is collectible against the company where it is shown that he was authorized by the company by its mode of doing business. Lake Shore, etc., Bank v. Butter, etc., Co., 51 Hun, 63 (1889). A due bill signed by an individual may be shown to have been intended as a due bill of the company, he being the president. Richmond, etc., R. R. v. Snead, 19 Gratt. (Va.), 354 (1869). An instrument for the payment of money running from a person "as manager and president" is enforceable against the corporation although signed by the person as an individual. Jones v. Woolley, 26 Pac. Rep., 120 (Idaho, 1891). A check signed by individual with the corporate seal attached and name of secretary not enforceable against company, it having no benefit thereof. Serrell v. Derbysbire, etc., R'y, 9 C. B., 811

(1850). The signature to a corporate mortgage omitting one word of the name is nevertheless good, and although signed "Chas. P. Law, president of the Santa." etc., is sufficient where the corporate seal is affixed. Underhill v. Santa Barbara, etc., Co., 28 Pac. Rep., 1049 (Cal., 1892). Where notes are made by an individual the pavee cannot introduce evidence that they were in behalf of the corporation, the suit being on the notes. Sparks v. Despatch, etc., Co., 15 S. W. Rep., 417 (Mo., 1891). An accommodation note running to "F. Medhurst, commercial director," given to him by a friend, cannot be enforced by the corporation. Medhurst having defaulted and defrauded the company. Societe, etc., v. Mackintosh, 24 Pac. Rep., 669 (Utah, 1890). The corporation is not liable on a note as follows: "For value received, we, the subscribers, jointly and severally, promise to pay the plaintiffs or order, for the Boston Glass Manufactory, \$3,500, on demand," and signed by individuals as individuals. Bradlee v. Boston, etc., Manufactory, 33 Mass., 347 (1835). A grant to "the governors, president and fellows of Kings college, at Windsor, in the province of Nova Scotia," is prima facie a grant to the corporation. Governors of Kings College v. McDonald, 2 Tham., 106 (Can., 1843).

¹ Williams v. Uncompander, etc., Co., 22 Pac. Rep., 806 (Colo., 1889). An assignment of a mortgage and note belonging to a corporation by its president and secretary, as follows: "We, the undersigned, D. R. T., president, and C. S. B., secretary, have transferred

only to deeds and not to simple contracts.¹ It frequently happens, however, that the person with whom the contract is made attempts to hold liable the officer or agent of the corporation on the ground that such officer or agent used his own name in the body of the contract, or signed it as agent instead of using the corporate name. The courts, however, have quite uniformly defeated such attempts to hold the officer or agent liable. If the instrument or contract indicates that the officer or agent is acting only as agent, and if the name of the corporation appears on the instrument, the officer or agent is not liable thereon.² But there have been many cases up-

have hereunto attached our names and affixed our seals," signing their names and affixing their private seals, is presumptively a corporate transfer. Lay v. Austin, 7 So. Rep., 143 (Fla., 1890).

¹See New Eng., etc., Co. v. De Wolf, 25 Mass., 56 (1829), and cases in preceding section.

² A note stamped with the corporate seal, followed by the words "John Roach, treasurer," is the company's note alone. Miller v. Roach, 22 N. E. Rep., 634 (Mass., 1889). A note, "We promise to pay," and signed "San Pedro Mining and Milling Company, T. Kraus, president," cannot be enforced against Kraus personally. Liebscher v. Kraus, 43 N. W. Rep., 166 (Wis., 1889). A note reading "We promise," etc., and signed "Warrick Glass Works, J. Price Warrick, president," is conclusively held to be the note of the corporation alone. Reeve v. First Nat'l Bank, 23 Atl. Rep., 853 (N. J., 1892). Where the directors sign a corporate note on the back with the words added "board of directors," it may be shown by parol evidence that they signed it as directors, and are not liable personally. Kline v. Bank of Tescott, 31 Pac. Rep., 688 (Kan., 1892). A note signed "G. A. Colby, President Pac. Peat Coal Co., D. K. Tripp, Sec. pro tem," is on its face a corporate note. Farmers', etc., Bank v. Colby, 28 Pac. Rep., 118 (Cal., 1883); Nott v. Hicks, 1 Cowen, 518 (1823); Billinger v. Bentley, 1 Hun, 562 (1874); Hascall v. Life Assoc., 5 Hun, 151 (1875); aff'd, 66

N. Y., 616; Morrill v. Segar Co., 32 Hun. 543 (1884), the court saving: "The rule now is that, where the instrument raises on its face a question as to the personal liability of the party signing it, parol evidence is admissible to show the intention of the parties;" Babcock v. Beman, 11 N. Y., 200 (1854); Whitney v. Wyman, 101 U. S., 392 (1879); Whitford v. Laidler, 94 N. Y., 145 (1883), where even a lease made out to an officer as such was held not enforceable against him: Holt v. Winfield, 25 Fed. Rep., 812 (1885), where an attempt was made to hold a president liable on an ultra vires subscription: Haight v. Sahler, 30 Barb. 218 (1859), where also the contract was sealed; Pitman v. Kintner, 5 Blackf. (Ind.), 250 (1839); Stanton v. Camp, 4 Barb., 274 (1848); Draper v. Moss, etc., Co., 87 Mass., 838 (1862); Sharpe v. Belles. 61 Pa. St., 69 (1869); Hopkins v. Mehaffy, 11 S.-& R. (Pa.), 126 (1824), where also a seal was used, the body of the instrument being in the company's name. To same effect, Abbey v. Chase, 60 Mass., 54 (1850), and Ellis v. Pulsifer, 86 id., 165 (1862); McHenry v. Duffield, 7 Blackf. (Ind.), 41 (1843), where a duebill was signed by a committee; Passmore v. Mott, 2 Binn. (Pa.), 201 (1809), where a secretary signed a ticket; Hovey v. Magill, 2 Conn., 680 (1818); McWhorter v. Lewis, 4 Ala., 198 (1842); Means v. Swormstedt, 32 Ind., 87 (1869); Mann v. Chandler, 9 Mass., 335 (1812): Carpenter v. Farnsworth, 106 id., 561 (1871). An officer is not liable personally on a note payable to him as "Sec.

holding a contrary rule. The weight of authority holds that the corporation alone is liable.

& Treas.." and indorsed by him likewise. Falk v. Moebs, 127 U.S., 597 (1888). A note signed in the company's name. followed by the words "B. L. Brownell, Pres.," binds him personally. Heffner v. Brownell, 31 N. W. Rep., 947 (Iowa, 1887). So, also, of a note signed "C. F. Clark, Trustee Omega Lodge," Coburn v. Omega Lodge, 32 id., 513 (Iowa, 1887). A promissory note that "We promise to pay," etc., signed "Houston Flour-mills Co., D. P. Shepherd, President," is enforceable against the company only. Latham v. Houston, etc., 3 S. W. Rep., 462 (Tex., 1887); Jefts v. York, 58 Mass., 371 (1849): 64 Mass., 392 (1852): O'Kell v. Charles, 34 L. T. Rep., 822 (1876). It may be a question of fact as to whether a treasurer in buving bought stock for himself or the company. Haynes v. Hunnewell, 42 Me., 276 (1856). See, also, Randall v. Van Vechten, 19 Johns., 60 (1821), holding a committee not liable on a sealed instrument: Stearns v. Allen, 25 Hun, 558 (1881). Cf. De Witt v. Walton, 9 N. Y., 571 (1853). In support of the text see, also, Dubois v. Delaware, etc., Co., 4 Wend., 285 (1830); Olcott v. Tioga, etc., R. R. Co., 27 N. Y., 546 (1863). also, Lindley on Partnership, pp. 346-352 (Callaghan & Co., 1881); Green's Brice's Ultra Vires, p. 754. The denial of the directors' liability on a note signed by them as directors is raised by answer, not by demurrer. McKensey v. Edwards, 10 S. W. Rep., 815 (Ky., 1889). A note drawn by the directors as directors of the company and sealed with the seal of the company is not enforceable against the directors individually. Aggs v. Nicholson, 1 H. & N., 165 (1856). The president is not liable on bonds which he signed as president and which the corporation had power to issue. McMasters v. Reed's Ex'rs, 1 Grant's Cases (Pa.), 36 (1854).

¹ Where a note reads, "We promise to pay," etc., and is signed "D. M. Co.

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J. K., President," the president alone is liable. Matthews et al. v. Dubuque Mattress Co. et al., 54 N. W. Rep., 225 (Iowa, 1893). Where a note is signed by the president and secretary in their individual names, except that they add the words "President" and "Secretary" respectively, there being nothing on the face of the note to show that it is a company note, they are liable personally on the note. They will not be allowed to show that it was the intention of all parties to bind the company only. or that the money went to the company only, or that the company authorized the note: nor can they file a cross-bill to relieve themselves from the note. San Bernardino, etc., Bank v. Andreson, 32 Pac. Rep., 168 (Cal., 1893). A note, "We promise to pay," etc., signed "E. H. Close, Treas., John Clark, Pres't," without referring to the corporation, may be enforced against Close and Clark personally, although in the border of the note the company's name Merchants' Nat'l Bank v. Clark, 64 Hun, 175 (1892). A treasurer is liable personally on a note signed personally by him. although the signature is followed by the word "Treasurer." Medberry v. Short, 15 N. Y. Week. Dig., 227 (1882); Tippets v. Walker, 4 Mass., 595 (1808). A note in the form "I promise to pay," and signed by "E., Pres. & Treas. C. Co.," has been held to be the note of E. and not of the corporation. Davis v. England, 141 Mass., 587 (1886); Stinchfield v. Little, 1 Me., 231 (1821), where a deed was to the agent; Bruce v. Lord, 1 Hilton, 247 (1856), holding the agent prima facie liable on a draft; Mare v. Charles, 5 Ell. & B., 978 (1856); Dayton v. Warne, 43 N. J. L., 659 (1881), involving a bond; Sawyer v. Winnegance, etc., Co., 26 Me., 122 (1846), holding the company not bound by an agreement to arbitrate; Seaver v. Coburne, 64 Mass., 324 (1852), involving a lease; Drake v.

§ 725. Requirements by charter or by-laws that contracts shall be made by certain officers or with certain formalities.—It has been held that, where the charter prescribes that corporate contracts shall be signed by certain officers, a contract that is signed by only a part of them is not enforceable, even in bona fide hands.¹ But the harshness and the inconvenience of this rule have caused it to be widely departed from and practically abandoned.²

Flewillen, 33 Ala., 106 (1858), holding the secretary prima facie liable; Dutton v. Marsh, L. R., 6 Q. B., 361 (1871), where the note was, "We, the directors of the Isle of Man Slate & Flag Co., Limited, do promise to pay J. D. £1,600." The company's seal was affixed. Tucker, etc., Co. v. Fairbanks, 98 Mass., 101 (1867); Barker v. Mechanics', etc., Co., 3 Wend., 94 (1829); Taft v. Brewster, 9 Johns., 334 (1812), involving a bond; Brockway v. Allen, 17 Wend., 40 (1837). Where a draft was drawn on an individual name, followed by the words "President Rosendale M'ng Co., New York," and accepted by him by the same signature, he is liable personally on it. Moss v. Livingston, 4 N. Y., 208 (1850); Hills v. Bannister, 8 Cowen, 31 (1827)

¹ Safford v. Wyckoff, 4 Hill, 442 (1842); Head v. Providence Ins. Co., 2 Cranch, 127 (1804); Badger v. American Ins. Co., 103 Mass., 244 (1869); Dawes v. North River Ins. Co., 7 Cowen, 462 (1827); Hill v. Manchester Water-works, 2 Nev. & M. (1833); S. C., 5 B. & Ad., 866; Corn Exch. Bank v. Cumberland Coal Co., 1 Bosw., 436 (1857). A corporate deed not countersigned by the secretary as required by statute is void as against a subsequent levy of execution. Galloway v. Hamilton, 32 N. W. Rep., 636 (Wis., 1887). Where the articles prohibit a purchase on credit a vendor who knew it cannot recover. Hotchin v. Kent, 8 Mich., 526 (1860). Where the charter prescribes who may be the corporate agents for particular purposes the provision is a limitation upon the power of the corporation, and it cannot appoint other agents for such purposes.

Washington Turnpike v. Cullen, 8 S. & R., 517, 521 (1822). And see United States Bank v. Dandridge, 12 Wheat. 64, 113 (1827); Royalton v. Royalton Turnpike Co., 14 Vt., 311 (1842); Union Turnpike v. Jenkins, 1 Caines, 381, 391 (1803); Beatty v. Marine Ins. Co., 2 Johns., 109 (1807): Commonwealth v. St. Mary's Church, 6 S. & R., 508 (1821): Como v. Port Henry Iron Co., 12 Barb., 27 (1851); In re General, etc., Co., 38 L. J. (Ch.), 320 (1869), where the general manager signed instead of two directors and the secretary. Time notes are void where the charter forbids all except demand notes. Root v. Godard, 3 McLean, 102 (1842); Root v. Wallace, 4 McLean, 8 (1845). The president cannot discount paper where the charter requires the board to pass on it. Manderson v. Com. Bank. 28 Pa. St., 379 (1857). See, also, British Assurance Co. v. Brown, 12 C. B., 723 (1852); but here the contract, being unilateral, was held not to be within the statute: Edwards v. Cameron's Coalbrook R., 11 Eng. L. & Eq., 565 (1852) an acceptance of a bill; Halford v. Cameron's Coalbrook R., 16 Q. B., 442 (1851); Andrews, etc., Co. v. Youngstown, etc., Co., 39 Fed. Rep., 353 (1889).

²The custom of the corporation may have that effect. Barnes v. Ontario Bank, 19 N. Y., 152 (1859); Bulkley v. Derby, etc., Co., 2 Conn., 252 (1817); Kilgore v. Bulkley, 14 Conn., 362 (1841); Kenner v. Manufacturing Co., 91 N. C., 421 (1884), holding also that the provision must be pleaded; Witte v. Derby Fishing Co., 2 Conn., 260 (1817). If the corporation ratifies or receives the benefits of the contract, the contract is valid. Whitney v. Union Trust Co., 65 N. Y.,

A constitutional and statutory provision that debts shall be incurred only upon a vote of the stockholders does not apply to

576 (1875): Curtis v. Leavitt, 15 N. Y., 1 (1857); Merchants' Bank v. Central Bank, 1 Ga., 418 (1846). Where the statute requires corporate contracts to be executed in a certain way, a contract not so executed cannot be enforced, although probably a quantum meruit would lie. Curtis v. Piedmont, etc., Co., 13 S. E. Rep., 944 (N. C., 1891). A bona fide purchaser of bonds is protected against the defense that they were issued illegally and in violation of statutory provisions, the issue itself having been authorized. Webb v. Herne Bay, L. R., 5 Q. B., 642 (1870). A substantial compliance with a statutory provision that bills of exchange must be accepted by the corporation in a certain way is sufficient. Halford v. Cameron's, etc., R'y, 16 Q. B., 442 (1851). In regard to the method in which New York religious corporations contract for the services of the minister, see Landers v. Frank, etc., Church, 97 N. Y., 119 (1884). A statute requiring that no contract shall be binding upon a corporation unless made in writing is held to refer wholly to contracts executory. Foulke v. San Diego, etc., R'y Co., 51 Cal., 365 (1876); Reuter v. Electric Tel. Co., 6 Ellis & B., 341 (1856). In this case an agreement of the chairman was held to have been ratified by the corporation though the deed of settlement required the signatures of three directors to contracts of the kind in controversy. Bargate v. Shortridge, 5 H. L. Cas., 297 (1855). Although the statute says that deeds of a corporation shall be signed by the president, yet signature by the vice-president is sufficient. Ballard v. Carmichael, 18 S. W. Rep., 734 (Tex., Although the statutes require contracts of corporations involving a liability of over \$100 to be in writing, and under the corporate seal, or signed by a corporate officer, yet a person performing work for the company may

sue on a quantum meruit. Roberts v. Demens, etc., Co., 16 S. E. Rep., 415 (N. C., 1892). A charter provision as to certain officers signing documents may In re Norwich. etc.. be disregarded. Co., 22 Beav., 143 (1856), where three directors did not sign as required. provision in Pennsylvania that certain corporations shall not make certain contracts except in writing signed by two directors does not apply to contracts made out of the state, and is waived if the corporation sues on the contract, and does not apply to a contract executed on one side. Park Bros., etc., v. Kelly, etc., Co., 49 Fed. Rep., 618 (1892). Where the charter provides that property shall be purchased by five trustees, a purchase-money mortgage executed by the president and secretary, not sealed with the corporate seal and not authorized by the corporation, is void. Nucleus Assoc. v. McElroy, 18 Atl. Rep., 1063 (Pa., 1890). A corporate lease not mala prohibita nor mala in se, but informal in that all the statutory formalities were not complied with. supports action for past-due Mayor v. Wylie, 43 Hun, 547 (1887). But where a statute prohibited transfers of securities over \$1,000 in value by cashier, unless directors had previously authorized, a director taking such securities without there being a previous authorization takes nothing by the transfer and cannot recover back what he paid therefor, the corporation being in a receiver's hands. Gillett v. Phillips, 13 N. Y., 114 (1855). Cf. Atkinson v. Rochester, etc., Co., 114 N. Y., 168 (1889). A statute providing that the president and two other members of a corporation shall sign deeds does not exclude the common-law method. Baron v. Mining Co., 90 N. C., 417 (1884). A deed of corporate land made by the president under his own name and seal is good when the statute said "the deed of the ordinary business debts.1 "Acts done by a corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter." 2 Provisions as to the mode in which a contract shall be made, such as that certain notice shall be given, may, if not followed, render the contract voidable. but not void. Where the charter provides that certain contracts may be made only after an act has been performed by the com-

president." Warner v. Mower, 11 Vt., Partnership, p. 248 (Callaghan & Co., 385 (1839). But see Isham v. Bennington, 19 id., 230 (1847), where the deed was signed by the president and failed to recite a resolution authorizing it, and was held void. A statute authorizing a corporation to convey real estate by an agent appointed for the purpose does not exclude other means of conveyance. as by its officers. Morris v. Keil, 20 Minn., 531 (1874), where the deed was by a foreign corporation. And in general the ordinary contracts of the company may be made without observing this statutory provision as to what officers shall contract. Mechanics' Bauk v. Bank of Columbia, 5 Wheat, 326 (1820); Prince of Wales Ass. Co. v. Harding, Ellis, B. & E., 183 (1858); Rockwell v. Elkhorn Bank, 13 Wis., 653 (1861); Merrick v. Burlington Plank-road, 11 Iowa, 74 (1860); Dana v. Bank of St. Paul, 4 Minn., 385 (1860); De Groff v. American Linen T. Co., 21 N. Y., 124 (1860); Creswell v. Lanahan, 101 U.S., 347 (1879): Kellev v. Mayor of Brooklyn, 4 Hill, 263 (1843); Moreland v. State Bank, 1 Breese, 203 (1828); South Carolina Bank v. Hammond, 1 Rich. L., 281 (1845); Boisgerard v. N. Y., etc., Co., 2 Sand. Ch., 23 (1844). See, also, Merritt v. Lambert, Hoff. Ch., 166 (1840), where title to land was taken in the president's name instead of the company's. Cf. Farmers' Loan & T. Co. v. Carroll, 5 Barb., 613 (1849). See, also, Fountaine v. Carmarthen, etc., Co., L. R., 5 Eq., 316 (1868), where no previous authorization by the stockholders was obtained; Agar v. Athenæum, etc., Soc., 3 C. B. (N. S.), 725 (1858), where a seal was required but was omitted: Lindley on

(1881).

¹ Manhattan Hardware Co. v. Phalen. 18 Atl. Rep., 428 (Pa., 1889).

² Demings v. Supreme Lodge, 131 N. Y., 522 (1892).

³ Campbell v. Argenta, etc., Co., 51 Fed. Rep., 1 (1892). A bona fide purchaser of a negotiable corporation bond is protected in assuming that the acts of the corporation and relating to its management in the issue of the bonds have been complied with. Hackensack Water Co. v. De Kay, 36 N. J. Eq., 548 (1883); Conn., etc., Ins. Co. v. Cleveland. etc., R. R., 41 Barb., 9 (1863), where the defense was set up that the stockholders had not voted on the matter as required by statute. The court held that the regular execution of the corporate powers was conclusively presumed in favor of bona fide holders. Purchasers are not affected by informalities in the notice of and the conducting of meetings. Fountaine v. Carmarthen R'y, L. R., 5 Eq., 316 (1868). It has been held that a purchaser of corporate securities may safely assume that all charter requirements in regard to notes relative to the securities have been complied with. Royal, etc., Bank v. Turquand, 6 E. & B., 327 (1856); Colonial Bank v. Willan, L. R., 5 P. C., 417 (1874); London, etc., R'y v. M'Michael, 5 Ex., 855 (1850), where the company sued for subscriptions; Zabriskie v. Cleveland, etc., R. R., 23 How. 381 (1859), where the stockholders acquiesced. See, also, Bank of United States v. Dandridge, 12 Wheat, 64 (1827). But compare the cases under the New York statute requiring the written consent of stockholders before a mortgage can be made by certain corpany, a third person may rely on the company's representation that the act has been done. A by-law requiring that contracts be made only by certain officers, or that certain formalities shall be observed, is usually of little consequence. Persons contracting with the corporation are not bound to know of the by-law, and the courts are reluctant to invalidate a contract by reason of it. 2

porations. § 779. infra. Where directors have power to bind the company, "but certain preliminaries are required to be gone through on the part of the company before that power can be duly exercised, then the person contracting with the directors is not bound to see that all these preliminaries have been observed." In re Land Credit Co., L. R., 4 Ch., 460 (1869), where bills of exchange had been issued and the directors knew it and acquiesced. Where the statute requires the consent of the court to a mortgage, the mortgage cannot be foreclosed if such consent was not obtained. Dudley v. Congregation, etc., N. Y. L. J., Sept. 2, 1891.

¹ Hackensack Water Co. v. De Kay, 36 N. J. Eq., 549 (1883), where bonds were to be issued only after a certain amount of the capital stock had been paid in: Royal, etc., Bank v. Turquand, 5 El. & B., 248 (1855), where a resolution was to precede all contracts. See, also, Ex parte American, etc., Co., 3 De G., J. & S., 147 (1865), and Prince of Wales, etc., v. Harding, Ell., Bl. & Ell., 183 (1857). See, also, Akin v. Blanchard, 32 Barb., 527 (1860); Kingsley v. New Eng., etc., Ins. Co., 62 Mass., 393 (1851); Union etc., Ins. Co. v. White, 106 Ill., 67 (1883): Irvine v. Union, etc., Bank, L. R., 2 App., 366 (1877); 5 N. Y. Supp., 291.

² Fay v. Noble, 66 Mass., 1 (1853); Ten Broeck v. Winn, etc., Co., 20 Mo. App., 19 (1885); Walker v. Wilmington, etc., R. R. Co., 1 S. E. Rep., 366 (S. C., 1887); Bank v. Cresson, 12 S. & R., 306 (1825); Manville v. Belden, etc., Co., 17 Fed. Rep., 425 (1883); Morrill v. Segar, etc., Co., 32 Hun, 543 (1884); Martin v. Niagara, etc., Co., 44 Hun, 130 (1887); Samuel v. Holladay, 1

Woolw., 400 (1869): Mechanics' Bank v. Smith, 19 Johns., 115 (1821). A company is bound by the customary contracts of its general freight agent, though he does not obtain the approval of the president as required by the bylaws. Medbury v. N. Y., etc., R. R. Co., 26 Barb., 564 (1858). Contra, Susquehanna Ins. Co. v. Perrin, 7 W. & S., 348 (1844); Rathbun v. Snow, 3 N. Y. Supp., 925 (Com. Pl., 1889). A person contracting with a corporation is not bound to know that a by-law prohibits the officers from borrowing money except by order of the board of directors. Arapaboe, etc., Co. v. Stevens, 22 Pac. Rep., 823 (Colo., 1889). A by-law that all notes shall be made to the order of the company may be disregarded. Stewart v. St. Louis, etc., R. R., 41 Fed. Rep., 736 (1887). Secret instructions limiting the apparent power of a general manager to contract do not affect strangers. Beuesch v. John, etc., Ins. Co., 11 N. Y. Supp., 348 (1890). Officers intrusted with the management of the corporate business are general agents, and private restrictions imposed by the corporation are immaterial against third persons acting on the faith of the agency. Grafius v. Land Co., 3 Phila. Rep., 447. Where the by-laws provided that no contract of the corporation involving a liability of over \$500 shall be voted unless signed by the president and treasurer and sealed with the corporate seal, a lease to the corporation on a rental of over \$500 and signed by the president alone, was held to be void. In this case it seems that no proof of even an apparent authority of the president was given. Bohm v. Loewer's, etc., Co., 9 N.

A limitation by by-law that no corporate liability shall be incurred unless expressly authorized by the directors does not invalidate corporate contracts made by agents acting "within the apparent scope of the agency." 1

A by-law requiring the signature of the secretary to notes issued by the corporation does not bind a person taking a note without actual knowledge of the by-law, especially where it has been long in disuse.²

C. ADMISSIONS OF AND NOTICE TO THE VARIOUS OFFICERS AND AGENTS OF A CORPORATION.

§ 726. Admissions and declarations of a director, president, cashier, general manager, treasurer, agent or stockholder as regards the corporation.— This subject is closely identified with the questions discussed in preceding sections. If a particular officer or agent has power to represent or contract for a corporation, he may in most cases bind the company by his admissions or declarations in regard thereto. But his power to do so must be shown.

The law is clear that the admissions of a stockholder do not bind the corporation.³ The board of directors acting as a board may

Y. Supp., 514 (1890). A by-law limiting the debts of the company is waived where such excess of debt is reported to the stockholders and acquiesced in by them. The by-law does not bind strangers who do not know of it. Underhill v. Santa Barbara, etc., Co., 28 Pac. Rep., 1049 (Cal., 1892). The question of the regularity of the action of corporate agents and officers in making contracts, and more especially of waiving provisions in contracts in violation of the rules, has frequently arisen in insurance policies where provisions have been waived orally or without the consent of specified officers. Carrugi v. Atlantic, etc., Co., 40 Ga., 135 (1869). An insurance policy is good although not sealed and without a clause exempting the stockholders from liability as required by the by-laws. In re Athenæum, etc., Soc., 4 K. & J., 549 (1858). The same question has also arisen in regard to the contracts of municipal corporations.

¹ Rathbun v. Snow, 123 N. Y., 343 (1890).

² Martin v. Niagara, etc., Co., 122 N. Y., 165 (1890).

³ Polleys v. Ocean Ins. Co., 14 Me., 141 (1837); Mitchell v. Rome R. R. Co., 17 Ga., 574, 586 (1855); Fairfield, etc., Co. v. Thorp, 13 Conn., 173 (1839); In re Kip, 1 Paige, 601 (1829); Soper v. Buffalo, etc., R. R. Co., 19 Barb., 310 (1855); Hartford Bank v. Hart, 3 Day (Conn.), 491, 495 (1807); Morrell v. Dixfield, 30 Me., 157 (1849); City Bank of Balt. v. Bateman, 7 Har. & John., 104 (1826); Magill v. Kauffman, 4 Serg. & Rawle, 317, 321 (1818); Stewart v. Huntington Bank, 11 id., 267, 269 (1824); Hosack v. College of Physicians, etc., 5 Wend.. 547 (1830); New York Code of Civil Pro., § 839; Augell & Ames on Corp., §§ 309, 657-660; 2 R. S. N. Y., 407, § 80; 1 Phill. Ev., 487, note 134, saying, "the admissions of corporators or quasi-corporators in the United States are received or rejected upon much the same principle as governs in respect to admissions of agents." The frequently cited case of Hartford Bank v. Hart, supra, where it was offered to prove bind the company by admissions and declarations, but a single director cannot do so except as a special agent of the company. Neither do the admissions or declarations of the president bind the company unless he has extra powers given to him; 2 nor ordinarily

that the president and directors of a bank knew when they discounted a note that the indorsement was forged, and to prove this by the confessions of said president and directors. Held, that the evidence was inadmissible.

¹ Magill v. Kauffman, 4 S. & R., 317 (1818), holding that while acts and declarations of trustees and agents of a congregation, in their official capacities. are evidence against those whom they represent, yet their statements made not in the transaction of the business of their principal are not evidence. "A fact once admitted by a corporation through its officer, duly and properly acting within the scope of his authority. is evidence against it, and cannot be withdrawn to the prejudice of any one who in reliance upon it has changed his situation in respect to the matter affected thereby. In such a case the doctrine of estoppel applies to a corporation as well as to an individual." O'Leary v. Board of Education, 93 N. Y., 1 (1883). Admissions of a director who is also a member of the discount board of a bank do not bind the corporation unless he was a duly authorized agent. River Bank v. Hoyt, 41 Barb., 441 (1864). Declaration of a director that a certain person is a corporate agent does not bind the company. Florida, etc., R. R. v. Varnedge, 7 S. E. Rep., 129 (Ga., 1888); Stewart v. Huntington Bank, 11 S. & R., 267 (1824), where certain declarations of bank officers as to the disposition to be made of certain collaterals were held not evidence against the bank. Reports to stockholders and directors do not bind the company by reason of that fact. Hall v. Mobile, etc., R. R. Co., 58 Ala., 10 (1877). The company is not bound by a director's declaration that an attorney would be paid. Hillyer v. Overman, etc., Co., 6 Nev., 51 (1870).

Nor as to the purpose of a fund. Grayville, etc., R. R. Co. v. Burnes, 92 Ill., 302 (1879). See, also, in general, Peck v. Detroit, etc., Works, 29 Mich., 313 (1874).

² The admissions of the president of the construction company which is operating the road are not admissible against the railroad company which is sued for an accident. Chattanooga, etc., R. R. v. Liddell, 11 S. E. Rep., 853 (Ga., 1890). His admissions cannot create a liability. Spyker v. Spence, 8 Ala., 333 (1845); Henry, etc., Co. v. Northern Bank, 63 id., 527 (1879). Admissions of the president of a bank that it did not own a note which was assigned to it are not admissible. Tuthill, etc., Co. v. Shaver, etc., Co., 35 Fed. Rep., 644 (1888). See, also, City Bank of Balt. v. Bateman. 7 Har, & Johns., 104 (1826), where a declaration by the president of a bank to an inferior officer, that certain money which had been brought into the bank by one of the directors was the money of the plaintiff, was held not admissible. But his admissions may prove its actual indebtedness. Hoag v. Lamont, 60 N. Y., 96 (1875). And as an active agent his admissions may bind the company. Northrup v. Miss., etc., Ins. Co., 47 Mo., 435 (1871); Spalding v. Bank, etc., 9 Pa. St., 28 (1848). So, also, where the company itself first uses his admissions as evidence. Western Union Tel. Co. v. B. & O. Tel. Co., 26 Fed. Rep., 55 (1885), the court saying, "a corporation can only speak through its officers and agents, and their declarations made in the course of their employment, and relating to the immediate transaction in which they are engaged, are always competent against the corporation." Statement of the president as to an accident, he not being present, is not admissible. Lombard, etc., R'y Co. v. Christian, 16 Atl. Rep., 628 (Pa., 1889); those of the secretary and treasurer; 1 nor those of a cashier, except as to matters in the ordinary course of his duties.2

The power of a superintendent to bind the company by his admissions and declarations depends on whether they pertain to his work and duties.³ The president and managing agent of a corporation have authority to make admissions in regard to the fulfillment of contracts.⁴ Such also is the rule in regard to other agents of the corporation.⁵

5 S. Rep., 353. Under the Alabama statute evidence of a person interested in the suit as to a conversation between him and the deceased president of a corporation is inadmissible. Tabler v. Sheffield, etc., Co., 6 S. Rep., 196 (Ala., 1889).

¹ Alexander v. Cauldwell, 83 N. Y., 480 (1881); Tripp v. New, etc., Co., 137 Mass., 499 (1884), where treasurer said that a condition had been performed; Kalamazoo, etc., Co. v. McAlister, 36 Mich., 327 (1877), where he stated a matter relative to a salary. Admissions or declarations of a secretary as to the amount due the corporation on a mortgage are not admissible unless it is shown that he was specially authorized to make them. Johnston v. Elizabeth. etc., Ass'n, 104 Pa. St., 394 (1883). Secretary and assistant treasurer of a corporation has no authority to bind the corporation by an account rendered by him to a creditor of the corporation. Harvey v. West Side, etc., Co., 13 Hun, 392 (1878). The assignee of a contractor's claim against a company cannot enforce it on the ground that at the time of assignment the secretary of the company represented that it would be paid. Barnett v. South, etc., R'y, 57 L. T. Rep., 436 (1887). In a suit of ejectment against a corporation, evidence that a corporate officer had tried to buy it of plaintiff is not admissible as an admission by the corporation. Mobile, etc., R. R. v. Cogsbill, 5 S. Rep., 188 (Ala., 1888).

²He cannot admit that the signature of the person to whom a certificate of deposit is issued is genuine, Merchants' Bank v. Marine Bank, 3 Gill, 96 (1845); nor that a new company is liable for the debts of an old one, Wyman v. Hallowell, etc., Bank, 14 Mass., 58 (1817); nor make representations as to an indorser's responsibility, Mapes v. Second Nat'l Bank, 80 Pa. St., 163 (1875). But he may admit to a surety that a note has been paid. Coheco Bank v. Haskell, 51 N. H., 116 (1871).

³The admissions of a superintendent that a reward offered by his company is to go to a certain person is not binding, Blain v. Pacific Ex. Co., 6 S. W. Rep., 679 (Tex., 1887); nor his representations as to the cost of mining. Hanover, etc., Co. v. Ashland, etc., Co., 84 Pa. St., 279 (1877). But he may admit the amount of damage caused by a nuisance. McGinness v. Adriatic Mills, 116 Mass., 177 (1874). May make admissions as to an assault made by an employee. Malecek v. Tower, etc., R. R. Co., 57 Mo., 17 (1874).

⁴ Bullock v. Consumers', etc., Co., 31 Pac. Rep., 367 (Cal., 1892).

5 Their admissions in regard to who paid for water in a ditch are evidence as to ownership thereof. Imboden v. Etowah, etc., Co., 70 Ga., 86 (1883). So, also, of a conductor as to a trunk. Morse v. Conn., etc., R. R. Co., 72 Iowa, 450 (1856); of a freight agent relative to the delivery of freight, Lane v. Boston, etc., R. R. Co., 112 Mass., 455 (1873).; and of a bridge-tender as to the proper way to pass through, Toll, etc., Co. v. Betsworth, 30 Conn., 380 (1862); but not of a road-master as to trees that were cut down, Coyle v. Ball, etc., R. R. Co., 11 W. Va., 94 (1877); nor as to an accident

The admissions and representations made by an agent of a corporation, acting within the scope of his authority and concerning matters intrusted to him, are binding upon the corporation. There are a large number of cases on this subject, and the question of how far the corporation is bound by the declarations of subordinate agents frequently arises in the courts. The general rule is very much the same as prevails in regard to admissions made by agents of a large business copartnership. If the admission pertained to matters within the scope of that particular agent's powers, or apparent powers, the principal is bound, otherwise it is not. Thus an inquiry, by a purchaser of stock, of corporate officers as to whether it was full-paid stock, must be made to officers having authority to speak for the corporation.

§ 727. Notice to an incorporator, stockholder, agent, superintendent, treasurer, secretary, cashier, president or director—When does their knowledge of facts constitute a notice of those facts to the corporation.—It is well settled that a corporation is not chargeable with knowledge of facts merely because those facts were

after it had happened, McDermott v. Hannibal, etc., R. R. Co., 73 Mo., 516 (1881); nor of trainmen, Adams v. Hannibal, etc., R. R. Co., 74 Mo., 553 (1881); nor of an engineer that brakeman would be paid, Stiles v. Western R. R. Co., 49 Mass., 44 (1844); nor of a telegraph operator, Sweatland v. Ill., etc., Tel. Co., 27 Iowa, 433 (1869); nor of an engineer as to an accident, Robinson v. Fitchburg, etc., R. R. Co., 73 Mass., 92. The admissions of a contractor may bind the company. Morris, etc., R. R. Co. v. Green, 15 N. J. Eq., 469 (1862). Declarations of agents made and known by the officers bind the corporation. Toll-bridge Co. v. Betsworth, 30 Conn., 380 (1862).

¹ Fairfield Co. Turnpike v. Thorp, 13 Conn., 173 (1839); Stewart v. Huntington Bank, 11 S. & R., 267 (1824); Hayward v. Pilgrim Soc., 21 Pick., 270 (1838); Sterling v. Marietta Co., 11 S. & R., 179 (1824); Westmoreland Bank v. Klinesmith, 7 Watts, 523 (1838); Harrisburg Bank v. Tyler, 3 Watts & S., 377 (1842); Farmers' Bank v. McKee, 2 Barr, 321 (1845); Hackney v. Allegheny Ins.

Co., 4 Barr, 185 (1846); Spalding v. Susquehauna Co. Bank, 9 Barr, 28 (1848); Crump v. United States M. Co., 7 Gratt., 352 (1851); Baptist Church v. Brooklyn Ins. Co., 18 Barb., 69 (1854); Devendorf v. Beardsley, 23 Barb., 656 (1857); Troy Ins. Co. v. Carpenter, 4 Wis., 20 (1855); Metropolis Bank v. Jones, 8 Pet., 12 (1834); Merchants' Bank v. Marine Bank. 3 Gill, 96 (1845); Hartford Bank v. Hart. 3 Day, 491 (1807); Osgood v. Manhattan Co., 3 Cow., 632 (1824); Polleys v. Ocean Ins. Co., 14 Me., 141 (1837); Ruby v. Abyssinian Soc., 15 Me., 306 (1838); Oldtown Bank v. Houlton, 21 Me., 507 (1842); Holman v. Norfolk Bank, 12 Ala., 369 (1847); Soper u Buffalo & R. R. R., 19 Barb., 310 (1855); Mitchell v. Rome R. R. Co., 17 Ga., 574 (1855); Tollbridge Co. v. Betsworth, 30 Conn., 380 (1862); Morse v. Connecticut River R. R., 6 Gray, 450 (1856); McGinness v. Adriatic Mills, 116 Mass., 177 (1874). See, also, Green's Brice's Ultra Vires, pp. 500-504; Wood's Railway Law, pp. 457-465; Morawetz on Corporations, §§ 540-540c. ² Browning v. Hinkle, 51 N. W. Rep.,

² Browning v. Hinkle, 51 N. W. Rep., 605 (Minn., 1892).

known to its incorporators or stockholders or clerk. But the corporation has notice of facts which come to the knowledge of its officers or agents while engaged in the business of the corporation, provided those facts pertain to that branch of the corporate business over which the particular officer or agent has some control. Thus, a corporation has been charged with notice of facts which were known at the time to its agent, local

Where an owner of a patent makes a contract to assign it, but afterwards, instead of doing so, forms a corporation and transfers the patent to it, the corporation is protected in its title, although the patentee was one of the incorporators and also a director of the corporation. Davis. etc., Co. v. Davis. etc., Co., 20 Fed. Rep., 699 (1884). Upon the reorganization of a corporation after bankruptcy the new company is not bound by the knowledge of its corporators as to the existence of incumbrances on property purchased from the old company. Burt v. Batavia Paper Mfg. Co., 86 Ill., 66 (1877). "If false and fraudulent representations are made to persons who afterwards become officers or agents of a corporation, and the corporation acts on the faith of such representations and is thereby defrauded, an action will lie in favor of the corporation for the damages thus sustained." Iowa, etc., Co. v. American, etc., Co., 32 Fed. Rep., 735 (1887).

² A company formed to purchase a patent-right is protected in its title, although some of its promoters and stockholders knew of an infirmity in the title. Racine, etc., Co. v. Joliet, etc., Co., 27 Fed. Rep., 367, 375 (1886); Housatonic Bank v. Martin, 42 Mass., 294, 308 (1840), where it was unsuccessfully sought by a mortgagor to defeat his deed by a subsequent assignment, on the ground that members of the corporation mortgagee had knowledge of the assignment; Union Canal Co. v. Lloyd, 4 Watts & S. (Pa.), 393 (1842), where, in a contest over title to land, evidence was held properly overruled which depended on the fact that a party was a stockholder in a com-

pany, and constructive notice of adverse claims was thereby sought to be established against the company. See Fairfield Sav. Bank v. Chase, 72 Me., 226.

³ Knowledge of a bank clerk of the place of residence of a party chargeable as indorser is not notice to the bank. Goodloe v. Godley, 21 Miss., 233 (1849).

4 "Notice to one agent of a corporation, with respect to a matter covered by his agency, must be as efficacious as to its directors or to its president, since these also are only agents, with larger powers and duties, it is true, but not more fully charged with respect to the particular thing than he whose authority is confined to that one thing." Saint v. Wheeler, etc., Co., 10 S. Rep., 539, 544 (Ala., 1892). Notice to an agent, but not in the course of his business, is not notice to the corporation. Willard v. Denise, 26 Atl. Rep., 29 (N. J., 1893). Where two corporations deal with each other through a common agent, the question of notice depends upon the circumstances of each case. Lyndou. etc., Co. v. Lyndon, etc., Inst., 22 Atl. Rep., 575 (Me., 1891). The corporation is not given notice of a breach of trust by an attorney in fact for the transfer of stock, even though the attorney be one of its directors. Tafft v. Presidio, etc., Co., 22 Pac. Rep., 485 (Cal., 1889). "In case of a corporation created for, and engaged*in, trade or business, service of a notice on any officer or agent of the company whose duty it is, either in his official capacity or by virtue of his employment, to communicate the fact of such service to the governing body of the corporation, is tantamount to personal service in case of a natural person." agent, or superintendent. So also as regards the higher officers of the company. Thus the company has been charged with notice of

State v. Felton, 19 Atl. Rep., 123 (N. J., 1889). The knowledge of an agent, whose powers are no greater than those of the master of a ship, is not notice to a corporation. Craig v. Continental Ins. Co., 141 U.S., 638 (1891). In the case Consolidated, etc., Co. v. Kansas, etc., Co., 45 Fed. Rep., 7 (1891), the court said: "Facts coming to the knowledge of an agent or attorney while engaged about the business of his agency are, in law, presumed to be known to the principal or client." Client chargeable when with knowledge of facts known to the attorney. Slattery v. Schwannecke. 44 Hun, 75; affirmed, 118 N. Y., 543. A corporation taking an assignment of a patent without notice that another party was entitled to it is protected. Averill v. Barber, 6 N. Y. Supp., 255 (1889).

¹ Knowledge of a local insurance agent that the insured is insuring for his firm is notice to the company. Keith v. Globe Ins. Co., 52 Ill., 518 (1869). Knowledge of local agent that insured had gone beyond the limits, and receipt of premiums thereafter, binds the company. Wing v. Harvey, 5 De G., M. & G., 265 (1854). Notice to insurance company of a subsequent insurance. Schenck v. Mercer, etc., Ins. Co., 24 N. J. L., 447 (1854). See, also, in general as to insurance, Troy, etc., Ins. Co. v. Carpenter, 4 Wis., 20 (1855); Bennett v. Maryland, etc., Co., 14 Blatch., 422 (1878); McEwen v. Montgomery, etc., Co., 5 Hill, 101 (1843). And see text-books on insurance law. "Notice to an agent of a bank, or other corporation intrusted with the management of its business, or of a particular branch of its business, is notice to the corporation in transactions conducted by such agent, acting for the corporation, within the scope of his authority, whether the knowledge of euch agent was acquired in the course

of the particular dealing or on some prior occasion." Cragie v. Hadley, 99 N. Y., 131 (1885); Wood's Railway Law, pp. 457-465; Smith v. Board, etc., Co., 38 Conn., 208 (1871). To this rule there are certain limitations more or less depending on the time of notice and the occasion of such notice; for example, while acting in the ordinary course of his employment as agent, notice to such agent of a corporation is notice to the corporation itself. But if such notice is given at an inopportune time, or upon an unseemly or inappropriate occasion, constructive notice to the corporation may ipso facto be easily rebutted. Seneca County Bank v. Neass, 5 Denio, 329 (1848); Holden v. N. Y. & Erie Bank, 72 N. Y., 294 (1878). It is well known that presumptive notice to a principal by reason of knowledge of an agent or trustee interested in concealing the fact from his principal cannot be imputed to the principal. Curtis v. Leavitt, 15 N. Y., 194, 195 (1857); Commissioners v. Thayer, 94 U.S., 631 (1876). This is equally true in the case of corporate agents. Seneca County Bank v. Neass, 5 Denio, 329 (1848). When the agent himself is the person charged with the fraud, notice to the principal through such an agent cannot be presumed, for it is the interest of the agent to conceal the facts from his principal. Cave v. Cave, L. R., 15 Ch. D., 639 (1880); 49 L. J., Ch., 505; 42 L. T., 730; 28 W. R., 793. Knowledge obtained by the corporate attorney and agent in another transaction does not bind the corporation. Constant v. University, etc., 111 N. Y., 604 (1888); Fairfield, etc., Bank v. Chase, 72 Me., 226 (1881). Notice to a bank clerk of matters not under his charge is not notice to the bank. Goodloe v. Godley, 21 Miss., 233 (1849).

² Knowledge of the general officers that an employee is incompetent is notice to the corporation, and it is liable facts known to the treasurer, secretary, cashier, and sometimes the president. Where a corporation takes title to land through its

for his negligence in running a train. Pittsburgh, etc., R'v v. Ruby, 38 Ind., 294, 313 (1871). Knowledge of the company's supervising engineer that the contractors in the construction of the bridge are innocently omitting certain things is notice to the company. Danville, etc., Co. v. Pomroy, 15 Pa. St., 151 (1850). Knowledge of a superintendent of an unrecorded lien is not notice to his company to which he conveys the property so subject. Wickersham v. Chicago, etc., Co., 18 Kan., 481 (1877). Knowledge of superintendent of coal mine of dangerous roof is notice to the company. Quincy, etc., Co. v. Hood, 77 Ill., 68 (1875): 42 N. W. Rep., 200.

1 Where the treasurer of two corporations takes the funds of one and places them with the other to make good a defalcation from the latter, the latter corporation is liable, since it is chargeable with the knowledge of its treasurer. Atlantic, etc., Mill v. Indian, etc., Mill, 17 N. E. Rep., 496 (Mass., 1888). Payment to the treasurer, who enters same on books, is notice to the company, since the directors, if they did their duty, would know of such entry. New Eng., etc., Co. v. Union, etc., Co., 4 Blatch., 1 (1857).

² Knowledge of the secretary that a vessel is being run not by the owners, but by a third person, is notice to the corporation, and it cannot sue the owners for work done. Pontchartrain R. R. v. Heirne, 2 La. Ann., 129 (1847). Knowledge of the secretary that his wife, the owner of stock, had pledged that stock is not notice to the corporation. Platt v. Birmingham, etc., Co., 41 Conn., 255 (1874).

³ Knowledge of the cashier and manager of a bank, acquired in the bank business, that an unrecorded deed has been made, defeats the bank's deed. Johnson v. Shortridge, 6 S. W. Rep., 64 (Mo., 1887). A bank may be a bona

fide purchaser of a draft from its cashier who has notice of defenses. Hummell v. Bank of Monroe, 37 N. W. Ren. 954 (Mich., 1888). Knowledge of cashier of bank that stock received in pledge is trust stock is notice to the bank. Loring v. Brodie, 134 Mass., 453 (1883). Cashier's knowledge of fraud in note is notice to the company. Fall, etc., Bank v. Sturtevant, 66 Mass., 372 (1853). tice to cashier of acceptance of the bank to receive payment in bonds is good no-Branch Bank v. Steele, 10 Ala., tice. 915 (1846). Notice to a cashier that bank funds have been loaned is notice to the bank. New Hope, etc., Co. v. Phenix Bank, 3 N. Y., 156 (1849). Where the directors acquiesce in the cashier's assumption of exclusive management of the bank's business, they will be held chargeable with knowledge of such things as by proper diligence they might and should have known as to the condition of business. Martin v. Webb, 110 U. S., 7 (1884). Knowledge of the cashier that a person turning in property to the bank is insolvent is notice to the bank. Witters v. Sowles, 32 Fed. Rep., 762 (1887). Notice to the cashier is notice to the bank. Bank of St. Mary's v. Mumford, 6 Ga., 44 (1849); Trenton, etc., Co. v. Woodruff, 2 N. J. Eq., 117 (1838). But knowledge obtained by the cashier outside of his duties is not notice to the bank (dictum). Seneca Co. Bank v. Neass. 5 Denio, 329, 337 (1848).

⁴The case of Kissam v. Anderson, 145 U. S., 435 (1892), reversed the decision below on the ground that it was for the jury to say whether the bank, whose funds were used by the president to pay the broker, had notice of payments by the broker to the president. A corporation to which the principal stockholder, incorporator and president conveys land is a purchaser with notice unless it proves the contrary. Billings v. Aspen, etc., Co., 51 Fed. Rep., 338, 349 (1892). A

incorporators, and all of them as well as the president had constructive or actual knowledge of a flaw in the title, the corporation thereby had similar notice. But in all cases the test turns on

bank is not given notice as to defenses to notes of a cattle company presented to the bank by its president but in behalf of the cattle company. Corcoran v. Snow C. Co., 23 N. E. Rep., 727 (Mass., 1890). Knowledge which a trustee of a railroad mortgage receives as trustee binds another company in which he is president and superintendent. N. Y., etc., R. R. v. N. Y., etc., R. R., 52 Conn., 274, 280 (1884). Notice to the president that stock is held in trust is notice to the company. Porter v. Bank of Rutland, 19 Vt., 410 (1847). Notice to the president of a bank that the village is being sued for damage due to the bank's sidewalk is notice to the bank. Port Jervis v. First Nat. Bank. 96 N. Y., 550 (1884). See, also, Gold, etc., Co. v. Nat. Bank, id., 640. Knowledge of the president that a person who is turning property in to the bank is insolvent is notice to the bank. Gilman v. Second Nat. Bank, 23 Hun, 498 (1881). See, also, Central, etc., Bank v. Levin, 6 Mo. App., 543 (1879); First Nat. Bank v. Fricke, 75 Mo., 178 (1881). Cf. First Nat. Bank v. Sherburne, 14 Bradw. (Ill.), 566. Notice to the president and certain stockholders who are sent to investigate for the corporation is notice to the corporation. United States v. San Pedro, etc., Co., 17 Pac. Rep., 337 (N. M., 1888). Knowledge of a president in regard to property which he sells to the company is not notice to the company. Barnes v. Trenton, etc., Co., 27 N. J. Eq., 33 (1876), citing cases. Where it was attempted to impute to a corporation the knowledge of its president of a prior unrecorded conveyance, it was held this could not be done where the knowledge was general and not specific or official. U. S. Ins. Co. v. Shriver, 3 Md. Ch., 381 (1851); S. C. on appeal, sub nom. Gen. Ius. Co. v. U. S. Ins. Co., 10 Md., 517 (1857). Knowledge of the president

of outstanding equities to land mortgaged by him to the corporation is not notice thereof to the company. Winchester v. Balti. & Susq. R. R., 4 Md., 231, 239 (1853). Notice to a stockholder who is also president of another company is not notice to the latter. First Nat. Bank v. Anderson, 5 S. E. Rep., 343 (S. C., 1888). The company is bound to take notice of the extent of a power of attorney given by a third person to its president. Mechanics' Bank v. Schaumberg, 38 Mo., 228 (1866). The knowledge of the vendor of personalty to a corporation that a chattel mortgage exists is not necessarily notice to the corporation, although he becomes its president and general manager. It is for the jury to decide whether there are not bona fide stockholders who would be injured by such a result. International, etc., Co. v. McMorran, 41 N. W. Rep., 510 (Mich., 1889). Knowledge of one who is president of a railroad and also of a bank, where the bank discounts paper for the railroad, is notice to the bank if he took part in its action. Waynesville Nat. Bank v. Irons, 8 Fed. Rep., 1 (1881); and see the note. Notice to a member of a copartnership is not notice to a corporation of which that member is president. Miller v. Ill., etc., R. R., 24 Barb., 312 (1857). President and treasurer who stand by and allow another to purchase property without saying that the company has a claim thereon bind the company thereby. Mihills, etc., Co. v. Camp, 49 Wis., 130 (1880). Knowledge of a president and director of a transfer of stock is notice to the company. Factors', etc., Co. v. Marine, etc., Co., 31 La. Ann., 149 (1879). Knowledge of a vice-president is not notice to the company. Fisher v. Murdock, 13 Hun, 485 (1878).

¹ Simmons, etc., Co. v. Doran, 142 U. S., 417, 436 (1892).

whether the corporate agent received the knowledge in the regular course of business.

The corporation is sometimes chargeable with knowledge of facts which are known to one of its directors; but there are so many exceptions to this rule that the only safety lies in a study of the cases themselves.

1 A corporation is chargeable with notice of facts known to its directors whereby the corporation acquired title to a large property from the hondholders of a foreclosed company. Rogers v. New York, etc., Land Co., 134 N. Y., 197 (1892). Notice to a director is not notice to the company except "in the business to which the knowledge is material through the agency of such director acting either alone or as one of the board." Buttrick v. Nashua, etc., R. R., 62 N. H., 413 (1882). The knowledge of a patentee that a label claims more than is correct is not notice to a corporation which purchased, owns and operates the patent, although he is a director. Lawrence v. Holmes, etc., 45 Fed. Rep., 357 (1891). The fact that a director in a bank negotiates the sale of commercial paper to it does not charge the bank with notice of defenses to the paper. Koehler v. Dodge, 47 N. W. Rep., 913 (Neb., 1891). If a director act in behalf of a bank in a transaction of which the bank takes the benefit, the bank is chargeable with a knowledge of all the director's acts in such transaction. Smith v. South Royalton Bank, 32 Vt., 341 (1859). Notice to a director who is acting as a special agent is notice to a bank. Fulton Bank v. Benedict, 1 Hall (N. Y.), 480, 557 (1829); Farmers' Bank v. McKee, 2 Pa. St. 318. Notice to three trustecs and superintendent of repairs for a corporation that the water from the bank building was not properly conducted away is notice to the corporation. "Jury may presume that the trustee did his duty by communicating to the corporation the knowledge he had obtained, and which it was material that the corporation should know." Winne v. Ulster, etc.,

Inst., 37 Hun, 349 (1855). Knowledge of a firm dissolution imparted to the board by a director at a regular meeting is notice to the bank. Bank of Pittsburgh v. Whitehead, 10 Watts (Pa.), 397 (1840); In re Carew's Estate Act. 31 Beav., 39 (1862), where a director and local manager of a bank obtained possession of certain acceptances without consideration, had them discounted by the bank and carried to his account, which was largely overdrawn; and the bank was held to have notice sufficient to prevent its being a bona fide owner. Notice once given to a board of directors is notice to its successor, although the individuals constituting it are all different. Mechanics' Bank v. Seton, 1 Pet., 299, 309 (1828). A director who as attorney for the company takes an acknowledgment of a mortgage to it binds the company with notice when he had previously taken an acknowledgment of an unrecorded deed. Fairfield, etc., Bank v. Chase, 72 Me., 226 (1881). Contra, Hauseman v. Bldg. Assoc., 81 Pa. St., 256.

² Although three of a body of city commissioners, who have defrauded the city by a conspiracy in expending money, are directors in a bank which advanced the money to the city, yet the bank may collect, it being proved that these three did not attend directors' meetings in reference to the matter and did not act for the bank in any way in regard to it. Mayor, etc., v. Tenth Nat'l Bank, 111 N. Y., 446 (1888). See, also, Nat'l Park Bank v. German, etc., Co., 53 N. Y. Super. Ct., 367 (1886). Knowledge of a director that a note is tainted with illegal gambling is not notice to the bank, although he recommended it for discount. Shaw v. Clark,

A corporation has notice of facts which are known to all its officers and stockholders and especially to a contracting firm that

49 Mich., 384 (1882). The fact that a cashier who discounts a note for a corporation payee is also a director in the latter is not notice to the bank of facts known to the corporation pavee. First Nat'l Bank v. Loghed, 28 Minn., 396 (1881). Knowledge of a director that a member of a firm in which the director is also a member has withdrawn therefrom is not notice to the corporation. But it was proved that the director had no management or interference in the corporate affairs. Powles v. Page. 3 C. B., 16, 24, 81 (1846). Where a director causes his bank to discount a note which he holds as an indorsee, the bank is not chargeable with knowledge of facts which he knows and which would defeat payment. Loomis v. Eagle Bank, 1 Disney (Ohio), 285 (1859); Louisiana State Bank v. Scnecal, 13 La., 525 (1839). Where a board of bank directors discounted a note for oue of their number, who had knowledge of fraud in its inception, the maker was held liable on the ground that the knowledge of the director which was not communicated to any other director could not be considered notice to the bank. Terrell v. Branch Bank at Mobile, 12 Ala., 502 (1847). And see Lucas v. Bank of Darien, 3 Ala. (O. S.), 280, 321 (1830); Washington Bank v. Lewis, 39 Mass., 24 (1839); Commercial Bank v. Cunningham, 41 Mass., 270, 276 (1841); First Nat'l Bank v. Christopher, 40 N. J. L., 435 (1878). Where a director had knowledge that certain bills which were discounted at the bank had been given originally as accommodation paper, but was not present when the board discounted them, and did not communicate his knowledge to any one, the bank was not regarded as having notice. Farmers' & Citizens' Bank v. Payne, 25 Conn., 444 (1857); Westfield Bank v. Cornen, 37 N. Y., 320 (1867). But if the director who has such knowledge acts for the bank

in discounting the note, his act is the act of the bank, and the latter is affected with his knowledge. National Security Bank v. Cushman, 121 Mass., 490 (1877); Bank of U. S. v. Davis, 2 Hill, 451, 464 (1842). *Cf.* North River Bank v. Aymar, 3 Hill, 262, 274 (1842).

Notice to an individual director, who has no duty to perform in relation to such notice, cannot be considered a notice to the corporation. And even knowledge of the president that certain deposits were only to be drawn in a certain manner was held not to be knowledge of the bank so as to render it liable when such money had, unknown to the president, been wrongfully withdrawn. Fulton Bank v. N. Y. & Sharon Canal. 4 Paige, 127, 136 (1833). Knowledge of directors in a matter of their own in which they are not acting for the corporation is not notice to the latter. held in a patent case where this defect of actual or constructive notice enabled the legal title to prevail over the equitable. Davis, etc., Wheel Co. v. Davis. etc., Wagon Co., 20 Fed. Rep., 699 (1884). An insurance company taking mortgages subsequent in date to an unrecorded deed of the same premises will not be charged with constructive notice of such deed by the fact that the grantor and mortgagor was, at the date of the deed and execution of the mortgages, a director in the insurance company. La Farge Fire Ins. Co. v. Bell, 22 Barb., 54, 61 (1856). Knowledge of a director, acquired by reading a notice thereof in a newspaper, that a firm has dissolved and that certain partners are no longer liable, is not notice to the corporation; he did not acquire the knowledge nor was it given to him for the corporation. Nat'l Bank v. Norton, 1 Hill, 572 (1841). On a question as to the ratification by a company of the unauthorized act of its president, where it is necessary to show knowledge on

owns the corporation and uses it to carry on the firm's business.1

Where railroad property purchased at foreclosure sale is transferred by the purchaser to a corporation for the bonds and stock of the latter, the New York court of appeals holds that such corporation "paid no value, and held the property subject to any equitable lien to which it was subject in the hands of its grantors."²

The question sometimes arises whether a director or officer of a corporation is chargeable with notice of all facts contained in the corporate hooks. The general rule is that he is not chargeable with actual knowledge of such entries, but such entries are admissions.

the part of the company, it is not enough to show an individual knowledge on the part of the minority of the board of trustees, even if a knowledge by all of them in their individual capacity, and not acting as a board, would be sufficient. Yellow Jack, etc., Co. v. Stevenson, 5 Nev., 224 (1869). A corporation is not chargeable with any knowledge of a deed which a director discovers on examining the record unofficially. Farrell Foundry v. Dart, 26 Conn., 376 (1857). Notice to a director, not constituted an organ of communication between the parties, that a promissory note was made to be discounted for a special purpose, is not notice to the bank, although the director was present when the note was discounted. Custer v. Tompkins County Bank, 9 Pa. St., 27 (1848). Knowledge by a director of a deed drawn by him professionally is not notice to the corporation whose subsequent deed of the same property is first recorded. Armstrong v. Abbott, 17 Pac. Rep., 517 (Colo., 1888). Notice of an unrecorded lien does not come to the corporation by the fact that a stockholder had notice and that he afterwards became an officer. Merchants', etc., Co., 8 Monthly L. Rep. (N. S.), 91 (Mass. U. S. D. C., 1855). Knowledge of a director that a bill purchased by company is accommodation on the part of the drawee is not knowledge of company if the director took no part in the purchase. In re Peruvian R'y Co., L. R., 2 Ch., 617 (1867). Knowledge acquired by a director while acting as a member of the firm which sells a note to the company is not notice to the company. Atlantic, etc., Bank v. Savery, 82 N. Y., 291 (1880). Corporatious having common directors or officers are not chargeable with knowledge of each other's transactions and condition. In re Marseilles Extension R'y, L. R., 7 Ch. App., 161 (1871). See, also, in general, Third Nat'l Bank v. Harrison, 3 McCrary, 316; West, etc., Bank v. Thompson, 124 Mass., 506.

¹ Holly Manuf. Co. v. New Chester, etc., Co., 48 Fed. Rep., 879 (1891).

² Vilas v. Page, 106 N. Y., 439, 465 (1887). See, also, ch. XL. Where the officers of a bank use its funds to buy property which they then turn into a corporation in payment for stock, the property is impressed with a trust and may be followed. The fact that they were officers of the corporation also is sufficient to give it notice. The bank may follow the stock or the property at their option. Farmers', etc., Bank v. Kimball, etc., Co., 47 N. W. Rep., 402 (S. D., 1890). A consolidated company takes with notice of facts known to one of the companies consolidated. Joy v. St. Louis, 138 U.S., 1 (1891). A tripartite agreement relative to a right of way through a park binds the successors of one of the companies. Id.

3"There is no rule of law which charges a director or stockholder of a corporation with actual knowledge of its business transactions merely because sible in evidence against him. They are not admissible as evidence, however, as against strangers.

A stockholder is chargeable with notice of entries on the corporate books if made in his presence and he personally assented thereto.³

But "a shareholder in a corporation is not chargeable with con-

he is such 'director or stockholder." Hence in an action by the corporation for an accounting, the books of the company are not competent evidence to establish the account and hold him Rudd v. Robinson, 126 N. Y., 113 (1891). A director sued by a stockholder for negligence in not attending to his duties is not presumed to have knowledge of all that is shown by the books of the company. This rule applies only to suits between the company and a stranger. Wallace v. Lincoln, etc., Bank, 15 S. W. Rep., 448 (Tenn., 1891). A director is bound to take notice of calls and cannot set up that he had no actual notice. Spellier, etc., Co. v. Geiger, 23 Atl. Rep., 547 (Pa., 1892). Knowledge imparted to the corporation is not notice to its president, who buys a note from it. Peckham v. Hendrew, 76 Ind., 47 (1881). The rule that a bank is estopped by the statement of its cashier to a surety that his principal had paid the note is not applicable where the surety is a director of the bank, for he will be conclusively presumed to know whether payment was made. His knowledge will also be imputed to a firm which was the security and of which he was a member. Merchants' Bank v. Rudolf, 5 Neb., 528 (1877). See, also, § 714, supra. Directors' minute-book is evidence against a director. Allison v. Coal, etc., Co., 9 S. W. Rep., 226 (Tenn., 1888); First Nat'l Bank v. Tisdale, 84 N. Y., 655 (1881). A director cannot hold the president liable on a loan by the former to the corporation made on representations of the condition of the corporation. Hubbard v. Weare, 44 N. W. Rep., 914 (Iowa, 1890).

1 The books of a company are "competent as evidence so far as related to any entries legitimately contained in them, and so far as they were relevant to the issues ou trial" in an action by creditors to hold a director liable for making a false report under the New York statute. Huntington v. Attrill, 118 N. Y., 365 (1890). Entries in corporate books may be evidence against a director. Rudd v. Robinson, 54 Hun, 315 (1889). Corporate books are admissible in evidence to show money received as against corporate officer on trial for embezzlement, even though the entries were not made by him. Humphrey v. People, 18 Hun, 393 (1879). The minutes of a directors' meeting are evidence of who were present and what was done, so far as a suit between the corporation and one of those who were present is concerned. Olney v. Chadsey, 7 R. I., 224 (1862). A director and vice-president is chargeable with knowledge of what is on the corporate records. First Nat'l Bank v. Tisdale, 84 N. Y., 655 (1881). Quære, as to entries in miscellaneous corporate works. Billings v. Trask, 30 Hun, 314 (1883).

² Person contracting with corporation is not bound to know what is contained in corporate records. Blair v. St. Louis, etc., R. R. Co., 25 Fed. Rep., 684 (1885). Entries in corporation books of matters relating to any property or right claimed by them can never be evidence for them unless made so by act of the legislature. Not admissible in favor of corporation as against strangers. Graville v. N. Y., etc., R. R. Co., 34 Hun, 224 (1884). See, also, 15 Wend., 256, note; Wait on Insolvent Corporations, § 528.

³ See Abbout's Trial Evidence, p. 53.

structive notice of resolutions adopted by the board of directors, or by provisions in the by-laws regulating the mode in which its business shall be transacted with its customers."

The question of serving notice or papers upon corporations in judicial proceedings is discussed elsewhere.² The publication of a notice in a newspaper is not notice, unless the party notified is proved to have read the notice.³

¹So held where a stockholder in a telegraph company sued it for negligence in sending a message. Pearsall v-Western U. T. Co., 124 N. Y., 256 (1890). A stockholder is not chargeable with knowledge of corporate contracts of which as a fact he knows nothing. Tarbox v. Gorman, 31 Minn., 62 (1883). A stockholder in a telegraph company, who is suing the latter for missending a message, is not chargeable with knowledge of the corporate by-laws relative to the sending of messages, even though he be a stockholder. Pearsall v. Western U. Tel. Co., 44 Hun. 532 (1887). But one who is a stockholder, director and vice-president is chargeable with knowledge of entries on the corporate books. First Nat'l Bank v. Tisdale, 18 Hun, 151 (1879); aff'd, 84 N. Y., 655. See, also, ch. XXX. One who is a stockholder and also director is as fully bound by entries in them as a partner is by entries in the partnership books. Montgomery v. Exchange Bank, 6 Atl. Rep., 133 (Pa., 1886). Minutes of directors were held to be evidence against a subscriber to disprove certain defenses set up by him to his subscription. Bedford R. R. Co. v. Bowser, 48 Pa. St., 29 (1864). The cases of Union Canal Co. v. Loyd, 4 Watts & S. (Pa.), 393, 398; and Graff v. Pittsburgh, etc., R. R. Co., 31 Pa. St., 489, 495 (1858), hold that a stockholder present and assenting to an entry on the corporate books is bound by it. But Hill v. Manchester, etc., Co., 5 B. & Ad., 866 (1833), per Parke, B., holds that corporate minutes are not admissible on behalf of the company in a suit against it by one of its stockholders. Corporate

books are not only evidence of cornorate acts when they are to be proved. but are to the same extent evidence against stockholders who are chargeable with knowledge of their contents. Blake v. Griswold, 103 N. Y., 429 (1886); Billings v. Trask, 30 Hun, 314 (1883). As between stockholders, the books of a corporation and sworn copies thereof are competent evidence to show the acts of a corporation. Hubbell v. Meigs, 50 N. Y., 480 (1872). See, also, Lindley on Partnership, p. 550; Black v. Shreve, 13 N. J. Eq., 455: Haynes v. Brown, 36 N. H., 545; Pittsburg Coal Co. v. Foster. 59 Pa. St., 365. Where a person is merely in possession of bank stock as collateral security, and does not participate in the meetings of the stockholders, and is not recognized by the stockholders as a member, he is not such a part of the corporation as to be bound to have knowledge of the facts in possession of the corporation or its officers. Baker v. Woolston, 27 Kan., 185, 189 (1882). A pledgee of stock, who takes no part in the stockholders' meetings is not chargeable with notice of a lien which the corporation has on property which he purchases. Baker v. Woolston, 27 Kan., 185 (1882).

² See § 752.

³ See § 119, supra. Though the company takes a newspaper, the announcement therein of a dissolution of partnership is not notice to it. Vernon v. Manhattan Co., 22 Wend., 183 (1839); aff'g 17 id., 524. Cf. 1 Hill, 578, note. Contra. Bank of S. C. v. Humphreys, 1 McCord (S. C.), 388 (1821); Martin v. Walton, 1 McCord (S. C.), 16. Notice in a newspaper taken by an individual

Where a party owns all the stock of another corporation it has been held that he is chargeable with notice of entries upon its books.1

is not notice. Rawley v. Horne, 3 Bing., company has notice. Green v. Mer-2 (1825). But if contained in a news-chants' Ins. Co., 27 Mass., 402 (1830). paper taken by a marine insurance company and is marine news, and the 55 N. W. Rep., 496 (Iowa, 1893). president knew the fact involved, the

¹ Hamilton, etc., Co. v. Iowa, etc., Co.,

CHAPTER XLIV.

RATIFICATION, ACQUIESCENCE OR LACHES AS A BAR TO A STOCK-HOLDER'S ACTION HEREIN.

§ 728. Introductory.

729. Laches, acquiescence or ratification as a defense to a stockholder's action to remedy illegal corporate acts which are prohibited by statute or contrary to public policy.

730. Express ratification herein.

§ 731. Stockholder chargeable with laches only after he has a full knowledge of the facts.

732. What length of time constitutes laches herein.

733. Miscellaneous applications of the doctrine of laches herein.

§ 728. Introductory.— When a stockholder brings an action to remedy the frauds, ultra vires acts or negligence of a director or third person, the most common and dangerous defense that he has to encounter is the defense that he has been guilty of laches in bringing his action. Like the defense of contributory negligence— a modern principle of law that defeats many actions for negligence— so the defense of laches, acquiescence or ratification has sprung up to defeat stockholders' actions herein. The principles which govern, define and explain this defense have become well settled. They form the subject of this chapter.

§ 729. Laches, acquiescence or ratification as a defense to a stockholder's action to remedy illegal corporate acts which are prohibited by statute or contrary to public policy.—It has already been shown that a stockholder may bring an action to remedy frauds, negligence or ultra vires acts. As regards the frauds and negligence of corporate officers, it is well settled that laches is a good defense to a stockholder's action herein. In reference to ultra vires acts, however, which are mala prohibita or mala in se, there is more difficulty. It is very clear that no assent or acquiescence of the stockholders can validate such acts.

But it is a different question to determine whether, after long

¹ See Kent v. Quicksilver Min. Co., 78 N. Y., 159, 186 (1879), where the court says: "A corporation may do acts which affect the public to its harm, inasmuch as they are per se illegal or are malum prohibitum. Then no assent of stockholders can validate them." A contract in which the directors are interested, being void by statute, cannot be en-

forced on the ground of waiver by the corporation. Barton v. Port Jackson, etc., Co., 17 Barb., 397 (1854). "Void" cannot be construed as "voidable" in a statute which is enacted from public policy, and not for the benefit of parties only. King v. Inhabitants, etc., 8 B. & C., 466 (1826), concerning a statute against binding out children.

acquiescence, the stockholder may take advantage of the invalidity of such acts. As regards acts mala prohibita—that is, acts expressly prohibited by statute—the stockholder may be barred from complaining thereof, since the state, through its attorneygeneral, may protect the interests of the public. The stockholder, however, may sue on the ground that unless the evil is corrected the state may forfeit the corporate franchises.² As regards acts mala in se, probably the rule will depend on the circumstances of the case. If the stockholder has participated in the act or knowingly accepted the benefit thereof, the court will not aid him, since he who comes into equity must do so with clean hands.3 Thus where a lease of a railroad is ultra vires, a bill in equity will not lie to set it aside. The court will aid neither party, they being in pari delicto.4 When, however, a stockholder has not participated or knowingly accepted the benefit of corporate contracts which are mala in se, there would seem to be no reason why mere delay on his part in bringing suit to set aside such acts should be fatal to his bill.

§ 730. Express ratification herein.— There are in general two ways in which a stockholder may be said to have ratified an act of the directors which he is attempting to enjoin or set aside. The ratification may be by an express agreement or statement to that effect, or it may be by such laches or acquiescence as will amount to an implied ratification. Cases involving the defense of an express ratification rarely arise, since this defense is easy to prove. If the complaining stockholder participated in the act complained of, he of course is barred of his remedy.

¹ See Stewart v. Erie, etc., Trans. Co., 17 Minn., 372 (1871); and in Gray v. Chaplin, 2 Russ. Ch., 126 (1826), the court said that the stockholder cannot claim that the public is wronged. "If a public right is to be enforced it must be at the suit of those to whom the protection of public rights belongs." Cf. Ashbury R'y, etc., Co. v. Riche, L. R., 7 H. of L., 653 (1875); S. C., L. R., 9 Ex., 262. That which is forbidden by statute cannot be ratified. A. C. Nellis Co. v. Nellis, 62 Hun, 63 (1891); Taylor v. Chichester, etc., R'y Co., L. R., 2 Ex., 356 (1867).

² Manderson v. Commercial Bank, 28 Pa. St., 379 (1857), where discounts were being improperly made.

³ See § 39, supra.

⁴ St. Louis, etc., R. R. v. Terre Haute, etc., R. R., 145 U. S., 393 (1892).

⁵Thus, in Evans v. Smallcombe, L. R., 3 H. of L., 249 (1868); aff'g L. R., 3 Eq., 769, the court said: "Consent might be either express or might be inferred from the acquiescence of the shareholders after full knowledge of the transaction which was in excess of the powers of the directors." See, also, Kent v. Quicksilver Min. Co., 78 N. Y., 159, 187 (1879).

⁶ As an instance of express ratification, see Allen v. Wilson, 28 Fed. Rep., 677 (1886). *Cf.* §§ 652, 662, 683.

⁷ Acquiescence and ratification of the guaranty by one railroad of stock and bonds of another railroad, the stock and bonds being owned by directors of the

In like manner, where the stockholder, with full knowledge, has accepted the benefit of the act, he cannot complain thereafter. But the defense of an implied ratification is more difficult to establish. An implied ratification is generally spoken of as laches. It is the subject of the remainder of this chapter.²

§ 731, Stockholder chargeable with laches only after he has a full knowledge of the facts.— Laches is a defense only when the stock-

former company, is a bar to an action to set the same aside. Barr v. N. Y., etc., R. R., 125 N. Y., 263 (1891). Although creditors may complain of a mortgage given to directors by the corporation when largely in debt, yet the president. who is also a large stockholder and who signs the mortgage, cannot do so. Perry v. Pearson, 25 N. E. Rep., 636 (Ill., 1890). Although a stockholder voted in favor of an ultra vires lease, vet if the corporation has repudiated the lease, the estoppel is destroyed and the stockholder's suit may continue. Memphis, etc., Co. v. Grayson, 7 S. Rep., 122 (Ala., 1890). Where all the stockholders unite in the issue of watered stock to the president for his own use, and assent to a contract between him and the company, the corporation itself cannot subsequently complain. Arkansas, etc., Co. v. Farmers', etc., Co., 22 Pac. Rep., 954 (Colo., 1889). A purchaser of stock that has voted for an issue of "watered" bonds and stock is estopped from complaining, even though the issue was prohibited by the constitution of the state - Pennsylvania. Wood v. Corry, etc., Co., 44 Fed. Rep., 146 (1890). A stockholder who votes for the purchase of property from a director cannot afterwards complain. Barr v. Pittsburgh, etc., Co., 51 Fed. Rep., 33 (1892). Where an act by the directors amounts to a preference to them, the corporation being insolvent, the act cannot be validated by a vote of the stockholders, the directors themselves voting a majority of the stock. Farmers' L. & T. Co. v. San Diego, etc., St. R'y Co., 45 Fed. Rep., 518 (1891). See, also, in general, Branch v. Jesup, 106 U. S., 468, 476

(1872); United States v. U. P. R. R. Co., 98 U.S., 569, 612 (1878). If all of the directors and stockholders know of a sale of property by a director to the corporation and do not object, and use the property, the transaction cannot be Battelle v. Northwestern. set aside. etc., Co., 33 N. W. Rep., 327 (Minn., 1887). A bondholder who is a party to the purchase at the foreclosure sale cannot object to the legality of the proceedings. Crawshaw v. Soutter. 6 Wall., 739. Knowledge of stockholders is not knowledge of the corporation. Hence, after the guilty directors are ousted by an election, the corporation itself may sue. Pacific R. R. v. Mo. P. R. R. Co., 111 U. S., 505 (1884). Unless inequitable, or rights of third persons have intervened. Id. "A receipt of money as a part of the earnings of a corporation is no ratification of acts of business carried on outside of the corporation without knowledge of him who is sought to be charged with them that the money came from such business." Central, etc., Bank v. Walker, 66 N. Y., 424 (1876). Stockholder in old and new company who aids in the latter's improvement of property purchased by it from former is estopped from objecting to validity of sale. St. Louis, etc., Co. v. Sandoval, etc., Co., 5 N. E. Rep., 370 (Ill., 1886).

¹ London Assurance Co.'s Case, 5 De G., M. & G., 465, 481 (1854). See, also, Weed v. Little Falls, etc., Co., 31 Minn., 154 (1883).

² See First Nat'l Bank v. Drake, 29 Kan., 311 (1888), for a definition of ratification.

holder, with a full knowledge of the facts, has delayed an unreasonable length of time in bringing his action. These two elements, knowledge and delay, are the essential elements of the defense. Until the stockholder has full and complete knowledge of all the essential facts which would be likely to induce him to institute the action, the beginning of the time from which laches will run cannot be said to commence. Where, however, the facts would be well known to any intelligent man, and the means of knowledge are open to the stockholder, he is chargeable with knowledge from the date when he should have ascertained the facts.

But it is not incumbent on the stockholder to keep himself informed as to the various acts of the corporation. He is not chargeable with knowledge merely because he might have ascertained the facts by an examination of the corporate books.⁴ Moreover, it is

¹ See the leading case of Cumberland Coal Co. v. Sherman, 30 Barb., 533 (1859), quoting from Lewin on Trusts; and the equally important case of Hoffman, etc., Co. v. Cumberland, etc., Co., 16 Md., 456 (1860).

² Gilman, etc., R. R. Co. v. Kelly, 77 Ill., 426 (1875). Where there is not a full disclosure at a stockholders' meeting the members present are not bound by their assent. Ives v. Smith, 3 N. Y. Supp., 645 (1888).

³ Laches must be denied in the bill and details given of how and when knowledge was received of the act complained of. Means of knowledge are equivalent to knowledge. Laches need not be pleaded as a defense. Credit Co. v. Arkansas, etc., R. R., 15 Fed. Rep., 46 (1882). Thirteen years' delay in attacking a consolidation as not being in compliance with statutory provisions is a "Whatever is sufficient to excite attention, and put the party on his guard and call for inquiry, is notice of everything to which the inquiry would have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant with it," It is immaterial whether the court declare the consolidation void or voidable. Leavenworth County v. Chicago, etc., R. R., 18 Fed. Rep., 209 (1883); Taylor v. South, etc., R. R. Co., 4 Woods (U.S.),

575 (1882), the court saying: "The means of knowledge are the same thing in effect as knowledge itself. . . . The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence." See, also, Kelley v. Newburyport, etc., R. R. Co. (Mass., 1886), 24 Am. & Eng. R'y Cas., 27. In the case of Phosphate, etc., Co. v. Green, L. R., 7 Com. Pl., 43 (1871), it was held that to show assent and acquiescence it is not necessary to prove the acquiescence of each individual shareholder. enough to show circumstances which are reasonably calculated to satisfy the court or a jury that the thing to be ratified came to the knowledge of all who chose to inquire, all having full opportunity and means of inquiry.

⁴ Stewart's Case, L. R., 1 Ch., 511 (1866); Stanhope's Case, id., 161, where the court said: "It is no part of the duty of a shareholder to look into the management of the business. . . . It is not enough to show that they might have become acquainted with the mismanagement of their affairs. It must be shown that they did so." See Ryan v. Leavenworth, etc., R'y Co., 21 Kan., 365 (1879). Also Holmes v. Newcastle, etc., Co., 45 L. J. (Ch.), 383 (1876), holding that knowledge of a sale of property

the well-established rule that lapse of time alone cannot support the defense of laches. There must be both knowledge and delay.

§ 732. What length of time constitutes laches herein.— After a stockholder has knowledge of or is chargeable with knowledge of an ultra vires, fraudulent or negligent act of the directors, he must institute his suit, if at all, within a reasonable time thereafter.² As to what will constitute a reasonable time depends on the circumstances of the case. The length of time during which a stockholder may delay in bringing his suit varies with each case, according to the circumstances of that case. The court requires that reasonable promptness be exercised so that large investments of new money or radical changes in the ownership of the stock or property may not be prevented or jeopardized by an unreasonable delay on the part of a stockholder in objecting to the transaction. Various illustrations of this principle of law are given in the notes below.³

is not knowledge of an illegal dividend from the proceeds. See, also, Spackman v. Evans, L. R., 3 H. of L., 171 (1868). See, also, Houldsworth v. Same, id., 263.

¹ Evans v. Smallcombe, L. R., 3 H. of L., 249 (1868); aff'g L. R., 3 Eq., 769, the court saying: "Lapse of time alone certainly would not make valid that which at the beginning was invalid. . . . Length of time may, in many cases, materially assist in establishing the presumption of acquiescence in an act which requires a confirmation to give it validity. But then it is not time, but the acquiescence, which changes what would otherwise be a void act into a valid one." Ashhurst's Appeal, 60 Pa. St., 290 (1869), where, however, the court says that "acquiescence is presumed from delay."

² In the case of Twin Lick Oil Co. v. Marbury, 91 U. S., 587 (1875), Mr. Justice Miller gives a clear statement of the law herein. Taylor v. South, etc., R'y Co., 4 Woods (U. S.), 575 (1882); Fredericks v. Penn. Canal Co., 2 Atl. Rep., 48 (Pa., 1885). See, also. Nashua, etc., R. R. Co. v. Boston, etc., R. R. Co., 27 Fed. Rep., 821, 826 (1886).

³ Where the trustee sells trust property to himself personally, and the cestui que trust are cognizant thereof and do

not object for several years, they cannot set the transaction aside. Hoyt v. Latham, 143 U. S., 553 (1892). Sce, also, Foster v. Mansfield, etc., R. R., 146 U.S., 88 (1892). A reorganization agreement cannot be successfully attacked by stockholders two years after it was made, especially where the stockholders do not offer to pay the debt due nor the expenses of foreclosure, and where "the relief they ask under their bill, if granted, would not only be valueless to them and other stockholders, but would saddle the company with a vast debt of nearly \$25,000,000, wholly due, and bearing a high rate of interest." Carev v. Houston & T. C. R'y Co., 52 Fed. Rep., 671 (Tex., 1892). Three years' time having elapsed before a stockholder ascertained a fraudulent sale of the company's stock by the directors to themselves, relief will be denied where that sale has been of great benefit to the remaining stock. Squair v. Lookout M. Co., 42 Fed. Rcp., 729 (1890). Thirteen years' delay by stockholders in complaining of a gift of town lots to the town by a committee of the stockholders upon the dissolution of the corporation is fatal. Nortou v. Kellogg, 41 Fed. Rep., 452 (1890). A delay of twenty years in complaining that a lease taken

There has been considerable doubt and difficulty in determining whether the statute of limitations will be applied by a court of equity to cases of this nature. It has been held in England that

by the company was due to the fact that a part of the directors were interested in the stock and bonds of the lessor company is fatal. Jesup v. Ill. Cent. R. R., 43 Fed. Rep., 483 (1890). "Means of knowledge, plainly within reach of stockholders by the exercise of the slightest diligence, is in legal effect equivalent to knowledge," Id. Laches is a bar to a suit against a corporation the same as against individuals, especially as new stockholders are continually coming in. St. Paul, etc., R'v v. Sage, 49 Fed. Rep., 315 (1892). Eleven and one-half years is no bar to a stockholder's suit to set aside illegal bonds and a mortgage, where no attempt was made to enforce the bonds. City of Chicago v. Cameron, 120 Ill., 447 (1887). Eleven years' delay is fatal to a complaint that another corporation has purchased a majority of the stock of the corporation in which the complainant stockholder holds stock, and that such purchaser is diverting the traffic to its own line and is wrecking the corporation which it controls. Alexander v. Searcy, 8 S. E. Rep., 630 (Ga., 1889).

Where for seven years a stockholder who owned a majority of the stock elected himself and two of his dummies as directors of the company, and caused the board to vote a large salary to himself as president and manager, and had leased to the company his property at a large rental, the salary and rental are illegal and void. Where the company had failed to pay its dividends by reason of such acts, a court of equity, upon the suit of another stockholder, ordered the president to account and appointed a receiver of the company and directed that its affairs be wound up. Miner v. Belle Isle Ice Co., 53 N. W. Rep., 218 (Mich., 1892). Although a stockholder may enjoin a consolidation of his company with another under a statute passed after the incorporation, the object of the consolidation being different from that of the original corporation, vet where the stockholder delays applying to the court for nearly a year and in the meantime the consolidated company has borrowed money and given mortgages, and such mortgages are about to be foreclosed, the complaining stockholder is guilty of laches and his remedv is barred. Rabe v. Dunlap, 25 Atl. Rep., 959 (N. J., 1893). Where a fraudulent foreclosure was made on April 5th and the fraud became known on June 5th, and suit was brought in September, the suit may be maintained, no one having been prejudiced by the delay. Ex-Mission, etc., Co. v. Flash, 32 Pac. Rep., 600 (Cal., 1893). Where a stockholder delays for a year in complaining of a sale of corporate property to two of the directors, and innocent third parties have acquired rights in the property in the meantime, the stockholder's remedy is barred by his laches, Snow v. Boston, etc., Co., 33 N. E. Rep., 588 (Mass., 1893). Seven years' delay in complaining that the directors issued bonds to themselves for no consideration and then foreclosed and bought the road in is fatal. Burgess v. St. Louis, etc., R. R., 12 S. W. Rep., 1050 (Mo., 1890). Where a pledgee bank, having a right to sell at private sale and without notice, sells the pledge through its president, who buys the pledge himself, and the president openly pays the bank for it, long delay on the part of the bank in complaining is fatal. Raymond v. Palmer, 6 S. Rep., 692 (La., 1889). Laches is a bar. Moore v. Silver, etc., Co., 10 S. E. Rep., 679 (N. C., 1890). A consolidation of railroads under an amendment to the charter may be prevented by a single stockholder. But several years' delay in complaining is fatal. stockholder then can only recover the value of his stock and past dividends.

the statute will be applied to a corporate action to compel a director to pay over to the corporation money received by him as a bribe, and that the statute begins to run from the time when the

Deposit Bank v. Barrett, 13 S. W. Rep., 337 (Kv., 1890). Where a stockholder delays in bringing a suit for an unreasonable length of time for the purpose of ascertaining whether the act complained of will be profitable to him, his suit to set aside the act will fail. Boyce v. Montauk, etc., Co., 16 S. E. Rep., 501 (W. Va., 1892). A director's purchase for the creditors and certain mortgage bondholders of the mortgaged property at a foreclosure sale cannot be set aside by a stockholder five years after the sale, where the road was sold for all it was worth and was badly in debt, and required large expenditures, and there was no possible means of raising more money, and the stockholders knew of the condition of things but made no effort to prevent a sale, and the director offered to allow the stockholders to come into a reorganization, and offered to resell the property for less than what he paid for it. This is the rule even though the property subsequently becomes very valuable. Osborne's Adm'x v. Monks, 21 S. W. Rep., 101 (Ky., 1893).

Stock voted to the president as a salary at a meeting where his presence is necessary to form a quorum may be recovered back, but acquiescence for ten vears is fatal. United States, etc., Co. v. Reed, 2 How. Pr. (U. S.), 253 (1885). See, also, Spackman v. Evans, L. R., 3 H. L., 171 (1868); Downes v. Ship, id., 343; Ashburst's Appeal, 60 Pa. St., 290 (1869); Zabriskie v. Hackensack, etc., R. R. Co., 18 N. J. Eq., 178 (1867); Nashua, etc., R. R. v. Boston, etc., R. R., 27 Fed. Rep., 821, 826 (1886); London, etc., Assoc. v. Kelk, 19 W. N., 67 (1884); Mc-Loughlin v. Detroit, etc., R'y Co., 8 Mich., 100 (1860); Gray v. Chaplin, 2 Russ. Ch., 126 (1826), where the stockholder had acquiesced forty-seven years in an ultra vires lease. In the case of Mills v. Central R. R. Co., 41 N. J. Eq.,

6 (1886), it was very properly held that a delay of fifty-four days was no bar. and also that a failure to vote against the act was no bar. In the case of Gifford v. N. J. R. R. Co., 10 N. J. Eq., 171 (1854), a delay of twenty years was held to be a bar. In the following cases the court held delay to be a bar: Peabody v. Flint. 88 Mass., 54 (1863), the delay being three and one-half years: Gregorv v. Patchett. 33 Beav., 595 (1864), six vears: International, etc., R. R. Co. v. Bremond, 53 Tex., 96 (1880), two years; Graham v. Birkenhead, etc., Co., 2 Mac. & G., 146 (1850), eighteen months; Kitchen v. St. Louis, etc., R'v Co., 69 Mo., 224 (1878), two years; Boston, etc., R. R. Co. v. N. Y. & N. E. R. R. Co., 13 R. I., 260 (1881); Ashhurst's Appeal, 60 Pa. St., 290 (1869), seven years; Sheldon, etc., Co. v. Eickemeyer, etc., Co., 90 N. Y., 607 (1882), four years; Pneumatic Gas Co. v. Berry, 113 U. S., 322 (1884); Graham v. Boston, etc., R. R. Co., 118 U. S., 161 (1886); In re Pinto Silver Min. Co., L. R., 8 Ch. D., 273; Royal Bank of Liverpool v. Grand Junction R. R. Co., 125 Mass., 490 (1878); In re Magdalena, etc., Co., 6 Jur. (N. S.), 975 (1860), where a delay of two years was held a bar; Brotherhood's Case, 31 Beav., 365 (1862), twelve years: Hervey v. Illinois, etc., R'y Co., 28 Fed. Rep., 169 (1884); Thompson v. Lambert, 44 Iowa, 239 (1876); Vigers v. Pike, 8 Cl. & Fin., 562, 650 (1840); Zabriskie v. Cleveland, etc., R. R. Co., 23 How., 381 (1859); Allen v. Wilson, 28 Fed. Rep., Cf. Boardman v. Lake 677 (1886). Shore, etc., R'y Co., 84 N. Y., 157 (1881); Badger v. Badger, 2 Wall., 87; Harwood v. Railroad Co., 17 Wall., 78; Rochdale Canal Co. v. King, 2 Sim. (N. S.), 89; §§ 161, 162, 198, supra. Seventeen years' delay bars the right of preferred stockholders to reach a fund which was to be given them as a comcorporation discovers the facts. And a similar rule seems to prevail in various of the United States.

promise by first bondholders, a foreclosure by second bonds having subsequently followed. Sullivan v. Portland. etc., R. R. Co., 94 U. S., 806 (1877). Five years' delay in attacking consolidation is too late. Bell v. Penn., etc., R. R. Co., 10 Atl. Rep., 741 (N. J., 1887). But a delay of eleven years and a half was held not fatal to a stockholder's action to set aside an ultra vires issue of bonds, where the railroad had been abandoned, the bonds never dealt in nor enforced, and the complainant had in view the removal of the lien, and intended to proceed and construct the road. City of Chicago v. Cameron, 11 N. E. Rep., 899 (Ill., 1887). Four years' delay in suing to set aside an ultra vires assignment of property held fatal. Descombes v. Wood, 4 S. W. Rep., 82 (Mo., 1887). Where a corporation is insolvent, and turns in its property at a fair price to a creditor whose debt is also secured by the guaranty of the president of the corporation, and the creditor at once sells the property to the president at an advanced priće, a stockholder who delays suit for two years, during which time the property becomes valuable and the president, who purchased, dies, is barred from complaining. Hancock v. Holbrook, 3 S. Rep., 351 (La., 1888). Laches bars the right of preferred stockholders to object to an ultra vires lease. Emerson v. N. Y., etc., R. R., 14 R. I., 555 (1884); aff'g Boston, etc., R. R. v. N. Y., etc., R. R., 13 id., 260; Butterfield v. Cowing, 20 N. E. Rep., 369 (N. Y., 1889). Three years' delay fatal to stockholders' suit to compel treasurer to pay back. Dunphy v. Travelers', etc., Association, 16 N. E. Rep., 426 (Mass., 1888). A lease of corporate property may be ratified by one hundred days' delay of the company in repudiating it, the lessee in the meantime expending money thereon. Hoosac. etc., Co. v. Donat, 16 Pac. Rep., 157

(Col., 1888). A lessor railroad cannot, nineteen years after the lease, sue in equity to set aside the lease as ultra vires. Laches is a bar. St. Louis, etc., R. R. v. Terre, etc., R. R., 33 Fed. Rep., 357 (1888). Ten years' delay bars an action by a stockholder to set aside a fraudulent foreclosure of a mortgage given by the company. Foster v. Mansfield, etc., R. R., 36 Fed. Rep., 627 (1888). Seven years' laches is fatal to a stockholder's complaint that a majority of the stockholders had committed fraud and brought about the pending foreclosure. Alexander v. Searcy, 8 S. E. Rep., 630 (Ga., 1889). A lease of a water company's property to an ice company, with the privilege to the stockholders of the former to take stock in the latter, will not be set aside at the instance of stockholders who did not offer to take such stock until too late. and who delayed complaining until after the ice company proved a success. Shaaber's Appeal, 17 Atl. Rep., 209 (Pa., 1889). The time consumed by the guilty officers in legal proceedings to collect their gains is not included in the time which constitutes laches on the stockholders' part. Davis v. Gemmell, 17 Atl. Rep., 259 (Md., 1889).

¹ Metropolitan Bank v. Heiron, L. R., 5 Ex. D., 319 (1880). The statute of limitations is no bar to an action against a director for fraud, when notice of the fraud came only to the directors, part of whom were also implicated. Re Fitzroy, etc., Co., 50 L. T. Rep., 144 (1884).

² Watts' Appeal, 78 Pa. St., 370 (1875). See, also, Taylor v. South, etc., R. R. Co., 4 Woods, 575 (1882). Also in California. See Dannmeyer v. Coleman, 11 Fed. Rep., 99 (1882), holding that in California the three-years' limitation to actions based on fraud after discovery thereof applies to directors' frauds herein. But see Phillippi v. Phillippi, 115 U. S., 151; Twin Lick, etc., Co. v. Marbury, 91 U. S.,

In general a court of equity will apply the statute or will not apply it as may seem most just, and will even shorten the time.¹

The statute of limitations is no bar to a receiver's action to recover back from directors a salary which was paid in breach of trust?

§ 733. Miscellaneous applications of the doctrine of lackes herein. It is well settled that the ratification of an act which the stockholder might have complained of does not authorize or ratify in advance a repetition of that act. A stockholder's right to object to a director's act can be exercised by him alone. It is also well established that the ratification which will bind a stockholder must be by himself alone. It cannot be by the other stockholders. But the acquiescence of a stockholder bars an action by any transferee of that stock.

If neither the defendants nor others have been induced by the delay to act upon the matters which are complained of, laches is no bar to the stockholder's action.⁷ The question of laches can be raised by demurrer.⁸

587 (1875); Moyle v. Landers, 21 Pac. Rep., 1133 (Cal., 1889). See, in general, Coit v. Campbell, 82 N. Y., 509, 514; Farnam v. Brooks, 9 Pick., 242; Godden v. Kimmell, 99 U. S., 201, 210; Preston v. Preston, 95 U.S., 200; Badger v. Badger, 2 Wall., 87; Medder v. Norton, 11 Wall., 442; Bowman v. Wathen, 1 How., 188: Beckford v. Wade, 17 Ves., 87. The statute of limitations is a bar to an action against directors for negligence in allowing overdrafts and illegal loans. Williams v. Halliard, 38 N. J. Eq., 373, 377 (1884). An action against a third person to recover money paid by the corporation to him for stock must be brought within six years or it is barred by the statute of limitations. Pierson v. McCurdy, 33 Hun, 520 (1884). But in Pierson v. Morgan, 20 Abb. New Cases (N. Y., 1887), and Brinkerhoff v. Bostwick, 99 N. Y., 185 (1885), the tenyear statute was applied to fraud. The statute of limitations may constitute a bar to an action by the corporation against its secretary for funds appropriated by him. Landis v. Saxton, 16 S. W. Rep., 912 (Mo., 1891).

Sullivan v. Portland, etc., R. R., 94
U. S., 806, 811 (1876). See, also, Ernest v. Croysdill, 2 De G., F. & J., 175 (1860);
Fliteroft's Case, L. R., 21 Ch. D., 519.

² Ellis v. Ward, 20 N. E. Rep., 671 (Ill., 1889). The statute of limitations is no bar. A court of equity is governed by the rules of laches instead. Id., 25 N. E. Rep., 530 (Ill., 1890).

³ Irvine v. Union Bank of Australia, 37 L. T. (N. S.), 176 (1877); S. C., L. R., 2 App., 366; Bloxham v. Metropolitan R'y Co., L. R., 3 Ch., 337, 354 (1868).

⁴ Taylor v. Chichester, etc., R. Co., L. R., 2 Ex., 356, 378 (1867).

⁵ Hazard v. Durant, 11 R. L, 195 (1875). This principle of law is substantially a mere restatement of the principle that the majority cannot bind the minority as regards ultra vires acts: nor can the directors. See Gallery v. Nat'l Ex. Bank, 41 Mich., 169 (1879).

6 See § 735, infra.

7 Whitman v. Bowden, 2 S. E. Rep.,630 (S. C., 1887).

⁸ Crumlisle v. Shenandoah, etc., R. R. Co., 28 W. Va., 623 (1886).

Delay due to the fact that a bill had previously been filed and dismissed on technical grounds is not laches.¹

If it is evident that the stockholder is waiting to see whether the unauthorized act will be profitable to the corporation, the court will refuse to grant him any relief.² So, also, if the stockholder, after a full knowledge of the facts, stands by and allows large operations to be completed or money expended or alterations to be made before he brings suit, he is guilty of laches, and his remedy is barred.³

Although a corporate debt is not incurred with the formalities required by statute, yet acquiescence therein by a stockholder bars any complaint by him.⁴

¹ Miner v. Belle Isle Ice Co., 53 N. W. Rep., 218 (Mich., 1892).

² Story's Eq. Jurisprudence, § 1539a; Kitchen v. St. Louis, etc., R'y Co., 69 Mo., 224 (1878); Gregory v. Patchett, 33 Beav., 595 (1864); Atchison, etc., R. R. Co. v. Fletcher, 10 Pac. Rep., 596 (Kan., 1886); Banks v. Judah, 8 Conn., 145 (1830); Watts' Appeal, 78 Pa. St., 370 (1875); Sheldon v. Eickemeyer, etc., Co., 90 N. Y., 607 (1882).

³ Same cases; also Houldsworth v. Evans, L. R., 3 H. of L., 263, 276 (1868). Delay of eight months held fatal. Great Western R'y Co. v. Oxford, etc., R'y Co., 3 De G., M. & G., 341.(1853). See, also, Boston, etc., R. R. Co. v. N. Y. & N. E. R. R. Co., 13 R. I., 260 (1881); Aurora, etc., Soc. v. Paddock, 80 Ill., 263 (1875); Stewart v. Erie, etc., Trans. Co., 17 Minn., 372 (1871). Goodin v. Cincinnati, etc., R. R. Co., 18 Ohio St., 150 (1868). In the well-considered case, however, of Covington, etc., R. R. Co. v. Bowler's Ex'rs, 9 Bush, 570, the court held that a delay of six years was not a bar to the

stockholder's remedy; and the court said that "inerely remaining passive does not deprive a party of the right to seek redress unless, in addition thereto. he does some act to induce or encourage others to expend their money or to alter their conditions, and thereby render it unconscientious for him to enforce his rights." But see Pacific R. R. v. Missouri Pac. R'y, 111 U.S., 505; reversing 12 Fed. Rep., 641, holding that delay pending appeal is not fatal. See, also, §§ 161, 162, supra. A stockholder who lies by and allows his corporation, which is not a success, to be merged with other property into a new company, payment being made in stock of the latter company, and the enterprise proves a success, cannot cause to be set aside an assessment to pay a debt incurred for expenses in bringing about such results. Taylor v. North Star, etc., Co., 21 Pac. Rep., 753 (Cal., 1889).

⁴ Manhattan H. Co. v. Boland, 18 Atl. Rep., 428 (Pa., 1889).

CHAPTER XLV.

- PARTIES, PLEADINGS, ETC., IN SUITS BY STOCKHOLDERS IN BEHALF OF THE CORPORATION—SUITS BY OR AGAINST THE CORPORA-TION IN GENERAL.
- A. SUITS BY STOCKHOLDERS IN BEHALF OF THE CORPORATION.
- § 734. Jurisdiction of the court Federal courts — Law and equity — Foreign corporations.
 - 735. Parties plaintiff—Who may bring the suit—Unregistered transferees—Stock that has voted in favor of the act—Small stockholders—Corporate creditors.
 - 736. Rule when the plaintiff stock-holder sues in the interest of a rival company, or purchases his stock for the purpose of bringing suit Rule in federal courts against suits by transferees.
 - 737. The complainant stockholder must sue in behalf of himself and other stockholders.
 - 738. Parties defendant herein The corporation—Directors—Third persons.
 - 739. Complainant's bill must not improperly join two or more causes of action herein.
 - 740. Complainant must allege that he requested the corporation to bring the suit, and that the corporation refused or neglected to do so.
 - When such an allegation may be omitted.
 - 742. Miscellaneous allegations of the complaint.
 - 743. Prayer for relief.
 - 744. Property received under the act objected to must be returned upon that act being set aside.

- § 745. Injunction restraining the corporate officers and others from doing specified acts.
 - 746. Injunction against corporate officers acting at all — Appointment of a receiver.
 - 747. Miscellaneous remedies.
 - 748. The complaining stockholder controls the conduct of the suit Similar suits elsewhere The results of the suit belong to the corporation.
 - 749. No contribution among the directors.
- B. SUITS BY OR AGAINST THE CORPORA-TION IN GENERAL.
- § 750. The discretion of the directors in refusing to institute or to defend an action involving corporate interests is not generally interfered with by the courts.
 - 751. Suits by and against the corporation Must be in corporate name.
 - 752. Service Appearance Answer.753. Allegation and proof of incorporation.
- 754. Confession of judgment.
- 755. Injunction and contempt.
- 756. Contempt and sequestration.
- 757. Foreign corporations may sue and be sued — Stockholders' suits against foreign corporations.
- 758. Service in suits against a foreign corporation.
- 759. Jurisdiction of the federal courts.

A. SUITS BY STOCKHOLDERS IN BEHALF OF THE CORPORATION.

§ 734. Jurisdiction of the court — Federal courts — Law and equity — Foreign corporations.— There has been some difficulty in determining whether the federal courts have jurisdiction of a stockholder's suit herein when the corporation and such directors as must be made parties are citizens of one state and the complain-

ant stockholder is a resident of another state. Inasmuch as the suit is for the benefit of the corporation, it has been claimed that the non-residence of the stockholder is insufficient to give jurisdiction. The federal courts have decided, however, that such jurisdiction exists, and it is in these courts that a large proportion of these suits are brought.¹

¹ Dodge v. Woolsev, 18 How., 331: Greenwood v. Freight Co., 105 U. S., 13 (1881); Pond v. Vt. Valley R. R. Co., 12 Blatch., 280 (1874), the court holding also that the complainant might omit as party plaintiff a stockholder residing in the state of the corporation. also, Hatch v. Chicago, etc., R. R. Co., 6 Platch., 105 (1868); Foote v. Linck, 5 McClain, 616 (1853): Bell v. Donohue, 17 Fed. Rep., 710 (1883), holding that the court has no jurisdiction if the stockholder and one of the defendants, a third person, who is alleged to have defrauded the corporation, are citizens of the same state. See, also, Burke v. Flood, 1 Fed. Rep., 541 (1880). Defendant cannot demand trial by jury. Brinckerhoff v. Bostwick, 105 N. Y., 567 (1887); 21 N. E. Rep., 1044 (1889). Cf. La Grange v. State Treasurer, 24 Mich., 468 (1872). In Hawes v. Oakland, 104 U.S., 450 (1881), the court vigorously denounced transfers of stock made for the purpose of giving the federal courts jurisdiction. The ninety-fourth rule was made in consequence thereof. Where "the parties on one side of the controversy are citizens of New Jersey, and those on the other side of the controversy are a New Jersey corporation and other citizens of New Jersey as well as a Pennsylvania corporation and citizens of Pennsylvania and of Maryland, . . . all the parties on one side of this controversy not being citizens of different states from all those upon the other side, the citizenship of the parties did not bring the case within the jurisdiction of the circuit court," N. J. Central R. R. Co. v. Mills, 113 U. S., 249 (1885); East Tenn., etc., R. R. Co. v. Grayson, 119 U.S., 240 (1886). If the

two parties in interest are both corporations of the same state, it seems that a stockholder cannot sue in the federal court by reason of his living in another state. Quincev v. Steele, 120 U. S., 241 (1887). See, also, Huntington v. Palmer. 104 U.S., 482. In suits by one or more in behalf of others, others will not be allowed to come in as parties plaintiff when to do so would oust the United States court of jurisdiction. Jackson, etc., Co. v. Burlington, etc., R. R. Co., 29 Fed. Rep., 474 (1887). Cf. Thouron v. East., etc., R'y Co., 38 Fed. Rep., 673 (1889).As to jurisdiction, see, also, Peninsular Iron Co. v. Stone, 121 U. S., 631 (1887). The United States court. which decreed a foreclosure, has jurisdiction to set aside a foreclosure as fraudulent, irrespective of citizenship in the latter case. Pacific R. R., etc., v. Missouri P. R'y Co., 111 U. S., 505 (1884); rev'g 12 Fed. Rep., 641. See, also, § 562, notes, supra, as to the jurisdiction of the United States courts. A stockholder may bring suit in the federal courts to remedy a corporate wrong, even though his interest as a stockholder is less than \$2,000. The test is whether the corporate interests involved exceed \$2,000. Hill v. Glasgow R. R., 41 Fed. Rep., 610 (1890). The defendant corporation cannot remove the case to the federal court where indispensable parties defendant are participants in the act complained of and are of the same state as the complainants. Wilder v. Virginia, etc., Co., 46 Fed. Rep., 676 (1891). Other creditors will not be allowed to come into the suit if it will oust jurisdiction of the Stewart v. Dunham, 115 U. S., court. 61 (1885).

The stockholder's suit herein is in a court of equity. It is not in a court of law, except where the injury is personal rather than to all innocent stockholders alike.

The question of whether a court will entertain jurisdiction of a case against a foreign corporation when there is difficulty in obtaining service on the corporation or enforcing the decree of the court is discussed elsewhere in this chapter.³

§ 735. Parties plaintiff—Who may bring the suit—Unregistered transferees—Stock that has voted in favor of the act—Small stockholders—Corporate creditors.—Ordinarily, a suit herein is instituted by one or more stockholders who are registered as such on the corporate books. It has been held, however, that the suit may be brought by a purchaser of a certificate of stock who has not as yet obtained a registry thereof in the corporate books. The

¹ See Gardiner v. Pollard, 10 Bosw., 674 (1863); Craig v. Gregg, 83 Pa. St., 19 (1876); Hirsh v. Jones, 56 Fed. Rep., 137; and see § 701, supra. This principle of law is assumed in nearly all the cases cited in Part IV of this work. In a complicated case equity will take jurisdiction of a suit to hold a president liable for misappropriating funds. McMullin's Appeal, 18 Atl. Rep., 1056 (Pa., 1890).

²Priest v. White, 1 S. W. Rep., 361 (Mo., 1886), where an action at law by a corporate creditor for fraud and deceit failed. The stockholder, however, may often have also another remedy - an action for deceit against the guilty parties. In Kimmel v. Stoner, 18 Pa. St., 155 (1851), and Kimmel v. Geeting, 2 Grant's Cases (Pa., 1853), however, where the corporation, through its directors, ordered an agent to purchase for the corporation certain shares of its stock which the state was about to sell. and after the purchase the directors divided it among themselves, it was held that a stockholder could sue such directors in an action on the case and obtain damages for the proportionate loss sustained by himself. See, also, §§ 157, 355, 651, 747. Cf. Quincey v. Steele, 120 U.S., 241 (1887). In the case Hanley v. Balch, 53 N. W. Rep., 954 (Mich., 1892), a stockholder sustained an action at law for damages against another stockholder who had wrecked the corporation and bought in the property in violation of an agreement to carry along the corporate debt. In a suit at law against corporate officers for damages for wrecking the corporation by creating false debts and causing all the property to be applied to their payment. the proceedings by which the property was so applied must be fully set forth. Cottrell v. Tenney, 48 Fed. Rep., 716 Where a corporation sues its directors for neglect of duty the action may be at law or in equity according to the nature of the relief sought. Horn, etc., Co. v. Ryan, 44 N. W. Rep., 56 (Minn., 1889). A vendee sued for the price of stock cannot set up that the plaintiff vendor had negligently managed the corporation and misappropriated its assets. Mealey v. Nickerson, 43 N. W. Rep., 911 (Minn., 1890).

³ See §§ 757, 758, infra.

⁴ Bagshaw v. Eastern Union R'y Co., 7 Hare, 114 (1849); Ervine v. Oregon, etc., Co., 28 Hun, 269 (1882); Parrott v. Byers, 40 Cal., 614 (1871). Cf. Landes v. Globe, etc., Co., 73 Ga., 176 (1884), where a stockholder had not paid his subscription; Mills v. Northern R'y, L. R., 5 Ch., 621 (1870), a quære. Contra, Ramsey v. Erie R'y Co., 7 Abb. Pr. (N. S.), 156 (1869); Heath v. Erie R'y Co., 8 Blatch.,

suit brought by one or more stockholders herein must be in behalf of themselves and such other stockholders as may wish to come in. Care is to be exercised, however, that stockholders who are disqualified from participating in the suit shall not be joined as parties plaintiff.¹

Where a person who holds stock as a trustee refuses to bring the suit, the *cestui que trust* may institute it, making the trustee a party defendant.² A person who has sold his stock cannot sue; ³ nor can a subscriber who has not paid as required by charter; ⁴ but an unregistered pledgee may sue.⁵ A stockholder cannot institute such a suit as this where his stock is all "water," ⁶ or the original business of the corporation was illegal.

Where the real business of the corporation is an illegal one—a lottery—and where the stock is wholly fictitious, the courts will not aid a stockholder. A stockholder cannot enjoin an issue of bonds

347 (1871); Hersey v. Veazie, 24 Me., 9 (1844). An unregistered holder of certificates is very doubtfully entitled to bring the action. Moore v. Silver, etc., Co., 10 S. E. Rep., 679 (N. C., 1890). Where the plaintiff's stock is transferred on the corporate books, until he obtains the stock again he cannot sue as a stockholder even though he claims that the stock was transferred without consideration and on terms not performed. Lawson v. Stanley, 15 N. Y. Supp., 707 (1891). Contra, Thompson v. Stanley, N. Y. L. J., July 2, 1892. A purchaser of a certificate of stock who has not yet. however, obtained a transfer of the same on the corporate books cannot complain of fraudulent or ultra vires acts. Brown v. Duluth, etc., R'y, 53 Fed. Rep., 889 (1893).

¹ Clements v. Bower, 1 Drew., '684 (1853). Cf. Parrott v. Byers, supra, holding that if one of the complainants is competent it is immaterial that the others are not. See, also, Pittsburgh, etc., R. R. Co.'s Appeal, 1 R'y & Corp. L. J., 139 (Pa., 1886); Burt v. British, etc., Ass'n, 4 De G. & J., 158 (1859), where the court said that if the stockholders "sue by a plaintiff who is personally precluded from suing the suit cannot proceed."

² Great Western R'y Co. v. Rushout, 5 De G. & Sm., 290 (1852); Daft v. Daft, etc., Co., N. Y. L. J., Dec. 3, 1890. Cf. Mayor v. Denver, etc., R. R., 38 Fed.. Rep., 197 (1889).

³ Doyle v. Muntz, 5 Hare, 509 (1846).

⁴ Busey v. Hooper, 35 Md., 15 (1871).

⁵ Baldwin v. Canfield, 26 Minn., 43: (1879). A pledgee of stock is as fully protected against ultra vires acts as a stockholder is. Campbell v. American, etc., Co., 122 N. Y., 455 (1890).

⁶ A person to whom watered stock has been issued as full-paid stock is not such a bona fide stockholder as may compel a creditor to return bonds which were illegally issued. The stock is void under the Wisconsin statutes. Hinckley v. Pfister, 53 N. W. Rep., 21 (Wis., 1892). Stock issued as full paid for no consideration whatsoever is void under the constitutional provision that stock shall be issued only "for labor done, services performed, or money or property actually received." The original holders of such stock cannot institute a suit to remedy a wrong done to the corporation by its president. Arkansas, etc., Co. v. Farmers', etc., Co., 22 Pac. Rep., 954 (Colo., 1889).

⁷Le Warne v. Meyer, 38 Fed. Rep., 191 (1889).*

by a corporation in which his corporation expects to become a stockholder.1

A stockholder who holds stock which has been voted in favor of the act complained of will fail in his suit. This stock is tainted with the fraud or illegality. This is a very important principle of law and defeats many suits instituted by stockholders to remedy past wrongs. But the law is clear that a stockholder who voted in favor of the transaction, or a holder of stock which at the time of the act complained of was held by a party who participated in the act or acquiesced therein or voted the stock therefor, cannot bring suit to set the transaction aside.²

¹ Mayer v. Denver, etc., R. R. Co., 38 Fed. Rep., 197 (1889).

² In re Syracuse, etc., R. R., 91 N. Y., 1 (1883). The purchaser of stock which was issued to directors cannot complain that the directors were guilty of fraud in the issue. Barr v. N. Y., etc., R. R., 125 N. Y., 263 (1891). In the case of Brown v. Duluth, etc., R'v. 53 Fed. Rep., 889 (1893), the court refused to interfere where the transferee of the stock took with notice. The court said: "The complainant as their transferee, is in no better situation than they are. He has no greater rights than his transferrers as regards a remedy invalidating the transaction. The maxim in pari delicto applies, and a court of equity will not aid him. He cannot bring suit in behalf of other stockholders against the corporation or other parties participating in the issue, as his own title is tainted with the same fraud." A purchaser of stock which voted in favor of a reorganization scheme cannot object to the scheme as being ultra vires, there being nothing illegal per se in it. Hollins v. St. Paul, etc., R. R., 9 N. Y. Supp., 909 (1889). A purchaser of stock that has voted for an issue of "watered" bonds and stock is estopped from complaining, even though the issue was prohibited by the constitution of the state -Pennsylvania. Wood v. Corry, etc., Co., 44 Fed. Rep., 146 (1890). Where three persons own all the stock of a company, two of them may buy the stock of the

third and give the company's notes in partial payment for the same. The transaction is legal inasmuch as no one is injured and all consent. Neither subsequent purchasers of the stock nor those who become stockholders after the notes are paid, nor stockholders who consent to the arrangement, can complain of it. Schilling, etc., Co. et al. v. Schneider et al., 19 S. W. Rep., 67 (Mo., 1892). A stockholder who purchases his stock from another stockholder cannot compel the latter to repay to the company dividends which he has received due to contracts by which the company had sold coal to a railway company, for which railway company such latter stockholder was purchasing agent. Clark v. American Coal Co., 53 N. W. Rep., 291 (Iowa, 1892). This same principle - that stock which has participated in a fraudulent act cannot afterwards be the basis of a suit to set aside that fraud - has been applied to bonds, so far as enforcing the covenants of the mortgage is concerned, such covenants being waived by a former owner of the honds which complainant now owns. Belden v. Burke. In regard to this case and the famous litigation in which it was but a part, see § 764, infra. In Alabama it is held that if the stock passes into bona fide hands, the bona fide holder may object to the fraudu-Ient or ultra vires act, even though the stock itself was tainted with the fraud by reason of being held by one of the

A stockholder who has been guilty of laches, or against whom the statute of limitations has run cannot complain. The smallness of the stockholder's interest, however, will not prevent his instituting a stockholder's suit to remedy a corporate wrong. An owner of one share is to be protected by a court of justice equally with the owner of a thousand shares. The old doctrine of de minimis non curat lex has sometimes been applied to this class of cases, but such decisions are not to be commended. If there are no suspicious circumstances connected with the suit, it is believed that this maxim of the law will not be applied to a case of this character.

The stockholders cannot join with the corporation in bringing the suit.³ The proper party to institute the suit is the corporation. If it fails to do so a stockholder may, where fraud or *ultra vires* is involved. But both cannot join in the suit. The subject of the

guilty parties at the time of the act. Parson v. Joseph, 8 S. Rep., 788 (Ala., 1891). But the weight of authority holds that if the stock purchased is tainted with the fraud—that is to say, if the persons guilty of the act complained of owned that stock when they did the act—no action will lie by a bona fide transferee of that stock. See § 40, supra. Ffooks v. Southwestern R'y, 1 Sm. & G., 142 (1853); Re British, etc., Co., L. R., 17 Ch. D., 467 (1881).

¹ See ch. XLIV. ² Armstrong v. Church Society, 13 Grant Ch. (U. C.), 552 (1867), the court saying: "Every member of a corporation has a right to object to any illegal diversions of its funds; and in this respect those who contribute most have no greater rights than those who contribute least." Seaton v. Grant, L. R., 2 Ch., 459 (1867), where the court said the maxim did not apply, since the stockholder sued not on his own behalf alone, but for himself and others. However, in the case of Dannemeyer v. Coleman, 11 Fed. Rep., 97 (1882), the court said: "It is always a suspicious circumstance where a single stockholder among a large number in a corporation rushes into a court of equity to vindicate, unaided and alone, the rights of the corporation and all other stockholders; and especially is this so where the amount

of stock owned by him is so very limited that in case of success his own share of the recovery will be so small as to make the maxim de minimis non curat lex very properly applicable." Cf. Ithaca, etc., Co. v. Treman, 93 N. Y., 660 (1883). In the case of Charlton v. Newcastle, etc., R'y Co., 5 Jur. (N. S.), 1096 (1859), the court said: "A single shareholder, holding five or ten shares or less, is perfectly justified in applying to the court to restrain a company, on behalf of himself and the other shareholders, by injunction, from committing any illegal act beyond their powers. It does not signify if all the other shareholders are pitted together against this holder of ten shares; the court holds it is better for the real interests of the company that they should obey the law, and any one single shareholder who invokes the aid of the court is entitled to its aid for that purpose." See, also, to effect that the holder of a single share may bring the suit, Beman v. Rufford, 1 Sim. (N. S.), 550, 564 (1851); Zabriski v. Cleveland. etc., R. R., 23 How., 381, 395 (1859); Kean v. Johnson, 9 N. J. Eq., 401, 410 (1853), reviewing the cases; Gifford v. N. J. R. R., 10 id., 171 (1854); Elkins v. Camden, etc., R. R., 36 id., 5 (1882).

³ Arkansas, etc., Co. v. Farmers', etc., Co., 22 Pac. Rep., 954 (Colo., 1889). intervention of stockholders in suits carried on by the corporation is considered elsewhere.¹

May a corporate creditor institute a suit to make the officers account for a fraudulent or *ultra vires* act? Undoubtedly, after judgment obtained and execution returned unsatisfied, a corporate creditor may follow the corporate assets into the hands of corporate officers or of third persons who have received such assets fraudulently and to the injury of creditors.²

This principle applies where the corporation sells out all its property to another corporation in exchange for the stock or bonds of the latter.³ Corporate creditors may complain of the issue of "watered" stock,⁴ and of the purchase by the corporation of its stock,⁵ But this is as far as the rule goes. There is no fiduciary relation between the directors and the creditors as there is between the directors and the stockholders. Hence many acts which would be fraudulent or illegal as against the stockholders are not so as against the creditors.⁶

¹ See § 659, supra.

² General creditors may file a bill in equity to reach assets illegally transferred away by the corporation, and they may do so before judgment at law where the corporation has been dissolved. The suit must be in behalf of all creditors. All the transferees may be brought into one suit. Pullman v. Stebbins, 51 Fed. Rep., 10 (1892).

- ³ See ch. XL, supra.
- ⁴ See ch. III, supra.
- $^5\,\mathrm{See}$ § 312, supra.
- ⁶ Creditors cannot object to a contract between the corporation and a director where the stockholders have assented thereto and the contract is a fair one. Welch v. Importers', etc., Bank, 122 N. Y., 177 (1890). A creditor cannot complain of a mortgage or deed from his debtor, a corporation, even though the mortgage and deed were to another corporation having the same board of directors as the debtor corporation. A stockholder might complain, but there is no fiduciary relation between corporate creditors and directors. The mortgage was given when the company was solvent, and the deed after it became insolvent. O'Conner, etc., Co. v. Coosa, etc., Co., 10 S. Rep., 290 (Ala., 1891).

The creditors of a corporation are not allowed to attack a corporate mortgage on the ground that its stockholders did not authorize it. as required by statute. Manhattan Hardware Co. v. Phalen, 18 Atl. Rep., 428 (Pa., 1889). A general director cannot intervene the same as a stockholder. Kansas, etc., R'v v. Fitzgerald, 49 N. W. Rep., 1100 (Neb., 1891). It is difficult for a corporate creditor to seek collection by making out a conspiracy. Brackett v. Griswold, 13 N. Y. Supp., 192 (1891). A suit in equity by a creditor of a national bank against a director for mismanagement does not lie where the statutes prescribe the remedy through the receiver. National Ex. Bank v. Peters, 44 Fed. Rep., 13 (1890). A creditor holding an unpaid promissory note cannot by bill in equity bring in the directors to hold them liable for false representations and also claim that the company was not duly incorporated, and also bring in a subsequent corporation that took all the assets of the first, and also bring in those persons who finally obtained such assets - all in one bill brought to collect the debt. National Bank v. Texas, etc., Co., 12 S. W Rep., 101 (Tex., 1889). See, also, in general, Columbus, etc., R. R. v. § 736. Rule when the plaintiff stockholder sues in the interest of a rival company or purchases its stock for the purpose of bringing suit—Rule in federal courts against suits by transferees.—The law is well settled that if a stockholder institutes a suit in behalf of himself and other stockholders to enjoin or to bring to an accounting the corporate directors, and such suit is instituted, not to protect and benefit the stockholders' interest in the corporation, but to benefit some other corporation, the court will refuse to entertain the suit and will dismiss it. The application of a stockholder

Burke, 20 Week. L. Bull., 287 (1888); Mills v. Northern R'y, L. R., 5 Ch., 621 (1870).

A general creditor of a corporation may sue to set aside an illegal mortgage by it by way of preference to another creditor, although the first mentioned creditor has not obtained judgment. Consolidated, etc., Co. v. Kansas. etc., Co., 45 Fed. Rep., 7 (1891). For various cases which corporate creditors have sustained in this connection, see Warner v. Hopkins, 111 Pa. St., 328 (1885): Lothron v. Stedmau, 42 Conn., 583 (U. S. C. C., 1875); Brown v. Orr, 3 Atl. Rep., 815 (Pa., 1886); but see Balliet v. Brown, 103 Pa. St. 546 (1883); Pond v. Framingham, etc., Co., 130 Mass., 194 (1881); Gavenstein's Appeal, 49 Pa. St., 310 (1865); Heath v. Erie R'y Co., 8 Blatch., 347 (1871); Currier v. New York, etc., R. R. Co., 35 Hun, 355 (1885). See N. Y. Code of C. P., §§ 1781, 1782. See, also, Conro v. Gray, 4 How. Pr., 166 (1849); Fisk v. Union P. R. R., 10 Blatch., 518 (1873); Irons v. Manufacturers' National Bank, 6 Biss., 301 (1875); Van Weel v. Winston, 115 U.S., 228; Cole v. Knickerbocker, etc., Co., 23 Hun, 255 (1880); 91 N. Y., 641; Mills v. Northern R'y, L. R., 5 Ch., 621 (1870); Paulson v. Van Steenburgh, 65 How. Pr., 342. The receiver of an insolvent railroad corporation may file a bill in equity to compel the directors and their attorney to disgorge corporate funds which they divided among themselves. Gindrat v. Dane, 4 Cliff., 260 (1874). In Bewley v. Equitable Life Assurance Soc., 61 How. Pr., 344 (1881), where a policy-holder

sought to hold liable for misuse of funds the directors who were elected by the holders of the \$100,000 of stock of that corporation, it was held that the action by him would not lie. If he had been a judgment creditor and the corporation had been insolvent a different rule would have applied, thus distinguishing Evans v. Coventry, 5 De G., M. & G., 911 (1854); Aldebert v. Leaf, 1 Hem. & M., 681 (1862); Re State, etc., Ins. Co., 11 Week. Rep., 746; Belknap v. North, etc., Ins. Co., 11 Hun, 282 (1877). As to the right of corporate creditors to sue for negligence, and an action by a receiver or assignee in behalf of them, see Penn. Bank v. Hopkins, 2 Atl. Rep., 83 (Pa., 1886). Directors are liable for damages in an action on the case brought by depositors in a bank after it was insolvent, the directors having neglected to know of the insolvency. Delano v. Case. 121 Ill., 247 (1887); aff'g 17 Bradw., 531. A receiver may sue them for negligence as the corporation might have done. Movius v. Lee, 30 Fed. Rep., 298 (1887). Suit by creditor against directors under the Wisconsin statute. Hurlbut v. Marshall, 62 Wis., 590 (1885). Where a receiver sues directors for negligence stockholders are not proper parties. Kimball v. Ives, 30 Hun, 568 (1883). A stockholder who participates in a corporate act cannot as a corporate creditor attack that act. Bank of Fort Madison v. Alden, 129 U.S., 372. See Mellen v. Moline, 131 U.S., 352 (1889); 6 N.Y. Supp., 296; 38 Fed. Rep., 191.

¹ The difficulty herein is in proving

herein to a court of equity will not be denied merely because it is for the interest of the public or of the corporation, or of the stockholder himself, that the act complained of be allowed to stand. The law does not depend on the opinion of the court as to the benefit of the act.¹

In regard to purchases of stock for the very purpose of bringing a stockholder's suit herein, there is some difference of opinion. The common law clearly is that such a stockholder has the same right to bring the suit that his transferrer had.² Such is the rule even though the stock was purchased for the purpose of bringing the suit. The law has nothing to do with the motive of a legal act.³

that the complainant is suing for the rival company. If, however, the latter is paying the costs of the suit. that is sufficient proof. Forrest v. Manchester, etc., R'v Co., 4 De G., F. & J., 126 (1861); Belmont v. Erie R'y Co., 52 Barb., 637 (1869); Filder v. London, etc., R'v Co., 1 Hem. & M., 489 (1863); Camblos v. Phil., etc., R. R. Co., 4 Brews., 563 (U. S. C. C., 1873); Waterbury v. Merchants', etc., Ex. Co., 50 Barb., 157 (1867); S. C., 3 Abb. Pr. (N. S.), 163; Rogers v. Oxford, etc., R'y Co., 2 De G. & J., 602 (1858). See, however, Densmore v. Central R. R. Co., 19 Fed. Rep., 153 (1883), holding that the fact that the complainant stockholder has business relations with the rival company and is aided by it in preparing his case is no bar, and that if it were the objection is to be raised by a plea in abatement. Ffooks v. Southwestern R'y Co., 1 Sm. & G., 142 (1853). See, also, where this defense failed, Sandford v. Railroad, 24 Pa. St., 378 (1855); Colman v. Eastern, etc., R'y, 10 Beav., 1 (1846), where a rival company instigated the suit; Central R. R. v. Collins, 40 Ga., 582 (1869), where the plaintiff was interested in a rival company.

¹ Hoole v. Great, etc., R'y Co., L. R., ³ Ch., ²⁶² (1867); Stevens v. Rutland, etc., R. R. Co., ²⁹ Vt., ⁵⁴⁵ (1851).

² Winsor v. Bailey, 55 N. H., 218 (1875); Bloxam v. Metropolitan R'y Co., L. R., 3 Ch., 337 (1868), where the complainant on December 13, 1867, advertised to induce the stockholders to combine; on January 15, 1868, purchased stock himself. and on January 25, 1868, commenced suit. So, also, see Seaton v. Grant, L. R., 2 Ch., 459 (1867), where the court sustained the suit, although it said: "He buys five shares in the company, and then files his bill in order to induce the company to buy off the litigation. That, no doubt, is a course of conduct which would meet with little approval in this court, or, indeed, in any other court; and such conduct might be material at the hearing with reference to the amount of relief which the plaintiff could obtain, or whether he was entitled to any relief at all." Nevertheless the court said, also, that "however questionable the mode of the plaintiff's introduction to the company may have been, he has an actual interest in the subject-matter of the suit." Du Pont v. Northern Pac. R. R. Co., 18 Fed. Rep., 467 (1883). See, also, Atchison, etc., R. R. Co. v. Fletcher, 10 Pac. Rep., 597 (Kan., 1886); Ervin v. Oregon R'v & Nav. Co., 35 Hun, 544 (1885); S. C., 28 Hun, 269 (1882); Young v. Drake, 8 Hun, 61 (1876); Kingman v. Rome, etc., R. R. Co., 30 Hun, 73 (1883). If, however, the transferrer participated or acquiesced in the act complained of, then the transferee is also barred. See § 40.

³ Cases supra; also Elkins v. Camden, etc., R. R. Co., 36 N. J. Eq., 5 (1882); Ramsey v. Gould, 57 Barb., 398 (1870), where the motive was "bringing men to justice;" Salisbury v. Metropolitan R'y, 38 L. J. (Ch.), 249 (1869). The right

But where the transfer is merely nominal the transferee cannot bring suit herein, since he has no pecuniary interests of his own to protect, and equity will not aid him. In the federal courts peculiar rules prevail. It was found that transfers of stock were frequently made for the purpose of securing jurisdiction of the case in the federal courts. Litigation that properly belonged to the state courts was added to the already overburdened calendars of the United States courts. Accordingly the supreme court of the United States made it a rule of the federal courts that a transferee of stock cannot sustain a stockholder's suit to remedy a corporate wrong which was perpetrated before he became a stockholder.

of a stockholder to enjoin an interference with an election is not defeated by the fact that a rival company purchased his stock for him. Camden, etc., R. R. v. Elkins, 37 N. J. Eq., 273 (1883). If the complaining stockholder has but a small interest he is aided only where he makes out a clear case. Benedict v. Western Union T. Co., 9 Abb. N. C., 222: Reiff v. Same, N. Y. Daily Reg., Aug. 23, 1887. Such parties are not favored by the courts, and an injunction will be denied where their rights can be preserved by damages. Kingman v. Rome, etc., R. R. Co., 30 Hun, 73 (1883). Person may purchase stock for purpose of bringing suit. Solomans v. Laing, 12 Beav., 339, 353 (1850); Pender v. Lushington, L. R., 6 Ch. D., 70 (1877). A bondholder's foreclosure is valid even though he purchased the bonds at the instigation of certain interests hostile to the railroad, and even though he expects those interests to protect him from loss. If he owns the bonds himself this is sufficient. McFadden v. May's Landing, etc., R. R., 22 Atl. Rep., 932 (N. J., 1891). A purchaser of stock for the very purpose of enjoining an ultra vires act which will injure another enterprise of the plaintiff may obtain an injunction. Carson v. Iowa, etc., Co., 45 N. W. Rep., 1068 (Iowa, 1890). A person may buy stock to commence a suit. Frothingham v. Broadway, etc., R. R. Co., 9 Civ. Proc. Rep., 304 (1886). But where a railroad contracts to run trains on Sunday, and afterwards a person buys five shares of

stock and brings suit to enjoin the company, his real object being to preserve the Sabbath, equity will not aid him. Sparhawk v. Union, etc., R'y, 54 Pa. St., 401, 453 (1867). As regards the motive of a stockholder, see, also, Clark v. American Coal Co., 53 N. W. Rep., 291 (Iowa, 1892).

¹ M'Donnell v. Grand Canal Co., 3 Ir. Ch. Rep. (N. S.), 578 (1853); Robson v. Dodds, L. R., 8 Eq., 301 (1869).

² See the vigorous denunciation of such transfers by Mr. Justice Miller, in Hawes v. Oakland, 104 U. S., 450 (1881).

³ Rule 94, as follows: "Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath. and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance." Promulgated January 23, 1882. See Dimpfel v. Ohio, etc., R. R. Co., 110 U. S., 209 (1884). But see Leo v. Union Pacific R'y Co., 17 Fed. Rep., 273 (1883); S. C., 19 id., 283. In Lafayette Co. v. Neely, 21 Fed. Rep., 738 (1884), it is held that this rule does not bar the stockholder's right to bring the action after a dissolution of the corporation. See, In Georgia the rule of the federal courts has been adopted that a subsequent stockholder cannot complain.

§ 737. The complainant stockholder must sue in behalf of himself and other stockholders.—It is a well-established rule of law that a stockholder's suit to remedy a wrong done to the corporation must be in behalf of all the stockholders, since they are all equally interested in the results of the suit. Accordingly, the complainant or complainants must bring the suit in behalf of themselves and such others of the stockholders as care to come in.² If all the stockholders, however, are made parties, there is no need of the suit being brought in behalf of others who may choose to come in.³

§ 738. Parties defendant herein — The corporation — Directors — Third persons.— The corporation itself is an indispensable party defendant to a stockholder's action for the purpose of remedying a wrong which the corporation itself should have remedied.⁴ This

also, Whittemore v. Amoskeag Nat'l Bank, 26 Fed. Rep., 819 (1885). See, also, Vennor v. Atchison, etc., R. R., 28 id., 581 (1886).

¹ Alexander v. Searcy, 8 S. E. Rep., 630 (Ga., 1889).

² Wallworth v. Holt, 4 Mylne & C., 619 (1840); Wickersham v. Chittenden, 28 Pac. Rep., 788 (Cal., 1892); Taylor v. Soloman, id., 134 (1838), on the ground "that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others;" Beman v. Rufford, 1 Sim. (N. S.), 550 (1851); Baldwin v. Lawrence, 2 Sim. & Stu., 18 (1824); Bromley v. Smith, 1 Sim., 8 (1826); White v. Carmarthen, etc., R'y Co., 1 Hem. & M., 786 (1863); Bailey v. Birkenhead, etc., R'y Co., 12 Beav., 433 (1850); Preston v. Grand Collier Dock Co., 11 Sim., 327 (1840); Winsor v. Bailey, 55 N. H., 218 (1875); Blatchford v. Ross, 54 Barb., 42 (1869); Cunningham v. Pell, 5 Paige, 607 (1836); Fawcett v. Laurie, 1 Dr. & Sm., 192 (1860); March v. Eastern R. R. Co., 40 N. H., 548 (1860); Whitney v. Mayo, 15 Ill., 251 (1853). But see Cass v. Ottawa, etc., Co., 22 Grant (U. C.), 512 (1875), and Hoole v. Great Western R'y Co., L. R., 3 Ch., 262 (1867), to the effect that the rule is otherwise as regards *ultra vires* acts.

³ Rogers v. Lafayette Agri'l Works, 52 Iud., 295 (1875). Cf. Bengley v. Wheeler, 45 Mich., 493 (1881). Several stockholders may join in bringing the suit. Marie v. Garrison, 83 N. Y., 14 (1880).

⁴ Davenport v. Dows, 18 Wall., 626 (1873); Coxe v. Hart, 53 Mich., 557 (1884); Black v. Huggins, 2 Tenn. Ch., 780 (1877); Samuel v. Holladay, 1 Woolw., 600 (1869); Allen v. N. J. Southern R. R. Co., 49 How. Pr., 14 (1875); Bagshaw v. Eastern, etc., R'y Co., 7 Hare. 114 (1849); Gregory v. Patchett, 33 Beav., 595 (1864); Charleston, etc., Co. v. Sebring, 4 Rich. Eq. (S. C.), 342 (1853); Brinckerhoff v. Bostwick, 88 N. Y., 52 (1882); Cunningham v. Pell, 5 Paige, 607 (1836), holding also that if the corporation is foreign, service may be by publication. In a stockholder's suit against directors the receiver of the insolvent corporatiou must be made a party. Porter v. Sabin, 36 Fed. Rep., 475 (1888). As to why the company must be made a party, see Willoughby v. Chicago, etc., Co., 25 Atl. Rep., 277 (N. J., 1892). The corporation itself is a necessary party defendant.

rule is due to the fact that a similar possible future suit by the corporation is thereby prevented, the rights of the corporation are duly ascertained, and the remedy made effectual against the corporation as well as others. It is not necessary or proper to join the directors of the corporation as parties defendant where the only object of the suit is to enjoin an act or to set aside an ultra vires act. The decree against the corporation is effective and binding upon all the officers of the corporation. Where, however, the object of the suit is to hold the directors personally liable for frauds or for negligence, the rule is different. In such cases they of course are necessary parties defendant. As regards outside par-

Putnam v. Ruch, 54 Fed. Rep., 216 (1893): Byers v. Rollius, 21 Pac. Rep., 894 (Colo., 1889); City of Chicago v. Cameron. 120 Ill., 447 (1887): Stromeyer v. Combes. 2 N. Y. Supp., 234 (1888); Bruschke v. Der Nord, etc., Verein, 34 N. E. Rep., 417 (Ill., 1893); American, etc., Co. v. Linn, 17 S. Rep., 191 (Ala., 1890). In a stockholder's suit against a foreign corporation holding a majority of the stock of a domestic corporation and fraudulently refusing to perform its contract with the latter, the latter is a necessary party and the case cannot be removed to the federal courts. Douglas v. Richmond, etc., R. R., 10 S. E. Rep., 1048 (N. C., 1890).

1 See §§ 745, 746, 755, infra; Winch v. Birkenhead, etc., R'y Co., 5 De G. & Sm., 562 (1852), where the court said: "I do not think it is necessary that the directors should be parties. The act that is sought to be restrained is the act of the company. The company itself cannot act except by means of its officers." Pioneer Gold, etc., Co. v. Baker, 20 Fed. Rep., 4 (1884); Heath v. Erie R'y Co., 8 Blatch., 347 (1871); Chase v. Vanderbilt, 62 N. Y., 307, 314 (1875); Bryson v. Warwick, etc., Co., 1 Sm. & G., 447 (1853); Bagshaw v. Eastern, etc., R'v Co., 7 Hare, 114 (1849): Allen v. N. J. Southern R. R. Co., 49 How., Pr., 14 (1875), the court saying: "They are represented by the corporation of which they are alleged to be directors, and when the corporation itself is made a party defendant it is improper to add the trustees or directors as parties when no personal claim or judgment is asked against them." But see Ribon v. Railroad Cos., 16 Wall., 446 (1872). The directors are bound to obey an injunction against the company if it comes to their notice. Hatch v. Chicago, etc., R. R., 6 Blatch., 105 (1868); People v. Sturtevant, 9 N. Y., 263 (1853).

² Where the minority sue to set aside fraudulent acts of the majority, the guilty directors are not necessary parties defendant. Woodroof v. Howes. 26 Pac. Rep., 111 (Cal., 1891). The director who sold property to the corporation is a necessary party defendant in a stockholder's action attacking the transaction. Tutweiler v. Tuscaloosa, etc., Co., 7 S. Rep., 398 (Ala., 1890). The omission of part of the guilty directors as parties defendant is not fatal. Anderton v. Wolf, 41 Hun, 571 (1886). The directors taking part in an ultra vires transfer of property are proper parties defendant to an injunction suit. Small v. Minn., etc., Co., 10 N. Y. Supp., 456 (1890). See, also, cases in ch. XXXIX and ch. XLII; Ducket v. Grover, L. R., 6 Ch. D., 82; Mason v. Harris, L. R., 11 Ch. D., 97 (1879); Fergusou v. Wilson, L. R., 2 Ch., 77, 90 (1866); Imperial, etc., Assoc. v. Coleman, 6 H. L., 189 (1873); rev'g L. R., 6 Ch., 568. The president should not be joined as a party defendant for purposes of discovery only. Tutweiler v. Tuscaloosa, etc., Co., 7 S. Rep., 398 (Ala., 1890).

ties, they are to be joined as parties defendant whenever the relief asked would affect their rights.¹

¹ Russell v. Wakefield, etc., Co., L. R., 20 Eq., 474, the court saying: "When you have got the second corporation or person a party to the suit, it may happen that, in addition to the relief that you are entitled to as regards the first, you are entitled to have relief against the second for something that has been done under the ultra vires agreement. You may be entitled to have money paid back which has been paid under the ultra vires agreement, . . . and you may be entitled to have property returned or other acts done; " Hare v. London, etc., R'v Co., 1 John. & H., 252 (1860), holding that in an action to set aside a traffic contract all the corporations who were parties to the contract are necessary parties; Tyson v. Mahone, 1 Hughes (U. S. C. Ct.), 80 (1871), to the effect that, in an action to set aside a consolidation, the other corporation is a necessary party; Bill v. Donohue, 17 Fed. Rep., 710 (1883); Taylor v. Miami, etc., Co., 5 Ohio, 162 (1831), where a guilty stockholder was made a party defendant; Abbot v. American Hard Rubber Co., 4 Blatch., 489 (1861); Benglev v. Wheeler, 45 Mich., 493 (1881); Shawhan v. Zinn, 79 Ky., 300 (1881), holding that the objection to a defect of parties herein may be raised at the trial, and need not be raised by demurrer; Cass v. Ottawa,, etc., Co., 22 Grant (U. C.), 512 (1875), holding that the attorneygeneral is not a necessary party defendant. Cf. Rvan v. Ray, 33 Alb. L. J., 321 (Ind., 1886). Sometimes the directors of another corporation are proper parties defendant. See Terhune v. Midland R. R. Co., 38 N. J. Eq., 423 (1884). In a suit by a minority of the stockholders of a railroad company to restrain it and a trust company from issuing bonds to a construction company, the charge being made that the majority stockholders controlled also the construction company and the issue

of bonds was corrupt, the trustee is a necessary and not a merely nominal party. Mayer v. Denver, etc., R. R., 41 Fed. Rep., 723 (1890). Parties in league and the guilty officers may be made parties defendant. Meyers v. Scott, 2 N. Y. Supp., 753 (1888). A person may be made a party defendant for purposes of discovery only. See Lewis v. St. Albans, etc., Works, 50 Vt., 477 (1878).

In an action by a person against a corporation for any cause of action, a secretary and book-keeper may be made a party defendant for the purpose of getting an answer of discovery under oath, which the corporation cannot make. Wych v. Meal, 3 P. Will., 310 (1734). See, also, § 519, supra; Chase v. Vanderbilt, 62 N. Y., 307, 314 (1875); Many v. Beekman Iron Co., 9 Paige. 188 (1841); Masters v. Rossie, etc., Co., 2 Sand. Ch., 301 (1845); Brumly v. Westchester, etc., Soc., 1 John, Ch., 366 (1815); McIntyre v. Union College, 6 Paige, 239 (1837); Vermilyea v. Fulton Bank, 1 Paige, 37 (1828). But not where the corporation is not a party. Ellsworth v. Curtis, 10 Paige, 105 (1843). In stockholder's suit in behalf of a dissolved corporation, the receiver is a necessary party. Clark v. San Francisco, 53 Cal., 306 (1878). In a suit to set aside a lease, both the lessor and lessee railroad companies are necessary parties. New Jersey Central R. R. Co. v. Mills, 113 U. S., 249 (1885); East Tenn., etc., R. R. Co. v. Grayson, 119 U. S., 240 (1886). A director who resigned before the acts complained of were done is not to be made a defendant, even though the resignation was never accepted. Nor is a director liable who was absent by reason of sickness. Movius v. Lee, 30 Fed. Rep., 298 (1887). In a suit to compel directors to turn over the corporation profits improperly realized by them, a separate action may be brought against each director. Langdon v. Fogg, 18 Fed.

§ 739. Complainant's bill must not improperly join two or more causes of action herein.—If the complainant's bill is multifarious. it of course cannot succeed as against the objection of the defend-Thus, it has been held that the stockholders cannot join an action in reference to dividends with one for an injunction to restrain the corporate directors from committing a fraud. A bill combining an action to restrain the corporation from investing in the stock of another company, and one to restrain it from aiding that company, has been held to be multifarious.2 The stockholders cannot join a suit against the corporation with one against third persons in behalf of the corporation.3 The plaintiff cannot join causes of action accruing to himself personally with the cause of action which he brings suit upon in behalf of the company.4 A bill is multifarious where there are several defendants and no combination between them is shown.5 Although the complaint is multifarious and obscure, vet a demurrer does not necessarily lie.6

§ 740. Complainant must allege that he requested the corporation to bring the suit, and that the corporation refused or neglected to do so.—Inasmuch as a fraud, ultra vires or negligent act of the directors of a corporation is an injury done to the corporation itself, it is the duty and proper function of the corporation to institute any action that may be brought to remedy the injury to the corporation. As already explained, however, a stockholder may bring

Rep., 5 (1883); but see Chandler v. Bacon, 30 Fed. Rep., 541 (1887), holding that the liability is joint and several, the court saying: "When the conduct of parties operates as a fraud or a deceit upon third persons, whatever their private intention, the relation of partnership may be said to exist as to such third persons." To same effect, Ervin v. Oregon, etc., Nav. Co., 20 Fed. Rep., 577 (1884). See § 663.

¹ Winsor v. Bailey, 55 N. H., 218 (1875). A stockholder's suit is not multifarious, although it is to compel the treasurer to pay back certain funds, and also to have a dividend declared therefrom. Dunphy v. Travelers', etc., Ass'n, 16 N. E. Rep., 426 (Mass., 1888).

² Salomons v. Laing, 12 Beav., 339 (1849), But a bill by stockholders and creditors to restrain acts and have a dissolution is not multifarious. Mills v. Hurd, 32 Fed. Rep., 127 (1887).

³ Thomas v. Hoblen, 8 Jur. (N. S.), 125

(1862). And see in general on multifariousness herein, Merchants', etc., Line v. Waganer, 71 Ala., 581; Smith v. Rathbun, 22 Hun, 150 (1880); 38 Fed. Rep., 629. An action to be allowed to enter a reorganized company and one to hold its officers liable for fraud cannot be joined. Stanton v. Missouri, etc., R'y Co., 4 R'y & Corp. L. J., 370 (N. Y., 1888).

⁴ Whitney v. Fairbanks. 54 Fed. Rep., 985 (Vt., 1893). A bill seeking to attack a fraudulent sale of property by a director to the corporation and also to enjoin a sale of complainant's stock under a forfeiture for non-payment of a subscription is multifarious. Tutweiler v. Tuscaloosa, etc., Co., 7 S. Rep., 398 (Ala., 1890).

⁵ American, etc., Co. v. Linn, 7 S. Rep., 191 (Ala., 1890).

⁶ Mayle v. Landers, 23 Pac. Rep., 798 (Cal., 1890).

the action if the corporation improperly refuses or neglects to institute such suit. Before the stockholder brings suit he must make a formal request to the corporate officers that suit be instituted by the corporation. Upon its refusal or neglect to comply with that request he may then bring suit himself. It is well settled, however, that he must allege in his bill in equity that such a request has been made and has not been complied with. There has been considerable discussion as to whether the stockholder, in addition to his request to the corporate officers to institute the suit,

¹ Holton v. New Castle, etc., R'y, 20 Atl. Rep., 937 (Pa., 1890); Byers v. Rollins, 21 Pac. Rep., 894 (Col., 1889). Failure to request the corporation to bring suit is fatal. Bad faith on the part of the complainant is fatal. Weidenfeld v. Allegheny, etc., R. R., 47 Fed. Rep., 12 (1891). Three directors cannot sue as stockholders where for all that appears they are a majority of the board and could cause the corporation to sue. Hodgson v. Duluth, etc., R. R., 49 N. W. Rep., 197 (Minn., 1891). A stockholder's action to restrain a levy of execution by a judgment creditor on the property of the corporation fails where he does not allege a request and show his interest in the corporation. Southwest, etc., Gas Co. v. Fayette, etc., Gas Co., 23 Atl. Rep., 224 (Pa., 1892). A request made to a railroad corporation to prevent a competing railroad from voting its stock is sufficient to authorize a stockholder's suit. Memphis, etc., Co. v. Wood, 7 S. Rep., 108 (Ala., 1889). See, also, Cogswell v. Bull, 39 Cal., 320 (1870); Hazard v. Durant, 11 R. I., 195 (1875), the court saying that the allegations of request "will be sustained by proof of a request to the stockholders in corporate meeting, or to the directors in office when the suit began, or in any other mode so that it be in legal effect a request to the corporation; Talbot v. Scripps, 31 Mich., 268 (1875); Ware v. Bazemore, 58 Ga., 316 (1877); Merchants', etc., Line v. Waganer. 71 Ala., 581; Hersey v. Veazie, 24 Me., 9 (1844); Memphis City v. Dean, 8 Wall., 64 (1868); House v. Cooper, 30 Barb., 157 (1858);

Wilkie v. Rochester, etc., R'v. 12 Hun. 242 (1877): O'Brien v. O'Connell, 7 Hun. 228 (1876): Abbott v. Merriam, 62 Mass., 588 (1851); Morgan v. Railroad Co., 29 Vt., 545 (1851). But a request to bring the suit in a federal court is insufficient. See Newby v. Oregon Central R. R. Co., 1 Sawyer, 63 (1870). The leading case of Foss v. Harbottle, 2 Hare, 461 (1843). failed by reason of a failure to make this effort to induce the corporation to act. See, also, the important case of Greaves v. Gouge, 69 N. Y., 154 (1877); Cogswell v. Bull, 39 Cal., 320 (1870); Palmer v. Hawes, 40 N. W. Rep., 676 (Wis., 1888). The defendant cannot raise this point in the appellate court for the first time. See Bulkley v. Beg. etc., Co., 77 Mo., 105 (1882). The request to the directors must be made in good faith and the actual wrong set forth, and the directors must not be charged in the request as being guilty unless they really are so. Bacon v. Irvine, 11 Pac. Rep., 646 (Cal., 1886). An allegation simply that the corporation neglected is insufficient. Must allege refusal. Leslie v. Lorillard, 31 Hun, 305 (1883). Need not allege specifically that the present board of directors have refused to act. Brown v. Buffalo, etc., R. R., 27 Hun, 344 (1882). A stockholder suing in behalf of his corporation, which has been dissolved many years, must nevertheless show that he sought to have the directors bring suit. Taylor v. Holmes, 127 U.S., 489 (1888). No request to the directors if the act is ultra vires. Botts v. Simpsonville, etc., Co., 10 S. W. Rep., 134 (Ky., 1888).

should not also be required to attempt to induce the stockholders in meeting assembled to take action by directing the directors to bring suit, or by refusing to re-elect them at the next election. The facts, however, that the stockholders in meeting assembled cannot control the discretion of the directors in bringing such a suit; that the remedy of refusing to re-elect them involves delay, and the assumption that a minority of the stockholders can by the election control such a suit; that irreparable injury or the vesting of great financial interests may occur in the meantime; and that laches may arise as a bar to the stockholder's suit — have settled the rule that the stockholder's request to the corporate directors to institute the suit is sufficient. He need not also apply to a stockholders' meeting.¹ In the federal courts the necessity of an allegation that the corporation has been requested to sue and has refused is fixed by a rule of the court.² The request may be made to the president,³

¹ Mason v. Harris, L. R., 11 Ch. D., 97 (1879), holding also that the court has no power to order such a meeting. See a discussion of this question in Brewer v. Boston Theater, 104 Mass., 378 (1870). See, also, Gregory v. Patchett, 33 Beav., 595 (1864). In McDougall v. Gardiner, 1 Ch. D., 13, 22, the difficulty herein probably arose from cases where a stockholder sought to enjoin acts which the directors could not do, but which the majority of stockholders could do. If the stockholders have the power to remove the directors, a request to the stockholders to act must be made before suit is brought by a stockholder. Rathbone v. Parkersburg, etc., Co., 8 S. E. Rep., 570 (W. Va., 1888). In the case of Miller et al. v. Murray, 30 Pac. Rep., 46 (Col., 1892), the court refused to sustain an action by the minority stockholders to set aside an alleged fraudulent sale of the corporate property at foreclosure sale, the property having been subsequently purchased by one of the officers, inasmuch as the complaining stockholders had votes enough to elect a board of directors, and thus have the suit brought in the corporate name.

² Rule 94: ". . . It [the bill] must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees: and, if necessary, of the shareholders, and the causes of his failure to obtain such action." McHenry v. N. Y., etc., R. R. Co., 22 Fed. Rep., 130; 25 id., 65, 114. See Leo v. Union Pacific R'v Co., 19 Fed. Rep., 283 (1884); S. C., 17 id., 273; Converse v. Dimock, 22 Fed. Rep., 573 (1884); Bill v. Western Union Tel. Co., 16 Fed. Rep., 14; Quincy v. Steel, 120 U. S., 241 (1887); Foote v. Cunard Min. Co., 17 id., 46 (1883), holding that an allegation that the corporation would probably refuse relief is insufficient. Not to be omitted merely because the

³ A request to and refusal by the president, who is also the manager, suffices even though he is the party guilty of the acts complained of. City of Chicago v. Cameron, 11 N. E. Rep., 899 (Ill., 1887). Request made to the president is good, though he replies that he had resigned two years previously, it appearing that

his resignation had not been accepted and no meetings held since the resignation. Averill v. Barber, 6 N. Y. Supp., 255 (1889). A request by one of the stockholders to the officers and president is sufficient. Becker v. Directors, etc., 15 S. W. Rep., 1094 (Tex., 1891). although this is denied in Tennessee.¹ If receiver is in charge request is to be to him.² A request to the executive committee is sufficient.³ A request by a stockholder to the trustee in insolvency of a corporation is sufficient to enable the former to bring suit to hold the directors liable for negligence if the trustee refuses to sue.⁴

§ 741. When such an allegation may be omitted.— There are occasions when the allegation that the stockholder has requested the directors to bring suit and they have refused may be omitted, since the request itself is not required. This occurs when the corporate management is under the control of the guilty parties. No request need then be made or alleged, since the guilty parties would not comply with the request; and even if they did the court would not allow them to conduct the suit against themselves.

guilty party owns a majority of the stock. Allen v. Wilson, 28 Fed. Rep., 677 (1886). Fact that the guilty party elected the existing board of directors does not excuse request. Allen v. Wilson, 28 Fed. Rep., 677 (1886). A suit by a stockholder to remedy frauds on the part of the president does not come within the ninety-fourth rule, and even if it does, an allegation that the guilty parties control the board of directors excuses any request to them to sue. Ranger v. Champion, etc., Co., 52 Fed. Rep., 611 (1892). Concerning the United States rule as to the request to the company, see Whitney v. Fairbanks, 54 Fed. Rep., 985 (Vt., 1893). Under rule 94, in the federal courts, it is not enough to allege that the guilty parties are in control of the corporation. This is not enough to dispense with a request to the directors to bring suit. Squair v. Lookout M. Co., 42 Fed. Rep., 729 (1890).

¹ In a stockholder's suit to hold the directors liable for negligence the request must be to the board of directors. A request to the president is insufficient. Wallace v. Lincoln, etc., Bank, 15 S. W. Rep., 448 (Teun., 1891).

² Nelson v. Burrows, 9 Abb. N. C., 280; Fisher v. Andrews, 37 Hun, 176 (1885); Kelsey v. Sargent, 40 Hun, 150 (1886). Where a receiver has been appointed it is for him and not for a stockholder to hold the directors re-

sponsible for management of a bank. Howe v. Barney, 45 Fed. Rep., 668 (1891).

³ Hazard v. Durant, 11 R. I., 196 (1875).

⁴ Wallace v. Lincoln, etc., Bank, 15 S. W. Rep., 448 (Tenn., 1891).

⁵ Wavne Pike Co. v. Hammons, 27 N. E. Rep., 487 (Ind., 1891); Hannerty v. Standard, etc., Co., 19 S. W. Rep., 82 (Mo., 1892); Wickersham v. Chittenden, 28 Pac. Rep., 788 (Cal., 1892); Ashton v. Dashaway Assoc., 22 Pac. Rep., 660 (Cal., 1889); Barr v. Pittsburgh, etc., Co., 40 Fed. Rep., 412 (1889); Smith v. Dorn, 30 Pac. Rep., 1024 (Cal., 1892); Eschweiler v. Stowell, 47 N. W. Rep., 361 (Wis., 1890); Anderton v. Wolf, 41 Hun, 571 (1886); Bjorngaard et al. v. Goodhue County Bank et al., 52 N. W. Rep., 48 (Minn., 1892). No request is necessary where the owners of a majority of the stock cause the directors to sell the property to a person who buys for them. Chicago Hansom, etc., Co. v. Yerkes, 30 N. E. Rep., 667 (Ill., 1892); Brinckerhoff v. Bostwick, 88 N. Y., 52; Rogers v. Lafavette, etc., Works, 52 Ind., 295 (1875); County of Tazewell v. Farmers', etc., Co., 12 Fed. Rep., 752 (1882); Davis v. Gemmel, 17 Atl. Rep., 259 (Md., 1889); Board of Tippecanoe Co. v. Lafayette, etc., R. R. Co., 50 Ind., 85 (1875); Wilcox v. Brickel, 11 Neb., 154 (1881), where the officers had absconded; Currier v. N. Y., etc., R. R. Co., 35 Hun, 355 (1885); Ramsey v. Gould, 57 Nevertheless, instead of this allegation the complainant must allege the facts which excuse such a demand or request to the directors, and these facts must be stated with particularity and definiteness.¹

§ 742. Miscellaneous allegations of the complainant.— The allegations which set forth the complaining stockholder's cause of action will of course depend largely on the particular facts of each case. It is necessary, however, to determine first whether the allegations are to make out a case of fraud, or of an ultra vires act, or of a negligent act. If an ultra vires act is complained of, the gist of the action is not fraud, and need not be and should not be alleged.² But where the action is to remedy a fraud, the allegations

Barb., 398 (1870); Kelsev v. Sargent, 40 Hun, 150 (1886); Parrott v. Byers, 40 Cal., 614 (1871); Fisher v. Andrews, 37 Hun, 176; Young v. Drake, 8 Hun, 61 (1876); Heath v. Erie R'y Co., 8 Blatch., 347 (1871), the court saying: "It would be a mockery to require or permit a suit against them to be brought and prosecuted under their management to obtain the relief sought by this bill;" Mussina v. Goldthwaite, 34 Tex., 125 (1870); Dowd v. Wisconsin, etc., R. R. Co., 65 Wis., 108 (1886); Pond v. Vermont, etc., R. R. Co., 12 Blatch., 280 (1874). But an allegation that the management is under the control of persons appointed by the guilty parties is insufficient. See McMurray v. Northern, etc., R'y Co., 22 Grant (U. C.), 476 (1875). And an allegation that the directors are "nearly if not entirely" in league with the guilty parties is insufficient. Cogswell v. Bull, 39 Cal., 320 (1870). If the directors are the guilty parties, a stockholder suing to prevent their running the corporation for the benefit of a partnership need not allege a request to them to sue. Rothwell v. Robinson, 38 N. W. Rep., 772 (Minn., 1888). If the fraud has been by the majority of the stockholders on the minority, no request to the directors to sue need be made. Nathan o. Tompkins, 2 S. Rep., 747 (Ala., 1887). See 21 Pac. Rep., 1133. Need not require directors to undo illegal lease when they cannot, except with consent

of another company. Board of Com'rs v. Lafayette, etc., R. R. Co., 50 Ind., 85 (1875). Request to directors is not excused by the fact that the guilty party -the corporate treasurer - owns a majority of the stock. Dunphy v. Travelers' etc., Ass'n, 16 N. E. Rep., 426 (Mass., 1888). In North Carolina it would seem that a demand on the guilty officers is necessary in any case. Moore v. Silver, etc., Co., 10 S. E. Rep., 679 (N. C., 1890). In a stockholder's suit to enjoin a rival company from voting stock in the stockholder's company, a request to the directors to sue is unnecessary where the directors are controlled by such rival company. Mack v. De Bardelaben, etc., Co., 8 S. Rep., 150 (Ala., 1890).

¹See cases in preceding note. The stockholder may bring his suit although the corporation has been dissolved. Lafayette Co. v. Neely, 21 Fed. Rep., 738 (1884). An allegation that frequent protests had been made is not a sufficient allegation of a request to sue. Boyd v. Sims, 11 S. W. Rep., 948 (Tenn., 1889). And it is insufficient to show that a majority of the directors are large stockholders in a competing company, although the charge is that such directors are fraudulently favoring the latter company. Id.

² Clinch v. Financial Co., L. R., 5 Eq., 450, 482 (1868). If the pleadings charge fraud as the basis of the suit, fraud must be proved; otherwise the suit fails, even though the evidence shows a

must clearly charge to that effect. The word "corrupt" has been held insufficient herein.¹ If the action is to set aside an ultra vires act, the act itself must be stated with particularity.² The complaint need not allege who the other stockholders are, how numerous, or whether a majority.³ The stockholder need not allege that he was a stockholder at the time of the act or that his stock has since come to him by operation of law.⁴ It is not necessary to allege that the stockholders have been free from acquiescence or laches.⁵

In North Carolina it is held that the complaining stockholder must aver that he is a "bona fide owner of stock; that he bought the same in good faith, and not for mere vexatious purposes." ⁶

- § 743. Prayer for relief.— The relief for which prayer is made in the bill will depend upon the character of the act complained of, and also of the facts in the particular case. Generally it is to compel the director or third parties to pay over to the corporation money or property fraudulently held by the defendants, or to enjoin acts, or to set aside transactions, or for a receiver, or for dissolution, or for more than one of these. It is well settled that the prayer for relief may be in the alternative. The relief granted cannot exceed that which is asked.
- § 744. Property received under the act objected to must be returned upon that act being set aside.— This is a principle of law that applies to all the remedies given by the court of equity in remedying the frauds or ultra vires acts of the directors or third persons against the corporation. He who seeks equity must do equity. An ultra vires act will not be set aside unless the money or property received by the corporation from third persons thereby is returned to such persons.⁹

right to relief on the ground of account, discovery or some other ground of equitable jurisdiction. Spies v. Chicago, etc., R. R., 40 Fed. Rep., 34 (1889).

- ¹ Russell v. Wakefield, etc., Co., L. R., 20 Eq., 474 (1875).
- ² Leo v. Union, etc., R'y Cc., 19 Fed. Rep., 283 (1884); S. C., 17 id., 273. Must allege that the corporation is one for profit. Applegarth v. McQuiddy, 19 Pac. Rep., 692 (Cal., 1888).
- ³ Descombes v. Wood, 4 S. W. Rep., 82 (Mo., 1887).
- ⁴ Parson v. Joseph, 8 S. Rep., 788 (Ala., 1891).
- ⁵ Horn, etc., Co. v. Ryan, 44 N. W. Rep., 56 (Minn., 1889).

- ⁸ Moore v. Silver, etc., Co., 10 S. E. Rep., 679 (N. C., 1890). For the various allegations to be made in a complaint to set aside an illegal alienation of corporate property, see Beecher v. Schieffelin, 4 N. Y. Civ. Proc. Rep., 230 (1883).
- ⁷ Colton v. Ross, 2 Paige, 396 (1831); Thomas v. Hobler, 4 De G., F. & J., 199 (1861).
- ⁸ Latimer v. Eddy, 46 Barb., 61 (1864). ⁹ The benefits received by the corporation must be returned in order to sustain an action setting aside a fraudulent contract. Barr v. New York, etc., R. R., 125 N. Y., 263 (1891). Where the directors of a railway company enter into a contract with third persons, whereby a

§ 745. Injunction restraining the corporate officers and others from doing specified acts.—The ordinary remedy of the stockholder is an injunction by a court of equity restraining the corporate officers from doing the specified fraudulent or ultra vires act which the stockholder complains of. Generally the injunction

new company is organized, franchises secured and a road built and leased to the old company, and the profits realized from the transaction are equally divided between the directors and the third persons, the latter are not liable for their profits, even though exorbitant. on suit by stockholders of the old company, unless the contract of lease is rescinded and the road restored to the new company. Hitchcock et al. v. Barrett et al., 50 Fed. Rep., 653 (N. Y., 1892); Buford v. Keokuk, etc., Co., 69 Mo., 611 (1879); Harpending v. Munson, 91 N. Y., 650 (1883): New Castle, etc., R. R. Co. v. Simpson, 23 Fed. Rep., 214 (1885), allowing to the party outlays, compensation and interest. Cf. Gray v. New York, etc., Co., 5 T. & C., 224 (1875); Thomas v. Railroad Co., 101 U.S., 71; Louisiana v. Wood, 102 U.S., 294; Lindley on Partnership, 363; Chapman v. Douglas County, 107 U.S., 348; Salt Lake City v. Hollister, 118 id., 256, 263; Green's Brice's Ultra Vires, 717. Consideration must be returned. Pierson v. McCurdy, 33 Hun, 520 (1884), where a receiver sued a director for funds used to purchase stock. See, also, Gould v. Cayuga, etc., Bank, 86 N. Y., 75 (1881); but see Allerton v. Allerton, 50 N. Y., 670 (1872). Payment by bondsmen of moneys used by directors in illegal purchases of bonds prevents action by receiver of corporation against directors. Hun v. Van Dyck, 26 Hun, 567 (1882). As to the right of the fraudulent possessor to compensation for improvements, see Jackson v. Ludeling, 99 U.S., 513 (1878). If, however, the complainant never received the consideration and cannot compel others to return it, it is not necessary for him to offer to return it. See Lamb v. San Pedro, etc., Co., 9 Pac. Rep.,

525 (New Mex., 1886). Where the majority have fraudulently caused the directors to sell land to them and to buy stock of them, the minority need not offer to restore anything in order to institute suit. Woodroof v. Howes, 26 Pac. Rep., 111 (Cal., 1891). A stockholder need not tender to a purchaser in bad faith of corporate property fraudulently sold by the directors. The action was to enjoin and set aside the sales. Gray v. New York, etc., Co., 3 Hun, 383 (1875). Where two religious corporations united by one conveying its property to the other and the latter paving the debts of the former, a judgment setting aside such sale will also require the former to restore to the latter the money advanced by it. Madison Ave., etc., Ch. v. Oliver St. Bap. Ch., 73 N. Y., 82 (1878): Pierson v. McCurdy, 33 Hun, 520 (1884). A stockholder seeking to have corporate bonds canceled must offer to return the consideration. Spencer v. Clarke, 1 N. Y. Supp., 533 (1888). It is clear, however, that the stockholder bimself cannot be expected to repay this consideration. A just rule would allow him to pray in his bill that the corporation repay the consideration. Cf. Atlantic & Pac. Tel. Co. v. Union Pac. R'y Co., 1 McCrary, 541 (1880), holding that though a contract be ultra vires a corporation will be restrained from recovering possession of property conveyed by it, except by due process of law and after return of the consideration. A stockholder suing to set aside need not tender if the party sued knew of stockholder's dissent at the time when he entered into the act. Metropolitan, etc., R. R. Co. v. Manhattan, etc., R. R. Co., 11 Daly (N. Y. Com. Pl.), 373 (1884). ¹ Where a proposed consolidation is

runs to the corporation itself; and this is sufficient to make it effective and binding upon all corporate officers to whose notice it comes.¹

§ 746. Injunction against corporate officers acting at all—Appointment of a receiver.— The law is well settled that the courts have no power to remove corporate officers.² Nor can the stockholders, in meeting assembled, remove the officers.³ It is also well established that a court of equity cannot practically remove corporate officers by enjoining them from performing any of their customary duties, and by appointing a receiver to manage the corporate affairs.⁴

The appointment of a receiver as a remedy for the frauds or ultra vires acts of the directors is practically the punishment of the

attacked by a stockholder a preliminary injunction granted so as not to render useless the whole suit in case it is successful will not be disturbed by the court of appeals. Young v. Rondout. etc., Co., 129 N. Y., 57 (1891); River Dun Nav. Co. v. North, etc., R'v Co., 1 R'v Cas., 134, 153 (1838); Blatchford v. Ross, 54 Barb., 42 (1869). In Indiana it is held than no injunction will be granted against the payment of an unfounded claim by the directors, but that the action will proceed and other relief be granted. Rogers v. Lafavette, etc., Works, 52 Ind., 296 (1876).

1 See §§ 738, 755; also Hatch v. Chicago, etc., R. R. Co., 6 Blatch., 105 (1868); Trimmer v. Penn., etc., R. R. Co., 36 N. J. Eq., 411 (1883), holding, however, that the officers are not liable herein for contempt by reason of the acts of subcontractors. See People v. Sturtevant, 9 N. Y., 263 (1853); Same v. Pendleton, 64 N. Y., 622 (1876). A director may resign after the company and officers have been enjoined from interfering with the corporate assets and may then pursue his remedies as a corporate creditor. Mexican, etc., Co. v. Mexican, etc., Co., 47 Fed. Rep., 351 (1891).

² Neall v. Hill, 16 Cal., 145 (1860), the court saying: "It is well settled that there is no jurisdiction in equity with regard to the removal of corporate offi-

cers of any description." Also Johnston v. Jones, 23 N. J. Eq., 216 (1872), and §§ 620, 711, supra.

³ Imperial, etc., Co. v. Hampson (1882), W. N., 189. See § 627.

⁴ People v. Albany, etc., R. R. Co., 55 Barb., 344, 383 (1869); Einstein v. Rosenfield, 38 N. J. Eq., 309 (1884); Howe v. Deuel, 43 Barb., 504 (1865); Waterbury v. Merchants', etc., Co., 50 Barb., 157 (1867); Cicotte v. Anciaux, 53 Mich., 227 (1884); La Grange v. State Treas., 24 Mich., 468 (1872). In New York an injunction order suspending "the general or ordinary business" of a foreign or domestic corporation in New York can be obtained only after notice to the corporation. Code of C. P., § 1809. Cf. § 1787. An injunction against an officer doing any corporate business during the pendency of a suit against bim for maladministration, etc., will not always be set aside, even under the rule that where the defendant specifically denies under oath all charges, the injunction must be dissolved. Hoyt v. Malone, 9 N. Y. Supp., 877 (1890). In New York by statute an injunction against a corporation and suspending its general and ordinary business can be granted only on notice. Hence an ex parte injunction against the removal of the treasurer is void. Wilkie v. Rochester, etc., R'y, 12 Hun, 242 (1877).

innocent and complaining party for the acts of the guilty party. As was well said by an Illinois court, "In principle this is very much like sending the creditor to jail because his debtor cannot pay him, and is so opposed to that spirit of justice which pervades all the true doctrines of equity jurisprudence that it will not bear discussion." 1

There are, however, strong cases to the effect that the court will appoint a receiver where it is evident that a continuation of business is impracticable or inequitable.²

¹In Hyde Park Gas Co. v. Kerber, 5 Bradw. (Ill.), 132 (1879), where a decree had been made that a receiver be appointed unless the officers paid over money received by them in fraud of corporate rights, the court set aside the decree and said that dissatisfaction by the minority with the management of the majority is not sufficient for the appointment of a receiver of the corporation. Fluker et al. v. Emporia City R'y Co. et al., 30 Pac. Rep., 18 (Kan., 1892); American, etc., Co. v. Toledo, etc., R'y, 29 Fed. Rep., 416 (1886). No receiver for mismanagement. Port Huron, etc., R'y v. Judge, 31 Mich., 456 (1875). court will not appoint a receiver of a solvent corporation even though the president has embezzled some of its funds and is disposing of his property and is apparently sustained by a majority of the stockholders. Ranger v. Champion, etc., Co., 52 Fed. Rep., 609 (1892). See, also, Bayles v. Orme, Freeman's Ch. (Miss.), 161 (1841); People v. Conklin, 5 Hun, 452 (1875); Hand v. Dexter, 41 Ga., 454 (1871); Baker v. Adm'r of Backus, 32 Ill., 79 (1863); People v. Albany, etc., R. R. Co., 7 Abb. Pr. (N. S.), 290; Belmont v. Erie R'y Co., 52 Barb., 637 (1869); Overton v. Memphis, etc., R. R., 10 Fed. Rep., 866 (1882); Smith v. Wells, 20 How. Pr., 158. Even where two rival boards of directors are litigating their respective rights, the court cannot turn the corporate affairs over to a receiver. See Karnes v. Rochester, etc., R. R. Co., 4 Abb. Pr. (N. S.), 107 (1867); Gavenstine's Appeal, 49 Pa. St., 310 (1865), holding that the appointment of a re-

ceiver is equivalent to enjoining the officers from managing the corporate business. See Cincinnati, etc., R. R. v. Duckworth, 2 R'y & Corp. L. J., 560 (1887), refusing a receiver at the instance of a stockholder and discussing the question. Mere disagreement of the parties as to the management of the property is no ground for a receivership. American, etc., Co. v. Toledo, etc., R'v Co., 29 Fed. Rep., 416 (1886). The case State of Florida v. Jacksonville, etc., R. R., 15 Fla., 201 (1875), seems to have been one for a decree that certain consolidated railroads were subject to the mortgage (see pp. 279, 280). Mismanagement and default in interest were charged. The court held (see p. 386) that a receiver should not have been appointed. The stockholders of a corporation cannot obtain a receiver of its property on the ground that the lessee of its property is not paying the rent which is due. City of Rochester v. Bronson, 41 How. Pr., 78 (1871). The lessee in this case alleged that it did not know which of two contesting boards of directors of the lessor was the right board to pay rent to. See, also, 26 Atl. Rep., 886.

²Where an electric light company purchases a majority of the stock of a competing electric light company in the same city, and elects the board of directors, and fraudulently uses its power to make the latter subservient to and as a feeder to the former, and intends to destroy the latter, the court, at the instance of a minority stockholder of the latter, will appoint a receiver of the company, but the proof of such intent must be

Sometimes the power to restrain or remove corporate officers, and to appoint a receiver of the corporation, is given to the court by a statutory enactment.¹

The fact that the directors so elected are stockholders in the controlling company is not sufficient. Davis v. U. S., etc., Co., 25 Atl. Rep., 982 (Md., 1893). Where for seven years a stockholder who owned a majority of the stock elected himself and two of his dumnies as directors of the company, and caused the board to vote a large salary to himself as president and manager, and had leased to the company bis property at a large rental, the salary and rental are illegal and void. Where the company had failed to pay its dividends by reason of such acts, a court of equity upon the suit of another stockholder ordered the president to account, and appointed a receiver of the company and directed that its affairs be wound up. Miner v. Belle Isle Ice Co., 53 N. W. Rep., 218 (Mich., 1892). Where a stockholder in a street railway starts suit to set aside an illegal consolidation with another company, fraudulently brought about by the officers, the latter company being insolvent and the former liable to become so, a cause of action is stated and a receiver may be appointed. Becker v. Directors, etc., 15 S. W. Rep., 1094 (Tex., 1891). In a stockholder's snit to cause an alleged fraudulent transaction to be set aside, the court appointed a receiver, not to take the property, but to carry on the suit. The upper court held that such an appointment was illegal. Burnes v. Atchison, 29 Pac. Rep., 579 (Kan., 1892). A few cases have beld that the court, under extreme circumstances, may appoint a receiver to take charge of the corporate business, even though the corporation is solvent, and no dissolution is intended, and no corporate creditors' interests are involved. See Stevens v. Davison, 18 Gratt. (Va.), 819 (1868), where a railroad was turned over to a receiver to protect stockholders' rights. Court will not enjoin officers

from acting. Foss v. Harbottle, 2 Hare. 461: Mozlev v. Alston, 16 L. J., Ch., 217 (1847); Hattersley v. Earl Selburne, 31 L. J., Ch., 873 (1862). So, also, Manneck. etc., Co. v. Manneck, 23 Alb. L. J., 216 (1881). A stockholder may have receiver appointed of foreign corporation which is insolvent and in hands of a receiver in state creating it. Phœnix Foundry v. North River Con. Co., 33 Hun, 156 (1884). Receiver appointed if the corporation is practically defunct and there has been a breach of trust. Hall v. Astoria, etc., Co., 5 R'y & Corp. L. J., 412 (Louisville Ct., 1889). See, also, in general, Frostburg Bldg, Ass'n v. Stark, 47 Md., 338 (1877). In the case of Hayward v. Lincoln Lumber Co., 26 N. W. Rep., 184 (Wis., 1885), the corporation was insolvent. In Lawrence v. Greenwich Fire Ins. Co., 1 Paige, 587 (1829), the court appointed a receiver to preserve the corporate property, there having been no officers elected by the stockholders. Under the statutes of Indiana the court may appoint a receiver in a stockholder's suit where there has been a diversion of funds to pay salaries and a failure to repair. Wayne Pike Co. v. Hammons, 23 N. E. Rep., 487 (Ind., 1891). See, also, Haywood v. Lincoln Lumber Co., 64 Wis., 639 (1885). In the case Forbes v. Memphis, etc., R. R., 2 Woods, 323 (1872), a receiver was appointed upon default of the defendants to answer, the bill being filed by a stockholder, a bondholder and the trustee for the bondholdholders on behalf of themselves and all other stockholders and bondholders to prevent the directors of the insolvent company from fraudulently disposing of the property.

¹ In New York, by statute, the court may appoint a receiver in a stockholder's action. Osgood v. Maguire, 61 N. Y., 524 (1875). The appointment of a receiver at the instance of a stockholder

§ 747. Miscellaneous remedies. — It has been held and clearly established that a stockholder cannot bring about the dissolution of the corporation merely because the officers have been guilty of a breach of trust.¹ Nor can he defeat an action for his subscription by alleging such a defense.² There are various other remedies and rules which govern this subject.³

§ 748. The complaining stockholder controls the conduct of the suit—Similar suits elsewhere—The results of the suit belong to the corporation.—It is a principle of equity practice, when a person brings a suit in behalf of himself and such others as may wish to come in who are similarly situated, that the complaining stock-

may be voidable. It is not void. Attorney-General v. Continental, etc., Ins. Co., 28 Hun, 360 (1882); affirmed, 93 N. Y., 630. In New York a stockholder's action under the statute to place the corporate property in a receiver's hands and for an accounting by its officer will be compelled to give precedence to another action instituted by the attornev-general under the statute to remove the officers, etc. Keeler v. Brooklyn El. R. R., 9 Abb. N. C., 166 (1880). In New York misconduct of a trustee authorizes a court to appoint a receiver. Jenkins v. Jenkins, 1 Paige, 243 (1829). See, also, Conro v. Gray, 4 How. Pr., 166; Kelly v. Mariposa, etc., Co., 4 Hun, 632 (1875). See, also, Verplanck v. Mercantile Ins. Co., 1 Edw. Ch., 83 (1831), and the New York cases in the preceding note. In New York it has been held that a stockholder may have a corporate officer arrested for his frauds on the corporation. Crook v. Jewett, 12 How. Pr., 19 (1854). In certain cases an "officer" is construed to mean merely an agent and not a director. So held in regard to appointing a receiver of a foreign corporation. Moran v. Alvas, etc., Co., N. Y. Law Jour., Dec. 5, 1891.

¹ See § 629, supra. A stockholder's prayer for relief that the corporation be dissolved and the assets distributed because a director has sold property to it at an overvaluation will be denied. Tutweiler v. Tuscaloosa, etc., Co., 7 S. Rep.,

398 (Ala., 1890). Where a corporation has abandoned its authorized business and engaged in another, it will be wound up. This is different from a case where the directors have merely and incidentally committed ultra vires acts. Re Crown, etc., Bank, 62 L. T. Rep., 823 (1890).

² See § 187, supra; also Chetlain v. Republic Life Ins. Co., 86 Ill., 220 (1877); South Georgia, etc., R. R. Co. v. Ayres, 56 Ga., 230 (1876). Nor can the stockholder enjoin a call. Ex parte Booker, 18 Ark., 338 (1857). If an illegal consolidation is set aside, the stockholders of the new company may recover back the amount paid in by them. In re Bank of Hindustan, L. R., 16 Eq., 417 (1873).

3 Where money is recovered and is to be distributed among the stockholders. see Pacific R. R. Co. v. Cutting, 27 Fed. Rep., 638 (1886). Director cannot set off claims due to him from the company. Ex parte Pelly, 21 Ch. D., 492. His bankruptcy is no defense. Emma Min. Co. v. Grant, 17 Ch. D., 122. The corporation may appeal from the judgment. Sheridan v. Sheridan Electric L. Co., 38 Hun, 396 (1886). Even though the plaintiff proves fraud, yet if the findings are not full enough to sustain the judgment, the higher court will reverse a judgment in the plaintiff's favor. Beach v. Cooper, 13 Pac. Rep., 161 (Cal., 1887).

holder controls the case and may continue, compromise, abandon or discontinue it at his pleasure. In case the suit is successful the complaining stockholder is entitled to have his costs paid by the corporation.

Judgment rendered in one stockholder's suit is a bar to a similar suit by another stockholder, even though the latter commenced his suit before judgment was rendered in the former.³ A stockholder has no right to institute a suit where there is already one pending in another court bearing on the same question.⁴

1"The plaintiff, as he acts upon his own mere motion and at his own expense, retains (as in other cases) the absolute dominion of the suit until decree, and may dismiss the bill at his pleasure. After decree, however, he cannot by his conduct deprive other persons of the same class of the benefit of the decree if they think fit to prosecute it." 1 Daniells on Ch. Pl. & Pr. (4th Am. ed.), 244; Allen v. N. J. Southern R. R. Co., 49 How. Pr., 14 (1875); Tremain v. Guardian, etc., Ins. Co., 11 Hun, 286 (1877), allowing discontinuance, and reviewing cases. See also the valuable briefs in this case. But see Seaton v. Grant, L. R., 2 Ch., 459 (1867). Cf. Scarth v. Chadwick, 14 Jur., 300 (1850). In the case of Belmont v. Erie R'y Co., 52 Barb., 637 (1869), the court held that the other stockholders could interfere in the management of the case. If the guilty directors settle with the complaining stockholder by paying him out of the corporate treasury the corporation may subsequently recover back the money so paid. Erie R'y Co. v. Vanderbilt, 5 Hun, 123 (1875). See, also, Derby v. Yale, 13 Hun, 273 (1878); Tremain v. Guardian, etc., Ins. Co., 11 Hun, 286 (1877). The stockholder who sues may discontinue or go on. Mattison v. Demarest, 1 Rob., 717 (1863). Cf. Thouron v. East., etc., R'y Co., 38 Fed. Rep., 673 (1889); Innes v. Lansing, 7 Paige, 584 (1839). The suit stops if the complaining stockholder is paid. Scarth v. Chadwick, 14 Jur., 300 (1850). After other creditors have come in as parties plaintiff, the original plaintiff cannot dismiss

the suit except with their consent. Belmont, etc., Co. v. Columbia, etc., Co., 46 Fed. Rep., 336 (1891).

² Meeker v. Winthrop Iron Co., 17 Fed. Rep., 48 (1883); Trustees v. Greenough, 105 U.S., 527 (1881); Central R.R. Co. v. Pettus, 113 U.S., 116 (1885), also holding that the attorney may have certain costs from parties benefiting thereby. When the majority enters into litigation with the minority costs are not to be paid by the majority out of the corporate funds. Pickering v. Stevenson, L. R., 14 Eq., 322 (1872). The case of Hubbard v. Camperdown Mills, 1 S. E. Rep., 5 (S. C., 1886), holds that the attorney for stockholders restraining the corporation from a fraud and having a receiver appointed cannot collect his fees from the corporate assets, but that the fees of the attorney defending the corporation should be paid from the fund. Cf. In re Attorney-General v. North, etc., Ins. Co., 91 N. Y., 57 (1883). As to the compensation and reimbursement to complaining stockholders, see, also, Woodruff v. N. Y., etc., R. R., 129 N. Y., 27 (1891).

³ Willoughby v. Chicago, etc., Co., 25 Atl. Rep., 277 (N. J., 1892). Where two suits for the same purpose, one by a stockholder and one by the corporation itself are pending in different states, the first decision will be followed in the other state, although the suit in the latter state was commenced first, unless there is collusion. Memphis, etc., Co. v. Grayson, 7 S. Rep., 122 (Ala., 1890).

⁴ Memphis City v. Dean, 8 Wall., 64 (1868); Black v. Huggins, 2. Tenn. Ch.,

Where the company itself has already brought suit on a cause of action and has been defeated, a stockholder cannot bring suit on the same cause of action on behalf of the corporation, even though the former case was decided in another state.¹

Another important principle of law in this connection is that the money or property recovered from directors or third persons in a suit in equity instituted by a stockholder in behalf of all the stockholders belongs to all the stockholders and not to the complaining stockholder. It goes to the corporation.²

§ 749. No contribution among the directors.— There is no contribution among directors guilty of a breach of trust for which a part are held liable.³ The director cannot set up a set-off,⁴ or bankruptcy, where he is guilty of fraud.⁵

780 (1877). See, also, as to who may be a complainant herein. Green's Brice's Ultra Vires (2d ed.), 649. In the case of Dannmeyer v. Coleman, 11 Fed. Rep., 97 (1882), the court queries whether each stockholder may institute a separate suit herein. The party with whom the alleged illegal contract was made cannot sustain a bill in equity to prevent a multiplicity of stockholders' suits. Manhattan R. R. Co. v. New York El. R. R. Co., 29 Hun, 309 (1883). Although a creditor has brought suit in behalf of himself and others, yet another creditor may institute another similar suit. After judgment in one, the other ceases. Innes v. Lansing, 7 Paige, 583 (1839).

¹ Alexander v. Donohoe, 68 Hun, 131 (1893).

² The proceeds of the suit go to the corporation. Howe v. Barney, 45 Fed. Rep., 668 (1891). The results of a stockholder's suit against the directors for negligence belong to the corporation, and not to him. Wallace v. Lincoln, etc., Bank, 15 S. W. Rep., 448 (Tenn., 1891). The proceeds of the suit belong to the corporation. An agreement that the attorneys shall have a contingent fee is good where all the stockholders stood by and allowed the work to go on. Davis v. Gemmell, 21 Atl. Rep., 712

(Md., 1891). The complaining stockholder cannot ask for his share of the property or money involved. Pratt v. Bacon, 27 Mass., 122 (1830). That the money or property recovered belongs to the corporation, see Evans v. Brandon 53 Texas, 56 (1880); Dewing v. Perdicaris, 96 U.S., 193, 198 (1877); Smith v. Poor, 40 Me., 415 (1855); Carter v. Ford, etc., Co., 85 Ind., 180 (1882). A plaintiff may upon the trial be compelled to elect whether he sues to hold the promoters liable for fraud or whether he sues in behalf of all stockholders and for the benefit of the corporation. Brewster v. Hatch, 122 N. Y., 349 (1890). Where a stockholders' suit enjoining illegal taxation is successful, the purchaser of the property of the corporation at a foreclosure sale succeeds to the benefit of that suit, and may refuse to pay the tax, Secor v. Singleton, 41 Fed. Rep., 725 (1890).

³ Wilkinson v. Dodd, 40 N. J. Eq., 123 (1885); Ervin v. Oregon, etc., Co., 20 Fed. Rep., 577 (1884); Peck v. Ellis, 2 Johns. Ch., 131 (1816). See Power v. Conner, 19 W. R., 923. In Lingard v. Bromley, 1 Ves. & B., 114 (1812), contribution was enforced between assignees in bankruptcy, one of whom had improperly paid a loss with the concur-

⁴ Ex parte Pelly, L. R., 21 Ch. D., 492 (1882).

⁵ Emma, etc., Co. v. Grant, L. R., 17 Ch. D., 122 (1880).

B. SUITS BY OR AGAINST THE CORPORATION IN GENERAL -- SERVICE AND JURISDICTION.

§ 750. The discretion of the directors in refusing to institute or to defend an action involving corporate interests is not generally interfered with.— It frequently happens that the corporation has a cause of action against a third party which the directors think best not to press, or that the corporation is sued and the directors think best not to defend, or, where an action is pending, the directors decide to compromise the matter. The judgment of the directors may, in the opinion of a stockholder, be erroneous, and yet it cannot be controlled or changed by the stockholders except by refusing to re-elect the directors to office. The stockholder cannot go into court and attempt to change the policy of the directors as regards the management of the suit.¹ In general a corporation represents and binds the shareholders in bringing and defending suits which involve the rights and obligations of the corporation, and binds them as fully as in the making of contracts.²

rence of the others. In Ramskill v. Edwards, L. R., 31 Ch. D., 100 (1885), contribution was enforced against a director who subsequently ratified an unauthorized loan which another director made and was held responsible for. An executor of a deceased director was also held liable. A director who objects and protests is not liable.

¹ These principles of law follow necessarily from the fact that the management and policy of the corporation are determined and controlled by the directors and not by the stockholders. The only cases wherein the stockholders may interfere are cases where the directors are guilty of fraud, *ultra vires* acts or gross negligence in protecting the corporate interests.

"There may be claims against directors; there may be claims against officers; there may be claims against debtors; there may be a variety of things which a company may well be entitled to complain of, but which, as a matter of good sense, they do not think it right to make the subject of litigation; and it is the company, as a company, which has to determine whether it will make anything that is wrong to the com-

pany a subject-matter of litigation, or whether it will take steps itself to prevent the wrong from being done." Mac-Dougall v. Gardiner, L. R., 1 Ch. D., 13 (1875). See, also, 15 Fed. Rep., 361, note. Even a majority of stockholders cannot go into court and have appeals dismissed where the directors order them to be continued. Railway Co. v. Alling, 96 U.S., 463 (1878). Questions of policy of management, of expediency of contracts or action, of adequacy of consideration not grossly disproportionate, of lawful appropriation of corporate funds to advance corporate interests, are left solely to the honest decision of the directors, if their powers are without limitation and free from restraint. hold otherwise would be to substitute the judgment and discretion of others in the place of those determined on by the scheme of incorporation. Ellerman v. Chicago Junction R'ys & Union S. Y. Co. et al., 23 Atl. Rep., 287 (N. J., 1891).

² Farnum v. Ballard, etc., Shop, 12 Cush., 507 (1853); Oglesby v. Attrill, 105 U. S., 605 (1881); Came v. Brigham, 39 Me., 35 (1854); Lane v. Weymouth School Dist., 10 Metc., 462 (1845); Graham v. Boston, Hartford & Erie R. R. Co., 118 Thus, it is not for the stockholder to institute a suit for a trespass against the corporate property; 1 nor can he take out an appeal or certiorari which the corporation does not take out; 2 nor bring an action against other corporate agents for injury and loss to the corporation. 3 The great case of Dodge v. Woolsey, 4 however, was on the very point now under discussion, and it was decided under the facts of that case, where the corporation refused to defend itself against an illegal tax, that a stockholder of the corporation might do that which the corporation should have done. 5 It is within the power of the directors to compromise a pending lawsuit by or against the corporation, and a stockholder cannot control the directors' decision. 6

U. S., 161 (1886), affirming S. C., 14 Fed. Rep., 753 (1883). Minority bringing suit against a third person to enforce a right which the corporation ought to enforce must make the corporate officers codefendants. Slatterly v. St. Louis. etc., Co., 4 S. W. Rep., 79 (Mo., 1877). A stockholder cannot appeal from a decree against the company. Ex parte Cutting, 94 U.S., 14 (1876). For the right of a stockholder or boudholder to intervene, see §§ 659, 848. Stockholders caunot intervene in corporate suits except where there is fraud or collusion. Heggie v. Building, etc., Assoc., 12 S. E. Rep. 275 (N. C., 1890). Stockholders are not allowed to intervene in the ordinary suits by or against the company. Gresbam v. Island, etc., Bank, 21 S. W. Rep., 556 (Tex., 1893).

¹ Dale v. Grant, 34 L. J., 142 (1870).

² Silk Mfg. Co. v. Campbell, 27 N. J. L., 539 (1859). Under the statute of Ohio a stockholder may sometimes appeal where the corporation does not. Henry v. Jennes, 24 N. E. Rep., 1077 (Ohio, 1890).

³ Forbes v. Whitlock, 3 Edw. Ch., 446 (1841). See, also, Quincey v. Steel, 120 U. S., 241 (1887).

418 How., 331 (1855), where the court said: "Now, in our view, the refusal upon the part of the directors, by their own showing, partakes more of disregard of duty than of an error of judgment. It was a non-performance of a

confessed official obligation, amounting to what the law considers a breach of trust, though it may not involve intentional moral delinquency." See, also, Memphis, etc., Co. v. Williamson, 9 Heisk. (Tenn.), 314 (1872), where suit was brought on the bond which the plaintiff in Memphis City v. Dean, 8 Wall., 73, gave in obtaining an injunction.

⁵ See, also, Park v. Petroleum Co., 25 West Va., 108 (1884); S. C., 26 id., 486 (1885).

6"It cannot be contended that the directors of a corporation do not possess authority, acting in good faith and in the exercise of their best judgment, to settle a pending action, or that the settlement is not binding on their stockbolders, even though it may subsequently appear that they failed to secure the best terms to which the corporation might have been entitled." Donohue v. Mariposa, etc., Co., 66 Cal., 317 (1885). See, also, Shawhan v. Zinn. 79 Ky., 300 (1881). The board of directors may compromise claims and lawsuits. New Albany v. Burke, 11 Wall., 96 (1870); First Nat'l Bank v. Nat'l Ex. Bank, 92 U. S., 122 (1875), aff'g 39 Md., 600; Pneumatic, etc., Co. v. Berry, 113 U. S., 322 (1885); Frankfort Bank v. Johnson, 24 Me., 490 (1844); Seeley v. San Jose, etc., Co., 59 Cal., 22 (1881). The sureties of a corporate treasurer are liable for the deficiency existing after the

A stockholder cannot sue to enjoin a person from slandering the title of property belonging to the corporation.1

Although the corporation does not set up the statute of limitations to a creditor's claim, a stockholder cannot intervene and set it up.2

A stockholder may bring suit in behalf of the corporation to compel the president to pay his subscription where the president is in control of the company and refuses to pay such subscription.3

It has been held, however, that a stockholder may bring suit on behalf of the corporation to remove a cloud from the corporate title to real estate,4 and that a stockholder may sue for the corporation to compel delinquent stockholders to pay in their unpaid subscriptions.⁵ In one case it has been held that where there is a controversy among the stockholders as to how many directors one of the stockholders — a municipality — is entitled to, a stockholder may file a bill to settle it, since the corporation is not bound to decide or test the matter.6

The rule which ordinarily prevents a stockholder from instituting or defending a suit against third persons herein is clearly to be distinguished from all other classes of actions treated of in the fourth part of this work. The actions now being considered are those which exist for or against the corporation in a multitude of cases, and which are of daily occurrence to all great corporations. They are actions not involving frauds or ultra vires acts of the directors, but involve at the most only a neglect of the directors to begin or defend suits.

There is a class of cases which are midway between these two classes. This third class involves a neglect of the directors to defend a suit against the corporation, and the further fact that the *defense is not made on account of the fraud and collusion of the directors with the complainants in the suit. This generally happens in foreclosures of mortgages on the property of the corporation, a subject which has already been treated.7

§ 751. Suits by and against corporations must be in corporate name.—It is stated by Blackstone that one of the distinguishing features of a corporation is that it may sue and be sued in its

compromise by the corporation of a in such a case. Knoop v. Bohmrich, 23 claim which the treasurer illegally created. Goodyear, etc., Co. v. Caduc, 10 N. E. Rep., 483 (Mass., 1887).

¹ Langdon v. Hillside, etc., Co., 41 Fed. Rep., 609 (1890).

² Davis v. Gemmell, 21 Atl. Rep., 712 (Md., 1891).

³ No request to directors is necessary

Atl. Rep., 118 (N. J., 1891).

⁴ Baldwin v. Canfield, 26 Minn., 43, 56 (1879).

⁵ Wallworth v. Holt, 4 Mylne & C., 619 (1840).

⁶ City of Wheeling v. Mayor of Baltimore, etc., 1 Hughes, 90 (1862).

⁷See §§ 659, 848, supra.

corporate name. This is an elementary principle of law. Consequently, the stockholders are not to be made parties in suits against the corporation. Moreover, a suit by or against the corporation must be by or against it in its corporate name, and not in the names of its officers. The president of the company may employ an attorney to bring suit or to appear for the company.

§ 752. Service — Appearance — Answer. — If the suit is against the corporation, service is made upon it, not by service upon a stockholder, but upon the chief officer of the corporation within the jurisdiction.

¹ Kelley v. Miss., etc., R. R. Co., 1 Fed. Rep., 564 (1880).

² Action against an individual, "president of the," etc., is not a suit against the corporation. The suit must be against the corporation in its corporate name. Ogdensburgh Bank v. Van Rensselaer, 6 Hill, 240 (1843). Action against stockholders does not bind or affect the corporation unless it is made a party by name and service. Lillard v. Porter. 2 Head (Tenn.), 177 (1858). When there is no prayer for process against a corporation by its corporate name, but only against its officers, and the body of the bill does not describe the corporation as a party, the corporation is not before the court, though it is in the title. Verplanck v. Mercantile Ins. Co., 2 Paige. 438 (1831). An important exception to this rule arises, of course, where the corporation refuses to sue and a stockholder sues for it. See Part IV of this work generally. Process running to A. as president of, etc., runs to A. individually, and the company is not thereby made a party, and an amendment without new service cannot cure. Plemmons v. Southern Imp. Co., 13 S. E. Rep., 188 (N. C., 1891). An attachment or garnishment against "William Milnes, president Shenandoah," etc., Railroad, is not good as against the company. It is against Milnes as an individual. Fidelity, etc., Co. v. Shenandoah, etc., R. R., 11 S. E. Rep., 58 (W. Va., 1890). A corporation may appeal from an order for the examination of one of its officers. Sherman v. Beacon, etc., Co., 11 N. Y.

Supp., 369 (1890). In a suit to enjoin a corporation from lowering the level of a lake the president may be joined as a party defendant. Cedar, etc., Co. v. Cedar. etc., Co., 48 N. W. Rep., 371 (Wis., 1891). Where suit is brought against a corporation and its officers are made parties defendant for purposes of discovery, the latter are not merely nominal parties. Dovle v. San Diego. etc., Co., 43 Fed. Rep., 349 (1890). Where an answer under oath is waived and no discovery is sought in an action against a corporation, the officers are not proper parties defendant. Colonial, etc., Co. v. Hutchinson, etc., Co., 44 Fed. Rep., 219 (1890).

³ See § 716.

⁴ Bache v. Nashville, etc., Soc., 10 Lea (Tenn.), 436 (1882); Lillard v. Porter, 2 Head (Tenn.), 177 (1858); De Wolf v. Mallett's Adm'r, 23 Dana (Ky.), 214 (1835). Service in Colorado by statute may be on a stockholder if there is no resident agent. Service cannot be avoided by a transfer of his stock by a stockholder for that purpose only. Colorado, etc., Works v. Sierra, etc., Co., 25 Pac. Rep., 325 (Colo., 1890).

⁵ Service of notice of attachment in a garnishment case upon two of the officers and directors of a corporation has been held sufficient notice to the corporation. Boyd v. Ches. & Ohio Canal, 17 Md., 195 (1860). Notice of a motion for a rule to establish the election of directors is sufficient if served on the directors whose election is questioned, and it need not be served on the other

Generally the statutes of the state specify the corporate officers upon whom service may be made. When a foreign corporation is defendant, great care has to be exercised in obtaining jurisdiction, and such suits frequently fail for want thereof.\(^1\) The corporation may appear either generally or specially for the purpose of objecting to the service.\(^2\) Formerly a corporation made complaint or answer in a suit by attaching the corporate seal to the bill of complaint or answer. But this rule left the answer unverified, and consequently, by statute now, it is generally prescribed that some officer of the corporation shall verify the pleading for the corporation.\(^3\)

directors or on the president. Ex parte Holmes, 5 Cowen, 426 (1826). Upon affidavit that the corporation had no presiding officer or treasurer, and that the secretary had left the country, the court ordered service to be on the trustee. Tom v. First Society, etc., 19 Wend., 25 (1837). Where the president and treasurer of a corporation misinform a process server and induce him to serve process upon another party which was intended to be served upon the president, the service is good as against the corporation. Wilson vCalifornia, etc., Co., 54 N. W. Rep., 643 (Mich., 1893). "At common law the process against a corporation could only be served on its head or principal officer within the jurisdiction of the sovereignty where the artificial body existed." Young v. Towers, etc., 18 Fed. Rep., 201, 208 (1883). Service upon the vice-president is good under a statute authorizing service on the president or other head. Comet, etc., Co. v. Frost, 25 Pac. Rep., 506 (Colo., 1890). Service upon one who has ceased to be president. director or other officer renders the judgment void. Beardsley v. Johnson, 121 N. Y., 224 (1890). Even though an officer resigns for the purpose of preventing service upon the company, yet if the resignation is accepted, service cannot be made upon him. Sturgis v. Crescent, etc., Co., 10 N. Y. Supp., 470 Service on one as secretary, when he never had been secretary, is not good. Collier v. Morgan's, etc.,

R. R., 5 S. Rep., 537 (La., 1889). Where the corporation had suspended business. and the chairman of the directors was dead, the court directed service to be made on the deputy chairman and secretary who had last served as such for the corporation. Gaskell v. Chambers. 26 Beav., 252 (1858). Service on the chief resident agent has been held sufficient. Newby v. Van Offen, etc., Co., L. R., 7 Q. B., 293 (1872). If the president is the plaintiff, service of the process cannot be on himself. Ashuelot, etc., Co., 86 Mo., 357 (1862), A notice of a lien served on the secretary is sufficient. Fletzell v. Chicago, etc., R. R. Co., 77 Mo., 315 (1883). Service on the president is sufficient. Chamberlin v. Mammoth, etc., Co., 20 Mo., 96 (1854). But not on a mere agent. McCall v. Byram, etc., Co., 6 Conn., 428 (1827). A suit against a supposed corporation is not good against its members, there being merely a copartnership. Service on the general manager does not make him a party defendant. Leatherman v. Times Co., 11 S. W. Rep., 12 (Ky., 1889). See § 758.

¹ See §§ 757, 758, infra.

²See § 758, infra. "A corporation, like a natural person, may appear voluntarily by attorney, and such appearance gives jurisdiction to the same extent as if there was actual service of process. Att'y-Gen., etc., v. Guardian, etc., Ins. Co., 77 N. Y., 272 (1879).

³ In an answer by a corporation: "The answer should be made by the

§ 753. Allegation and proof of incorporation.—If the corporation is plaintiff it is customary to allege that it has been and is incorporated.¹ If the defendant pleads the general issue he admits

principal officer of the defendant corporation, who should be able to admit or deny the facts charged and interrogated about, or to state want of knowledge clearly and truly as a reason for not doing either." Hale v. Continental Life Ins. Co., 16 Fed. Rep., 718 (1883). An injunction against a corporation is not dissolved by an answer verified by the present secretary, who became such after the acts occurred, and who verified that his acts therein referred to were true, and that the acts of others he believed to be true. Some officer cognizant of the facts must verify. Fulton Bank v. N. Y., etc., Canal Co., 1 Paige, 311 (1829). At common law a corporation answers by attaching its seal. The answer is not evidence, since it is not sworn to. If a sworn answer is desired. some of the officers or members must be made co-defendants. Baltimore, etc., R. R. v. Wheeling, 13 Gratt. (Va.), 40 (1855). In legal proceedings answers which, if made by an individual, should be under oath, are made by corporations under their corporate seals. Daniell's Ch. Prac., 146; Ransom v. Stonington, etc., Bank, 13 N. J. Eq., 212 (1860); Bronson v. La Crosse R. R. Co., 2 Wall., 302 (1863); Baltimore & Ohio R. R. Co. v. Gallahue, 12 Gratt., 655 (1855), answer of garnishee. See, also, Brumley v. Westchester, etc., Soc., 1 John. Ch., 366 (1815); Vermilyea v. Fulton Bank, 1 Paige, 37 (1828); Bouldin v. Bull, 15 Md., 18; Union Bank v. Geary, 5 Pet., 99; Haight v. Morris Aqueduct, 4 Wash. C. C., 601. A statute requiring a corporation to obtain the consent of a judge to interpose a defense to a suit on a promissory note before it can interpose a defense is not applicable where the corporation is an indorser to a note. Shorer v. Times, etc., Co., 119 N. Y., 483 (1890).

¹ Failure to allege incorporation is of the plaintiff as a corporation." Can-

cured by judgment where defendant failed to object. St. Cecilia Academy v. Hardin, 2 S. E. Rep., 305 (Ga., 1887). The following decisions have been made: A corporation plaintiff need not allege that it is a corporation; it suffices to state in the commencement of the declaration the name of the corporation. Union Cement Co. v. Noble, 15 Fed. Rep., 502 (1882); Smythe v. Scott. 24 N. E. Rep., 685 (Ind., 1890); Exchange Nat'l Bank v. Hastings, 49 N. W. Rep., 223 (Neb., 1891). Cf. 1 Barb, Ch., 36, n. (foot paging 44, 2d ed.). In a suit against a corporation on a promissory note the incorporation need not be alleged, since the signature estops a denial of incorporation. Griffen v. Ashville, etc., Co., 16 S. E. Rep., 423 (N. C., 1892). An examination before trial may be had to ascertain whether defendants are proper defendants or whether they are a corporation. Sweeny v. Sturges, 24 Hun, 162. Allegation of incorporation made once suffices for two causes of action in one suit. West v. Eureka, etc., Co., 42 N. W. Rep., 87 (Minn., 1889). The complaint need not allege whether the defendant is a foreign or domestic corporation. child v. Grand, etc., R'y, 10 N. Y. Supp., 36 (1890). The allegation "a corporation under the laws of Iowa" is sufficient. Saunders v. Sioux, etc., Co., 24 Pac. Rep., 532 (Utal, 1890). Incorporation must be alleged. Miller v. Pine, etc., Co., 31 Pac. Rep., 803 (Idaho, 1892). In California an averment of corporate existence is necessary in every count of a complaint against the corporation. People v. Central R. R., 23 Pac. Rep., 303 (Cal., 1890). In a libel in admiralty such averment should be made. Sun, etc., Ins. Co. v. Mississippi, etc., Co., 14 Fed. Rep., 699 (1882). "The bringing of an action in a name purporting to be a corporate name is a sufficient averment of the existence the incorporation of the plaintiff.¹ The fact of incorporation is proved by showing the certificate of incorporation, the corporate minutes proving an organization by a corporate meeting, and the user of the corporate name in business.²

andaigua Academy v. McKechine, 19 Hun, 62 (1879). There has been considerable controversy as to whether at common law a corporation plaintiff need allege that it is incorporated. See Henriques v. West India Co., 2 Ld. Raym., 1532; Cent., etc., Co. v. Hartshorn. 3 Conn., 199: Ewing v. Robinson, 15 Ind., 26: Zion Ch. v. St. Peter's Ch., 5 W. & S., 215; Vance v. Bank of Ind., 1 Blackf., 80: Emery v. Evansville, etc., R. R. Co., 13 Ind., 143; O'Donald v. Evansville, etc., R. R. Co., 14 Ind., 259; Rees v. Conocheaugue Bank, 5 Rand., 326; Jackson v. Bank of Marietta, 9 Leigh, 240; Farmers', etc., Bank v. Trov, etc., Bank, 1 Doug. (Mich.), 437; Lighte v. Everett Ins. Co., 5 Bosw., 716; Lewis v. Bank of Ky., 12 Ohio, 132; Miss., etc., R. R. Co. v. Gaster, 20 Ark., 455; Bank of Utica v. Smalley, 2 Cowen, 770: Jackson v. Plumbe, 8 John., 378; Dutchess, etc., Co. v. Davis, 14 John., 238; Bank of Mich. v. Williams, 5 Wend., 483; Bank of Waterville v. Belster, 13 How. Pr., 270. Cf. 129 U. S., 677; 21 N. E. Rep., 340; 30 Barb., 491. Cannot demur on ground that incorporation is not alleged. Adams v. Lamson, etc., Co., 59 Hun, 127 (1891). No demurrer for failure to allege incorporation. Rothschild v. Trunk R'y, 14 N. Y. Supp., 807 (1891). Demurrer lies for failure to allege incorporation. Schillinger, etc., Co. v. Arnott, 14 N. Y. Supp., 326 (1891).

¹ Bailey v. Valley, etc., Bank, 19 N. E. Rep., 695 (Ill., 1889). But see Oregonian R'y v. Oregon, etc., Co., 23 Fed. Rep., 232 (1885), holding that the defense of no corporate capacity to sue in a particular case is raised by plea in abatement, and the defense of no corporate capacity at all by a plea either in abatement or bar. Cf. Pullman v. Upton, 96 U. S., 328; and see President, etc., v. Weed, 19 Johns., 300 (1822), holding that the plea

of nul tiel corporation is not good, and that the general issue should be pleaded. Denial of corporate existence of plaintiff can be only by plea in abatement. Denial of merits waives this defense. Conard v. Atlantic Ius. Co., 1 Pet., 386 (1828). Contra, U. S. Bank v. Stearns, 15 Wend., 314 (1836). An answer of nul tiel corporation precedes an answer to the merits. De facto existence must then be proved. An answer alleging want of parties raises the question of whether the corporation is more than a partnership. Heaston v. Cincinnati, etc., R. R. 16 Ind., 275 (1861). A general denial in a suit in equity puts in issue the corporate character of the plaintiff. Bank of Jamaica v. Jefferson, 22 S. W. Rep., 211 (Tenn., 1893). The plea of general issue does not deny the corporate existence. Rempert v. S. C. R'y, 9 S. E. Rep., 968 (S. C., 1889). A denial upon information and belief that the plaintiff is a corporation puts in issue the incorporation. Michigan Ins. Bank v. Eldred, 143 U. S., 293 (1892). The plea that the plaintiff "is not a corporation duly authorized by law to maintain this suit" is a good plea of nul tiel corporation. The burden is on the plaintiff to prove corporate existence. Johnson v. Hanover, etc., Bank, 6 S. Rep., 909 (Ala., 1889). The corporate existence of a foreign corporation plaintiff is not put in issue where the answer does not expressly deny the same, and where the making of the corporate contract in question is admitted. Commercial Bank, etc., v. Pfeiffer, 108 N. Y., 242 (1888).

² Proof of incorporation may be by an exemplified copy of the charter and evidence of user. Special charter may also be proved by statute book. U. S. Bank v. Stearns, 15 Wend., 314 (1836). Incorporation may be proved by putting in evidence the records, books and min-

§ 754. Confession of judgment.—A corporation may confess judgment, but it is doubtful whether it can be done except by order of the board of directors.¹

utes of the company showing an organnization in pursuance of the charter. Glenn v. Orr, 1 S. E. Rep., 538 (N. C., 1887). A certificate of incorporation, with evidence of organization and user. and of a judgment in another case recovered by the corporation against defendant, is sufficient proof that plaintiff "had in good faith attempted to legally organize as a corporation, and had long acted as such, and was at least a corporation de facto, which is all that is necessary to enable it to maintain an action against any one other than the state who has contracted with the corporation or who has done it a wrong." Baltimore, etc., R. R. v. Fifth, etc., Church, 137 U.S., 568 (1891). Fifty years' existence as a corporation is a sufficient proof of incorporation. Proprietors, etc., v. Inhabitants, etc., 26 N. E. Rep., 239 (Mass., 1891). It is sufficient to prove the de facto existence of the corporation defendant in a suit on contract. Benesch v. John, etc., Ins. Co., 11 N. Y. Supp., 348 (1890). An act recognizing a corporation as such is sufficient proof of incorporation. Boykin v. State. 11 S. Rep., 66 (Ala., 1892). If proof is given by plaintiff that a copartnership existed and the defense is that it was a corporation, the defendant must prove that Although the company had a president and secretary, this in itself does not raise a presumption of a corporation. Clark v. Jones, 6 S. Rep., 362 (Ala., 1889). Production of corporate books showing election of officers is sufficient to raise presumption of existence of corporation. Wood v. Jefferson Co. Bank, 9 Cowen, 193 (1828). production of the act of incorporation and proof of user under it by the corporate body afford presumptive proof in the first instance of the fact of incorpotion." People v. Beigler, Hill & Denio Supp., 133 (1843). See, also, on the

method of proof. Chamberlain v. Huguenot, etc., Co., 118 Mass., 532 (1875); Spring, etc., Works v. San Francisco, 22 Cal., 434 (1863); Eastern, etc., Co. v. Vaughan, 14 N. Y., 546 (1856); Hughes v. Antietam, etc., Co., 34 Md., 316 (1870); Leonardsville Bank v. Willard, 25 N. Y., 574 (1862); Reynolds v. Myers, 51 Vt., 444 (1879); West, etc., Bank v. Ford, 27 Conn., 282 (1858); Society, etc., v. Town, etc., 4 Peters, 480 (1830); Alderman, etc., v. Finley, 10 Ark., 423 (1850); Oldtown, etc., R. R. v. Veazie, 39 Me., 571; Pullman v. Upton, 96 U. S., 328 (1877); Penobscot, etc., R. R. v. Dunn, 39 Me., 587 (1855); Heaston v. Cincinnati. etc.. R. R., 16 Ind., 275 (1861); Inhabitants. etc., v. Wedgewood, 44 Me., 49 (1857); Litchfield Bank v. Church, 29 Conn., 137, 148 (1860); United States v. Ins. Co., 22 Wall., 99 (1874); De Witt v. Hastings, 40 N. Y. Sup., 463 (1876); affirmed, 69 N. Y., 518; Commonwealth v. Bakeman, 105 Mass., 53 (1870); South, etc., Co. v. Gray, 30 Me., 547 (1849); Utica, etc., Co. v. Tilman, 1 Wend., 555 (1828); Jackson v. Leggett, 7 Wend., 377 (1831). A foreign corporation proves incorporation by its papers and proceedings, and by putting in evidence the statute authorizing incorporation. Savage v. Russell, 4 S. Rep., 235 (Ala., 1888). Existence of a plank-road corporation is not proved by fact that governor had appointed inspectors of it and they had certified that the road was completed. Bill v. President, etc., 14 Johns., 416 (1817).

¹A president and treasurer have no power to confess judgment for the corporation. Adams v. Cross, etc., Co., 5 R'y & Corp. L. J., 18 (Ill., 1888). Contra, Chamberlain v. Mammoth, etc., Co., 20 Mo., 96 (1854). "Upon a confession of judgment by a corporation the court in which the action is pending must of necessity judge of the authority of any natural person who may appear for the

In New York, by statute, a corporation cannot confess judgment in contemplation of insolvency.¹

§ 755. Injunction and contempt.—An injunction against a corporation should run to the corporation in its corporate name. All officers and agents upon whom it is served or to whose knowledge it comes are guilty of contempt of court if they disregard it.² The corporation and also all of its officers and agents who wilfully violate the injunction may be fined for contempt of court.³

company in that behalf, . . . and its judgment as to the right and authority of the person so appearing to bind the corporation must be conclusive in all other proceedings where the same judgment is drawn in question." White v. Crow, 17 Fed. Rep., 98 (1883). Treasurer cannot confess judgment. Stevens v. Carpe, etc., Co., 57 Mich., 427 (1885). A corporation may confess judgment. Shute v. Keyser, 29 Pac. Rep., 386 (Ariz., 1892). As to the power of the president and other officers to confess judgment, see ch. XLIII, supra.

¹ In re Waterbury, 8 Paige, 380 (1840); Kingsley v. First Nat'l Bank, 31 Hun, 329 (1884); National Shoe, etc., Bank v. Mechanics', etc., Bank, 89 N. Y., 467 (1882). See 6 N. Y. Supp., 346; N. Y. L. J., Aug. 10, 1889.

² An injunction against a corporation in New York may be served on a division superintendent of the division Moreover, knowledge of interested. the injunction is as good as service. Disobedience is contempt. Rochester, etc., R. R. v. New York, etc., R. R., 48 Hun, 190 (1888). See, also, High on Injunctions; also § 745, supra. The company may be indicted for not obeying the order of the court. Queen v. Birmingham, etc., R. R., 9 Car. & Payne, 469. An injunction against a foreign corporation may apply to its acts out of the state as well as in it. Prince, etc., Co. v. Prince, etc., Co., 51 Hun, 443 In a proceeding by a New York receiver of a dissolved New York corporation against a former director for interfering with the assets against the injunction of the New York court, held, that the director could not evade the injunction by going out of state. Williams v. Hintermeister, 26 Fed. Rep., 889 (1886). Though a bank may be in contempt it does not follow that each servant or agent of the bank also is in contempt. Southern D. Co. v. Houston, etc., R'v Co., 27 Fed. Rep., 344 (1886). Where the defendant is a foreign corporation and has no property in the state which could be reached by sequestration, a court of chancery will not decree an injunction which cannot be enforced. Bank of B. Falls v. Rutland, etc., R. R. Co., 28 Vt., 470 (1856); King v. Barnes, 113 N. Y., 476 (1889). Cf. § 758. Injunction may bind a corporation though not a party to the suit. Eagle, etc., Co. v. Miller, 41 Fed. Rep., 351 (1890). If the employee violates the injunction not knowing of it and is arrested, he may sue his corporation for damages for withholding notice of the iniunction. Guirney v. St. Paul, etc., R'y, 46 N. W. Rep., 78 (Minn., 1890). In Goldengate M. Co. v. Superior Court, 65 Cal., 187, it was held that a corporation may be punished for contempt of court.

³ In re Tift, 11 Fed. Rep., 463 (1881). Injunction against certain directors of corporation from using patented articles is violated by their forming a new corporation to do the same acts, they being directors also of latter. Iowa Barb., etc., Wire Co. v. Southern Barbed Wire Co., 30 Fed. Rep., 123 (1887). Injunction against corporation running a ferry cannot be evaded by corporation transferring its boats to its president individually. Corporation fined, and presi-

§ 756. Contempt and sequestration.— Inasmuch as a corporation is an existence entirely distinct from its officers or members, the latter cannot be held answerable and in contempt of court for its neglect or refusal to perform the orders, decrees or judgments of courts. Such is the rule so far as the corporation is commanded to do a specified thing.¹ But the corporation itself is bound to obey the court, and for failure to do so the court will sequestrate the corporate property. Sequestration is a chancery remedy whereby the property of a party is seized by the officers of the court of chancery to punish contempts and to compel obedience to the order or decree of the court.² It is used not only to compel.

dent imprisoned for contempt. "Injunction orders must be fairly and honestly obeyed, and not defeated by subterfuges and tricks on the part of those bound to obey them; they may be violated by aiding, countenancing and abetting others in violation thereof as well as by doing it directly; and courts will not look with indulgence upon schemes, however skilfully devised, designed to thwart its orders." Mayor, etc., v. N. Y. & Staten I., etc., Co., 64 N. Y., 622 (1876). Foreign corporation violating injunction may be fined for contempt of court. Service in same way as in ordinary case. Its agent violating injunction may also be fined, United States v. Memphis, etc., R. R. Co., 6 Fed. Rep., 237 (1881).

¹ A contempt of court by a corporation may be punished by punishing the corporate officers who do the act or control the action of the corporation. Sercomb v. Catlin, 128 Ill., 556 (1889). The case of Lackarme v. Quartz, etc., Co., 1 H. & C., 134 (1862), whereby an order was enforced by reaching the corporate officers, is based on the English statute giving the court such a power. In the ancient case of Salmon v. Hamborough Co., 1 Ch. Ca., 204 (1683), where the corporation defendant did not obey an order of the court and had no property, the house of lords issued an order directed to the corporate officers ordering them to obey the former order or be committed for contempt. Papers against a corporation are not to be directed against

its officers personally, even as officers. Verplanck v. Mercantile Ins. Co., 2 Paige, 438 (1831). The only remedy in such a case seems to be a sequestration of the corporate property. If the corporation is insolvent there seems to be no remedy. at all to compel obedience. See 4 Wait's Pr., 206; Curzon v. African Co., 1: Vern... 132. Where, however, the corporation is enjoined from doing a certain thing, then the officers are personally liable for contempt if they do the thing enjoined. See § 755. In the case of Davis v. Mayor, etc., 1 Duer, 451, 484 (1853). the court said that it was admitted that a mandamus directed to the corporation in its corporate name bound all the officers and members (citing municipal' corporation cases). Chancellor Bland. in McKim v. Odam, 3 Bland, 422, with good reason objects to the technical and senseless rule that corporate officers cannot be compelled to do an act which the corporation is commanded to do. A somewhat similar instance of the power of the court arises in a mandamus to make a transfer of stock. See § 390. Cf. 21 N. E. Rep., 606.

² See Daniell's Ch. Pr., vol. II, p. 1052, etc.; Barb. Ch. Pr., vol. I, p. 71, etc., and p. 444; Angell & Ames on Corp'ns, § 667, etc. As regards corporations this remedy was used to compel the corporation to appear and answer a bill in equity, and also to subject the property of the corporation to the payment of a money decree of a court of chancery. Sequestrations in chancery correspond

the corporation to do an act commanded by a court of chancery, but also to subject the corporate property to the payment of a money decree which a court of chancery has made against the corporation.¹

A sequestration reaches all the goods and chattels and the rents and profits of land belonging to the corporation; but there is some doubt as to whether choses in action and the title to real estate can be subjected to this remedy by a court of chancery. It is clear that originally the corporate realty could not be so reached.

§ 757. Foreign corporations may sue and be sued — Stockholders' suits against foreign corporations.—A foreign corporation is considered a resident of the state wherein it was created; and it is regarded as a citizen of that state in all questions of jurisdiction.

greatly to executions at law. Sequestration "is most certainly of the nature of an execution." It is demandable of right. It issues though the corporation has no property. Reid v. Northwestern R. R. Co., 32 Pa. St., 257 (1858). The case of Jones v. Boston Mill Corp'n, 4 Pick., 507 (1827), holds that sequestration is a proper remedy to enforce a decree.

¹ If the sequestration is to compel the corporation to do something other than pay money, the corporate property is merely seized and held by the court until the corporation complies. If, however, the sequestration is to compel the payment of a money decree, the corporate property seized will be sold and the proceeds applied to that debt. See authorities cited supra.

² Same authorities.

³ Daniell's Ch. Pr., vol. II. p. 1054; Coats v. Elliott, 23 Texas, 606. Sequestration is the proper remedy to subject the net profits of a turnpike company to the payment of a judgment. Neither sequestration nor a common-law execution can effect a sale of the road, however, since the franchise is a trust from the state. Ammont v. President, etc., 13 S. & R., 210 (1825). But where, under the statutes, a receiver is appointed in sequestration proceedings, the decisions are inclined to hold otherwise. Atlas Bank v. Nahant Bank, 23 Pick., 480 (1839). But see Foster v. Townsend, 61

N. Y., 203; N. Y. Code of C. P., § 1772. In proceedings under § 1784, etc., of the N. Y. Code of C. P., all the corporate personalty and realty vests in the receiver. See § 67 of III R. S., 468, applicable to such proceedings under \$ 1788 of Code of C. P. The origin of this code proceeding is II N. Y. R. S., 463, § 36. See, in construction thereof, Bangs v. McIntosh, 23 Barb., 591; Devendorf v. Beardslev, 23 Barb., 656: Judson v. Rossie Galena Co., 9 Paige, 598. See, also, Devoe v. Ithaca, etc., R. R. Co., 5 Paige. 521 (1835), as to the practice. As regards choses in action the old authorities differed. 1 Barb. Ch. Pr., p. 71, says that the choses in action cannot be reached by sequestration. Daniell's Ch. Pr., vol. II, p. 1052, says that possibly choses in action in the possession of . third persons cannot be reached. The later authorities, however, are inclined to extend this remedy to choses in action. Grew v. Breed, 12 Metc., 363; Hosack v. Rogers, 11 Paige, 603 (1845); White v. Geraerdt, 1 Edw. Ch., 340. It has been doubted whether sequestration proceedings could reach the books and papers of the corporation. Lowten v. Colchester, 2 Meriv., 395 (1816); but it would seem that such papers should be subject to sequestration so far as they contain information or give title to property which has been sequestered.

⁴ Louisville, C, & C. R. R. Co. v. Latson, 2 How., 497 (1844); Stafford v.

It is discretionary, however, with a court as to whether it will grant equitable relief against a foreign corporation. Especially is this the case in regard to suits brought by stockholders. The courts will often refuse to grant relief, inasmuch as there may be no means of enforcing the decree.

American Mills Co., 13 R. I., 310 (1881); Cowardin v. Universal Life Ins. Co., 32 Gratt., 445 (1879), holding that it is subject to attachment as a non-resident; Marshall v. Baltimore & O. R. R. Co., 16 How., 314 (1853); Covington, etc., Co. v. Shepherd, 20 How., 227 (1857): Myers v. Dorr, 13 Blatch., 22 (1870); Merrick v. Van Santvoord, 34 N. Y., 208 (1866); Daly v. National Life Ins. Co., 64 Ind., 1 (1878); Hadley v. Freedmen's, etc., Bank, 2 Tenn. Ch., 122 (1874); Harding v. Chicago & A. R. R. Co., 80 Mo., 659 (1883); McGregor v. Erie R'v Co., 35 N. J. L., 115 (1871): Stout v. Sioux City & Pac. R. R. Co., 8 Fed. Rep., 794 (1881), holding that a foreign corporation which had filed its charter with the secretary of state and otherwise complied with the local statute was a domestic corporation under the law of Nebraska. A foreign corporation may be sued in Massachusetts by a resident. Young v. Providence, etc., Co., 23 N. E. Rep., 579 (Mass., 1890). Foreign corporations may be sued in Tennessee. Cumberland, etc., Co. v. Turner, 12 S. W. Rep., 544 (Tenn., 1889). A non-resident may sue a foreign corporation in South Carolina when the cause of action arose within the state. Central R. R. v. Georgia, etc., Co., 11 S. E. Rep., 192 (S. C., 1890). A foreign corporation cannot be garnished for a debt due to a non-resident. Alabama, etc., R. R. v. Chumbey, 9 S. Rep., 286 (Ala., 1891). A foreign corporation may plead the statute of limitations. St. Paul v. Chicago, etc., R'v, 48 N. W. Rep., 17 (Minn., 1891). As to restrictions by the state on the right of a foreign corporation to remove cases to the federal courts, see § 695, supra.

¹ The courts of Massachusetts will not take jurisdiction of a suit by the stockholders of a Missouri corporation to en-

join the corporation from issuing bonds secured by mortgage on property in Missouri. Kimball et al. v. St. Louis. etc., R'y Co., 31 N. E. Rep., 697 (Mass., 1892) reviewing the cases, and the court saying that while it had jurisdiction and its judgment would be binding even in Missouri, vet "It would be a misuse of our powers to attempt to control the action of those courts in a case like this by an adjudication which would depend upon them for enforcement, and which they might say had mistaken the Missouri law." A resident stockholder may enjoin a foreign railroad corporation from constructing branch lines. Ives v. Smith, 8 N. Y. Supp., 46 (1889). A non-resident stockholder cannot enjoin a foreign corporation from making an ultra vires transfer of its property to still another foreign corporation. Small v. Minn., etc., Co., 10 N. Y. Supp., 456 (1890). Where one foreign corporation is under obligation to issue stock to another foreign corporation, a resident stockholder of the latter may bring suit in New York courts to compel the issue of such stock. Babcock v. Schuylkill, etc., R'y Co., 9 N. Y. Supp., 845 (1890). The courts of Maryland will not issue a mandamus to compel a foreign corporation to annul a forfeiture of stock. This is a matter to be litigated in the courts of the state creating the corporation. North State, etc., Co. v. Field, 20 Atl. Rep., 1039 (Md., 1885). Ordinarily the court will not remedy the frauds of directors of a foreign corporation. Moore v. Silver, etc., Co., 10 S. E. Rep., 679 (N. C., 1890). The American stockholders in an English company organized to own and work mines in America may by suit in an American court cause to be set aside a reorganization made in England in violation of The courts have frequently refused to entertain jurisdiction over a foreign corporation in cases where the decree of the court cannot be enforced.¹

By the comity of states the courts of a state will entertain a suit brought by a foreign corporation.²

the by-laws of the company. Brown v. Republican, etc., Mines, 55 Fed. Rep., 7 (Col., 1893). An American corporation cannot be sued in England by service upon a resident agent in that country, although three-quarters of the stockholders reside in England, it appearing that all of the directors reside in America. Babcock v. Cumberland, etc., Co., 68 L. T. Rep., 155 (1892).

¹ Williston v. Michigan, etc., R. R. Co., 95 Mass., 400 (1866); Howell v. Chicago, etc., R'v Co., 51 Barb., 378 (1867), a stockholder's action to enjoin an ultra vires act: Gregory v. N. Y., etc., R. R. Co., 40 N. J. Eq., 38 (1885), where a resident stockholder in a foreign corporation sought to set aside its lease to a resident corporation; Cunningham v. Pell, 5 Paige, 607 (1836), holding that no personal judgment could be reudered against an absent director who was not personally served. In the case of Ervine v. Oregon, etc., Co., 28 Hun, 269 (1882), the court sustained the jurisdiction where service on the directors was personal, even though the corporate property was not in the state. The court said: "The relief within the power of the court to grant may be incomplete, and not commensurate with the injuries and loss sustained, growing out of the fact that material interests affected are outside of this jurisdiction; but that affords no adequate reason why an attempt in that direction should not be made. Efforts in such direction frequently afford only approximate justice." A West Virginia stockholder in a Pennsylvania construction company may sue a West Virginia railroad company which owes bonds to the construction company, and compel an accounting and distribution of such bond assets. when the Pennsylvania company is in-

solvent and has been dissolved. No request to the directors is necessary. Cromlisle v. Shenandoah V. R. R. Co., 28 W. Va., 365 (1876). It has been held that a resident stockholder of a foreign corporation may enjoin it from making an ultra vires extension of its line by building branches, etc. Ives v. Smith. 3 N. Y. Supp., 645 (1888). But it will not be ordered to pay a dividend. Redmond v. Enfield, etc., Co., 13 Abb. Pr. (N. S.), 332 (1872). Nor has the court jurisdiction where of two bodies of men each claim to be the rightful stockhold-Wilkins v. Thorne, 60 Md., 253 (1883). Nor will the court enjoin a foreign corporation from delivering stock and bonds to a construction company. though the plaintiff claims that he has the contract for construction. Kansas, etc., R. R. Co. v. Topeka, 135 Mass., 34 (1883). A court will not order a domestic corporation to do an act in another state, such as opening ditches, etc. Port Royal, etc., R. R. Co. v. Hammond, 58 Ga., 523 (1877). Cf. Fisk v. Chicago, etc., R. R., 53 Barb., 513 (1868); Prouty v. Mich., etc., R. R., 1 Hun, 655; 85 N. Y., 273; Boardman v. Lake, etc., R. R., 84 N. Y., 157. See, also, Ervin v. Oregon, etc., Co., 28 Hun, 269; 35 id., 544. A foreign corporation cannot sue another foreign corporation in New York to compel a conveyance of land located in another state. Cumberland. etc., Co. v. Hoffman, etc., Co., 30 Barb., 159, 171 (1859). See 4 N. Y. Supp., 836. ² Silver Lake Bank v. North, 4 John.

Ch., 370 (1820); Newburg Petroleum Co. v. Weare, 27 Ohio St., 343 (1875); Lewis v. Bank of Kentucky, 12 Ohio St., 132 (1843); Smith v. Weed Sewing M. Co., 26 Ohio St., 562 (1875), holding also that it need not allege in its pleading the terms of its charter showing its

§ 758. Service in suits against a foreign corporation.— At common law a foreign corporation could not be sued outside of the state creating it, inasmuch as service on its officers was held insufficient. This view of the law is now abandoned. Jurisdiction over a foreign corporation may be acquired, in snits on contracts made or business done within the jurisdiction, by service upon an officer of the corporation or upon its agent engaged in the state.¹

capacity to sue: Hanna v. International Petroleum Co., 23 Obio St., 622 (1873): Lathrop v. Commercial Bank of Scioto. 8 Dana, 114 (1839); Louisville, C. & C. R. R. Co. v. Latson, 2 How., 497 (1844); Bank of Augusta v. Earle, 13 Pet., 519 (1839); Bank of Michigan v. Williams, 5 Wend., 478 (1830); Beaston v. Farmers' Bank of Delaware, 12 Pet., 135 (1838): Marine & F. I. B. Co. v. Jauncey, 1 Barb., 489 (1847), holding that its authority to sue need not be set forth in its pleading: Tombigbee R. R. Co. v. Kneeland, 4 How., 16 (1846); N. Y. Dry Docks v. Hicks, 5 McLean, 111 (1850); Lucas v. Bank of Georgia, 2 Stew. (Ala.), 147 (1829); Guaga Iron Co. v. Dawson, 4 Blackf., 202 (1836); New Jersey, etc., Bank v. Thorp. 6 Cow., 46 (1826); Mutual Benefit Life Ins. Co. v. Davis, 12 N. Y., 569 (1855); Direct U. S. Cable Co. v. Dominion Tel. Co., 84 N. Y., 153 (1881); Hibernia Nat'l Bank v. Lacombe, 84 N. Y., 367 (1881), holding that it has the same right to remedies and liens as citizens; Williams v. Creswell, 51 Miss., 817 (1876), where a District of Columbia corporation was complainant; American, etc., Ins. Co. v. Owen, 81 Mass., 491 (1860); Leasure v. Union, etc., Ins. Co., 91 Pa. St., 491 (1879); Portsmouth, etc., Co. v. Watson, 10 Mass., 91 (1813); Bank of Edwardsville v. Simpson, 1 Mo., 184 (1822); National Bank v. De Bernales, 1 Carr. & P., 569 (1825); Henriques v. Dutch, etc., Co., 2 Ld. Raym., 1532 (2 Geo. II.); Lycoming F. Ins. Co. v. Longley, 62 Md., 196 (1884); Portsmouth Livery Co. v. Watson, 10 Mass., 91 (1813); British American Land Co. v. Ames, 6 Metc., 391 (1843), holding that a corporation of a foreign country may sue; Importing, etc., Co. v. Locke, 50 Ala.,

332 (1873); Savage Mfg. Co. v. Armstrong, 17 Me., 34 (1840); American Colonization Soc. v. Gartrell, 23 Ga., 448 (1857). In this case the charter declared the corporation to be created for a specified purpose, "and for no other purpose," and its right to sue in another state was questioned. Bank of Marietta v. Pindall, 2 Rand., 473 (1824); Leazure v. Union Mut., etc., Co., 91 Pa. St., 491 (1879); Hahneman, etc., Co. v. Beebe, 48 Ill., 88 (1868), where the right to sue in another state for libel was questioned: United States v. Insurance Companies, 22 Wall., 99 (1874), holding that corporations created merely for domestic and business purposes in the seceding states during the rebellion may sue in the federal courts; Insurance Co. v. The "C. D., Jr.," 1 Woods, 72 (1870), holding that it may sue either in state or federal courts; Fidelity Ins. T., etc., Co. v. Niven, 5 Houst. (Del.), 416 (1878), holding that if empowered to act as an administrator it may sue as such in another state. But the statutes of a state may prohibit a foreign corporation from suing or being sued in its courts except in such cases as the statute may designate. A statute to this effect exists in New York. Duquesne Club v. Pennsylvania Bank, 35 Hun, 390 (1885). See Bank of Commerce v. Rutland, etc., R. R. Co., 10 How. Pr., 1 (1854); Code of C. P., §§ 1779, 1780. In New York a non-resident cannot sue a foreign corporation on a cause of action which arose out of the state. 112 N. Y., 315; Robinson v. Oceanic, etc., Co., 19 N. E. Rep., 625 (1889).

¹St. Clair v. Cox, 106 U. S., 350 (1882); Hayden v. Androscoggin, 1 Fed. Rep., 93 (1879), where service was on the presi-

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In most of the states there are statutes which provide for service

See, also, § 752; Peckham v. North Parish, 33 Mass., 274, 286 (1834); Martens v. International, etc., Soc., 53 N. Y., 339 (1873); City, etc., Ins. Co. v. Carrugi, 41 Ga., 660 (1871): Henning v. Planters' Ins. Co., 28 Fed. Rep., 440 (1886). holding that the judgment is conclusive only when it shows that the corporation was doing husiness in the jurisdiction: Barnett v. Chicago, etc., R. R. Co., 4 Hun, 114 (1875): Augerhoefer v. Bradstreet Co., 22 Fed. Rep., 305 (1884). Suit by non-resident against foreign corporation for cause arising out of state by service on treasurer gives no jurisdiction. Newell v. Great Western R'v Co., 19 Mich. 336 (1869); Despar v. Continental, etc., Co., 137 Mass., 444 (1884), holding that service on the treasurer is insufficient. But in Massachusetts a bill lies to subject assets of foreign corporatiou to the payment of its debts. Silloway v. Columbia, etc., Co., 74 Mass., 199 (1857). And attachment lies against it. Ocean Ins. Co. v. Portsmouth, etc., R'y Co., 44 Mass., 420 (1841). And if it has a place of business in the state it may be sued under the statute. Nat'l Bank of Commerce v. Huntington, 129 Mass., 444 (1880). At common law service on the officer in charge of the resident business of a foreign corporation gives jurisdiction for a cause of action arising in the jurisdiction. Newby v. Von Opper, etc., Co., L. R., 7 Q. B., 293 (1872). But service of injunction papers on a resident selling agent is insufficient. Carrou Iron Co. v. McClaren, 5 H. of L. Cases, 416 (1855). A corporation incorporated by the United States may be reached by service on the president anywhere in the country. Eby v. Northern Pac. R. R. Co., 13 Phil., 144 (1879). An Iowa corporation could not be sued in the District of Columbia (Lathrop v. Union Pac. R'y Co., 1 MacArthur, 234--1873), until a statute authorized service. Dallas v. Railroad Co., 2 id., 146 (1875). Judgment in another state against a

foreign corporation doing business there. service being on an officer who is accidentally in the state, is conclusive and Moulin v. Ins. Co., 24 N. J. L. 234 (1853). A foreign corporation cannot be bound by obtaining service upon an officer who is casually in the state where the statute is silent on the subject. Aldrich v. Anchor, etc., Co., 32 Pac. Rep., 756 (Ore., 1893). Service of process upon the president of a foreign corporation who is temporarily within the state is not good service in Pennsylvania. Phillips v. Burlington, etc., Co., 21 Atl. Rep., 640 (Pa., 1891). Where foreign corporations are forbidden to do business in the state under a penalty of a fine, unless a certificate is filed, this is the only penalty. Contracts made by a foreign corporation without filing a certificate are enforceable. Toledo, etc., Co. v. Thomas, 11 S. E. Rep., 37 (West Va., 1890). Attachment of property in the state does not make the cause one arising in the state. Whitehead v. Buffalo, etc., R'y Co., 18 How. Pr., 230 (1859). Service on the president of a foreign corporation in a cause of action not arising in the state gives no jurisdiction. State v. District Court, 26 Minn., 234 (1879). Service on the secretary who is casually in the state is not good. Middlebrooks v. Springfield, etc., Ins. Co., 14 Conn., 301 (1841). A foreign corporation may sue a foreign corporation where both do business in the state. Emerson v. Mc-Cormick, etc., Co., 51 Mich., 5 (1883). Foreign corporation doing business in the state may be sued. Thomas v. Placerville, etc., Co., 65 Cal., 600 (1884). Service of notice of attachment on a director suffices. Boyd v. Ches., etc., Canal Co., 17 Md., 195 (1860). Service on the treasurer is insufficient to compel the transfer of patents. Despar v. Continental, etc., Co., 137 Mass., 252 (1884). Service on a stockholder of a foreign corporation is not good. Rand v. Upper Locks, etc., Co., 3 Day (Conn.), 441 (1809);

in suits against foreign corporations by service on an officer or

O'Brien v. Shaw's, etc., Co., 10 Cal., 343 (1858). A default is effectual only when the papers show a proper service. Willamette, etc., Co. v. Williams, 1 Oreg., 112 (1854).

Stockholders are not entitled to notice of the suit. Peirce v. Somersworth, 10 N. H., 369 (1839), Cf. § 750, supra: Bankright v. Liverpool, L. & G. Ins. Co., 55 Ga., 194 (1875), holding that in Georgia a foreign corporation cannot be sued in personam except upon a contract made there. The remedy upon a foreign contract or foreign judgment is in rem by attachment and garnishment. Camden Rolling-mill, Co. v. Swede Iron Co., 32 N. J. L., 15 (1866), holding that a foreign corporation which has no place of business in New Jersev cannot be sued in the courts of that state on a contract made in another state, but otherwise on a contract made in the state. See National Condensed Milk Co. v. Brandenburgh, 40 N. J. L., 111 (1878); Bushel v. Commonwealth Ins. Co., 15 S. & R., 176 (1827), holding that an attachment will lie against it. To same effect, St. Louis, etc., Ins. Co. v. Cohen, 9 Mo., 421 (1845); Andrews v. Michigan Central R. R. Co., 99 Mass., 534 (1868): National Bank of Commerce v. Huntington, 129 Mass., 444 (1880); Barr v. King, 96 Pa. St., 485 (1880), holding that it may be garnished on execution; Smith v. Mutual Life of N. Y., 14 Allen, 336 (1867), holding that a citizen of another state cannot sue in the courts of Massachusetts a corporation which is foreign to that state on a cause of action which did not arise within the jurisdiction: Despar v. Continental, etc., Co., 137 Mass., 252 (1884), holding that it cannot be compelled to specifically perform a contract. The leading case of McQueen v. Middletown, etc., Co., 16 John., 5 (1819), states the common-law rule as to suits against a foreign corporation. Process against a foreign corporation cannot be served

upon its officers who may be found within the jurisdiction of the court unless such service is authorized by the statutes of the state where suit is brought. Pomeroy v. New York & N. H. R. R. Co., 4 Blatch., 120 (1857); Eaton v. St. Louis, etc., Co., 2 McCrary, 362 (1881): Latimer v. Union Pacific R'v Co., 43 Mo., 105 (1868); Wright v. Liverpool & G. Ins. Co., 30 La. Ann., 1186 (1878), holding that process cannot be served on local agent. No attachment lies on insurance money due by resident branch of a foreign insurance company to another foreign company. Straus v. Chicago, etc., Co., 46 Hun, 216 (1887). Moch v. Virginia, etc., Ins. Co., 10 Fed. Rep., 696 (1882), as to judgment by service on agent doing business in the state. Also Block v. Atchison, etc., R. R. Co., 21 id., 529 (1884); Talcott & Co. v. McCormick Harvesting Machine Co., 51 Mich., 5 (1883), holding that foreign corporations may sue each other in Michigan if both are doing business within the state and the cause of action accrued there; Farmers', etc., Nat'l Bank v. Dearing, 91 U.S., 34 (1875), followed in Rhoner v. First National Bank, 14 Hun, 126, holding that an attachment cannot be issued against national banks until after final judgment; and overruling Southwick v. First National Bank, etc., 7 Hun, 96, and Bowen v. First Nat'l Bank, 34 How. Pr., 409 (1867). It has been held that they are so far foreign corporations that they may be required to give security for costs. See National Park Bank v. Gunst, 1 Abb. N. C., 292 (1876). But they may obtain an attachment on property to the same extent that a domestic corporation may. Market Nat'l Bank v. Pacific Nat'l Bank, 64 How. Pr., 1 (1882). See, also, Pennoyer v. Neff, 95 U. S. 714; Am., etc., Co. v. Conant, 45 Mich., 642; Moulin v. Trenton Ins. Co., 24 N. J., 222; Pope v. Terre, etc., Co., 87 N. Y., 137; Good Hope Co. v. R. R., etc., Co., 22 Fed. Rep., 635;

agent, the particular officer or agent being specified. Sometimes.

Camden, etc., Co. v. Swede, etc., Co., 32 N. J., 15. If, under a statute, the foreign corporation appoints an agent in the state to accept service, a personal judgment may be rendered against the corporation. Wilson v. Martin, etc., Co., 20 N. E. Rep., 318 (Mass., 1889).

¹ Service of a summons in a cause of action arising out of the state may be made on the head of a department in New York, the company, a foreign corporation, having an office in New York. Tuchband v. Chicago, etc., R. R., 115 N. Y., 437 (1889). Under the New York statute service on a foreign corporation cannot be made by serving its attorney. Taylor v. Granite, etc., Ass'n, 32 N. E. Rep., 992 (N. Y., 1893). In Nebraska service may be made upon a managing agent of a foreign corporation doing business in the state. Klopp et al. v. Creston City, etc., Co., 52 N. W. Rep., 819 (Neb., 1892). In Michigan if service on a person as a principal officer of a foreign corporation is made on one who by affidavit shows he was not such, the service is set aside. First Nat'l Bank v. Burch, 43 N. W. Rep., 453 (Mich., 1889). Service on the resident agent of a foreign corporation is sufficient. Voorheis v. People's, etc., Co., 48 N. W. Rep., 1087 (Mich., 1891). See Hiller v. Burlington, etc., R. R. Co., 70 N. Y., 223 (1877); Childs v. Harris Mfg. Co., 104 N. Y., 477 (1887); Pope v. Terre Haute, etc., Co., 87 N. Y., 137 (1881). Service cannot be upon an officer who has resigned, and the resignation accepted. Ervin v. Oregon, etc., Co., 22 Hun, 598 (1880). As to Pennsvlvania, see Hussey Mfg. Co. v. Deering, 20 Fed. Rep., 295 (1884). See Barnett v. Chicago, etc., R. R., Co., 4 Hun, 114 (1875), to effect that sometimes the judgment is binding though the corporation has no property in the juris-The legislature may change the mode of service. Railroad Co. v. Becht, 95 U.S., 168 (1877). The statute must be strictly followed. St. Clair v.

Cox. 106 U. S., 350 (1882). Attachment does not lie against a foreign corporation after a receiver of it has been anpointed in the state where it exists. Thomas v. Merchants' Bank, 9 Paige, 216 (1841). For service under the Pennsylvauia statute, see Benwood Iron Works v. Hutchinson, 101 Pa. St., 359 (1882): Hussey Mfg. Co. v. Deering, 20 Fed. Rep., 795 (1884). Service on a resident agent whose agency is for other states only is not good. Schmidlapp v. Louisiana, etc., Co., 71 Ga., 246 (1883). Service under the Utab statute, Walker v. Continental Insurance Co., 2 Utah, 231 (1879): the Missouri statute, McNichol v. United States, etc., Agency, 74 Mo., 457 (1881). Service must be on the de facto officers. Berrian v. Methodist Soc., 4 Abb. Pr., 424 (1857). Service on clerk under the statute. Libbey v. Hodgdon, 9 N. H., 394 (1838). Service under the New Jersey statute. National, etc., Milk Co. v. Brandenburgh, 40 N. J. L., 111 (1878). On a contract made in the state, service on agent suffices in New York, though the foreign corporation does no business and has no property in the state. Barnett v. Chicago, etc., R. R. Co., 4 Hun, 114 (1875). Frequently the statute allows service on a "managing agent." Difficulty arises in defining this term. It has been held that a person is a "managing agent" if he is a general manager, Carr v. Commercial Bank, 19 Wis., 272 (1865); a local insurance agent, Bain v. Globe Ins. Co., 9 How. Pr., 448 (1854): a local agent, American Ex. Co. v. Johnson, 17 Obio St., 641 (1867); a general freight agent, Palmer v. Pennsylvania Co., 35 Hun, 369 (1885); the agent who made the contract. Estes v. Belford, 22 Fed. Rep., 275 (1884). But a stock transfer agent is not a managing agent, Riddington v. Mariposa, etc., Co.. 19 Hun, 405 (1879); nor is an assistant secretary, Sterett v. Denver, etc., R. R. Co., 17 Hun, 316 (1879); nor is a horsecar superintendent, Emerson v. Auburn,

also, the statute requires a foreign corporation to appoint a resident

etc., R. R. Co., 13 Hun, 150 (1878); nor is a ticket agent, Doty v. Michigan C. R. R. Co., 8 How. Pr., 427 (1854); nor is a baggage-master, Flynn v. Hudson, etc., R. R. Co., 6 id., 308 (1851); nor is a boat captain, Upper, etc., Co. v. Whittaker, 16 Wis., 220 (1862). The term "special agent" includes a conductor, New Albany R. R. Co. v. Grooms, 9 Ind., 243 (1857); New Albany R. R. Co. v. Tilton, 12 id., 3 (1859); Ohio & M. R. R. Co. v. Quier, 16 id., 440 (1861); the person in charge who attends to the business, Angirhoefer v. Bradstreet Co., 22 Fed. Rep., 305 (1884); but not the traveling agent, Parke v. Commonwealth Ins. Co., 44 Pa. St., 422 (1863); nor the collecting attorney, Moore v. Freeman's Nat'l Bank. 92 N. C., 590 (1885). For many other cases on these and similar statutes and on the general principles governing service of process on corporations, see 8 Southern Law Rev., 199; and 1 Barb. Ch. Pr., 52. Service on a domestic corporation cannot be made by personal service on the president outside of the Dillard v. Central, etc., jurisdiction. Iron Co., 1 S. E. Rep., 124 (Va., 1887). In Oregon the statute is construed to hold that a domestic corporation must be sued in the county of the principal office, or where the cause arose. Holgate v. Oregon P. R'v. 17 Pac. Rep., 859 (Oreg., 1888). Contra, Glaize v. S. C. R. R., 1 Strobh. L. (S. C.), 70 (1846). A vice-president and general superintendent is an "officer" upon whom service may be made under a statute. Norfolk, etc., R. R. v. Cottrell, 2 S. E. Rep., 123 (Va., 1887). Service on the foreign corporation is sufficient where the company bas an office and general agent doing a substantial business in the state. But see § 759. Tuchband v. Chicago & A. R. R., 115 N. Y., 437 (1889). Cf. Barnes v. Mobile R. R., 12 Hun, 126 (1877).

Where service on an agent is allowed if certain officers cannot be found in the county, the return of service on an

agent must show that the officers were not within the jurisdiction. Miller's Adm'r v. Norfolk, etc., R. R., 41 Fed. Rep., 431 (1889). Service upon a director of a foreign corporation sustained under the New York statute. McElroy v. Continental R'v. 6 N. Y. Supp., 306 (1889). A Maine corporation may sue a New Jersey corporation in Massachusetts, where the latter company has filed an agreement with the state of Massachusetts agreeing that it might be sued there. Consolidated S. Co. v. Lamson C. S. Co., 41 Fed. Rep., 833 (1890). Foreign corporations doing business in the state may be sued on a cause of action that arose out of the state, aud service may be made on an agent or depot master if the statutes authorize service to be made in this way. Humphrevs v. Newport, etc., Co., 10 S. E. Rep., 39 (W. Va., 1889). Service may be on the superintendent of insurance at Albany although the action is in the city court of New People v. Justices, 11 N. Y. Supp., York. 773 (1890). Under the Michigan statutes service may be made on foreign corporations by service on a resident agent who is in charge of the property. Shafer Iron Co. v. Iron, etc., Judge, 50 N. W. Rep., 389 (Mich., 1891). A general superintendent is a "managing agent" upon whom service may be made under a statute. Barrett v. American, etc., Co., 56 Hun, 430 (1890). An advertising agent is not an "agent" upon whom service may be made under the New Jersey statute. Mulhearn v. Press Pub. Co., 20 Atl. Rep., 760 (N. J., 1890). A local agent of a domestic insurance company is not an agent employed in the general management of the business. State Ius. Co. v. Waterhouse, 43 N. W. Rep., 611 (Iowa, 1889). Service may be upon a general superintendent when the statute authorizes it on a managing agent. Barrett v. American, etc., Co., 10 N. Y. Supp., 138 (1890). An employee who attends to the publicaagent to accept service before it does business in the state.¹ In the circuit court of the United States it was formerly the law that a corporation incorporated beyond the circuit in which the suit was brought may be made a defendant by such service as suffices in the state wherein the suit is brought, if it does business there.²

tion of a periodical and the printing. binding and mailing is not a "managing agent." Ruland v. Canfield Pub. Co., 10 N. Y. Supp., 913 (1890). An agent is not an "officer." Banks v. Gav. etc., Co., 12 S. E. Rep., 741 (N. C., 1891). Where by statute the state superintendent of insurance is made agent to accept service of process on foreign insurance companies doing business in the state, service on him by mail is insufficient. Farmer v. Nat'l Life Assoc., 50 Fed. Rep., 829 (1892). The attachment papers in an attachment against a foreign corporation must show the jurisdiction of the court. Oliver v. Walter, etc., Co., 10 N. Y. Supp., 771 (1890).

¹Goodwin v. Colorado, etc., Co., 110 U.S., 1 (1884); Gibbs v. Queen Ins. Co., 63 N. Y., 114 (1875). See, also, §§ 694-696; also note 1, p. 1180. A judgment obtained by such service cannot be impeached in other jurisdictions. Lafayette Ins. Co. v. French, 18 How., 404 (1855); Moch v. Virginia, etc., Ins. Co., 10 Fed. Rep., 696 Transacting business without filing is equivalent to filing. Ehrman v. Teutonia Ins. Co., 1 McCrary, 123 The appointment of such an agent does not affect the right of the corporation, as a citizen of another state, to sue and be sued in the federal courts. Stevens v. Phœnix Ins. Co., 41 N. Y., 149 (1869); Gray v. Quicksilver Min. Co., 21 Fed. Rep., 288 (1884). For decisions under Massachusetts statute requiring foreign insurance companies to appoint an agent to accept service. see Thayer v. Tyler, 76 Mass., 164 (1857); National, etc., Ins. Co. v. Pursell, 92 Mass., 231 (1865); Leonard v. Washburn. 100 Mass., 251 (1868); Gillespie v. Commercial, etc., Ins. Co., 78 Mass., 201 (1858); Morton v. Mutual Ins. Co., 105 Mass., 141 (1870). An appointment, under statute, of a resident agent to accept service continues until a new appointment is made. Gibson v. Manuf'rs, etc., Co., 10 N. E. Rep., 729 (Mass., 1887).

² New Eng., etc., Ins. Co. v. Woodworth, 111 U.S., 138, 146 (1883); Eaton v. St. Louis, etc., Co., 7 Fed. Rep., 139 (1881); M'Cov v. Cincinnati, etc., R. R. Co., 13 Fed. Rep., 3 (1882); St. Louis. etc., Co. v. Consolidated, etc., Co., 32 Fed. Rep., 802 (1887); Hunter v. International R'y, etc., Co., 26 Fed. Rep., 299 (1886); Block v. Atchison, etc., Co., 21 id., 529 (1884); Carpenter v. Westinghouse Air-brake Co., 32 Fed. Rep., 434 (1887). But see Good Hope Co. v. R'v, etc., Co., 22 Fed. Rep., 635 (1884), holding that service on the president, who was there to adjust a difficulty, was insufficient. Cf. Estes v. Belford, id., 275, where a patent-right had been used in the jurisdiction. Service on an agent of a domestic corporation does not give jurisdiction over a foreign corporation though the latter operates through the former. United States v. American Bell Tel. Co., 29 Fed. Rep., 17 (1886). Unless the state statute provide otherwise, no jurisdiction is acquired by attachment of property and service of papers on resident officers of a foreign corporation. Boston Electric Co. v. Electric Gas, etc., Co., 23 Fed. Rep., 838 (1885), reviewing the authorities. Where the foreign corporation has appointed a resident agent to accept service, the federal court has jurisdiction by service on such agent. Ex parte Schollenberger, 96 U.S., 369 (1877); Knott v. Southern, etc., Ins. Co., 2 Woods, 479 (1874); Merchants' Mfg. Co. v. Grand, etc., R'y Co., 63 How. Pr., 459 (1882, U. S. C. Ct.), where a foreign But by the act of congress of 1887 a suit in the federal courts can be instituted only in the district where either the plaintiff or defendant resides, where the jurisdiction of the court is due to the parties being citizens of different states. Nevertheless where a removable suit is properly commenced in a state court it may be removed to the federal court, though neither of the parties reside in that district.

§ 759. Jurisdiction of the federal courts.— The federal courts refuse to follow the New York decisions and statute allowing suit to be brought against a foreign corporation by service upon the president while temporarily within the state, the corporation not being engaged in business in the state. On removal of the case to the federal court the service will be set aside. A special appearance for that purpose may be put in.³

corporation sued an alien corporation; Lung Chung v. Northern Pac. R'y Co., 19 Fed. Rep., 254 (1884), where service was insufficient; Gray v. Quicksilver Mining Co., 21 id., 288 (1884). The fact that a state is a stockholder in a corporation does not deprive the United States courts of jurisdiction where the corporation is a party. Bank of United States v. Planters' Bank, 9 Wheat., 904 (1824). In the federal courts service on a ticket solicitor of a railroad defendant for a cause of action arising in another circuit is insufficient. Maxwell v. Atchison, etc., R. R., 34 Fed. Rep., 286 (1888). As to the affidavit to be made by the corporation in order to remove a case to the United States court, see Mix v. Andes Ins. Co., 74 N. Y., 53 (1878). An order to show cause may be served on the cashier of an insolvent bank, although the bank is in a receiver's hands. Platt v. Archer, 9 Blatch., 559. A Connecticut corporation cannot be sued by an alien in the California circuit court of the United States. Denton v. International Co., 36 Fed. Rep., 1 (1888); Filli v. Delaware, etc., R. R., 37 Fed. Rep., 65 (1888). But see Riddle v. N. Y., etc., R. R. Co., 39 Fed. Rep., 290 (1889). See, also, Connor v. Vicksburg, etc., R. R., 37 Fed. Rep., 273; Preston v. Fire, etc., Co., 37 Fed. Rep., 721.

¹Ch. 373, Stat. at L. 1887. See, also, cases in preceding note.

² Kansas, etc., R. R. v. Interstate, etc., Co., 37 Fed. Rep., 3 (1888). See, also, Zambrino v. Galveston, etc., R'y Co., 38 Fed. Rep., 449 (1889); Riddle v. N. Y., etc., R. R. Co., 39 id., 290 (1889).

³ Clews v. Woodstock, etc., Co., 44 Fed. Rep., 31 (1890). Service on an officer of a foreign corporation who temporarily comes within the state is not good and will be set aside. Golden v. Morning News, etc., 42 Fed, Rep., 112 (1890). A foreign corporation sued in state courts by service on a director casually in the state may remove to United States court and have suit dismissed. Bentliff v. London, etc., Corp., 44 Fed. Rep., 667 (1890). On removal to the federal court, a suit commenced by service on the president, who casually was in the jurisdiction on private business, will be dismissed, the company never having transacted business or maintained an office in the state. Reifsnider v. American, etc., Co., 45 Fed. Rep., 433 (1891). "Where a foreign corporation is not doing business in a state, and the president or any officer is not there transacting business for the corporation and representing it in the state, it cannot be said that the corporation is within the state so that service can be made upon it." Dictum. FitzA large number of decisions are given in the notes below on the various phases of the jurisdiction of the federal courts in suits brought against foreign corporations.

gerald Con. Co. v. Fitzgerald, 137 U.S., 98 (1890). Where a corporation appears. demurs, removes the case into the federal court, and answers, it cannot attack the jurisdiction of the court, even though service was on the president, who was enticed into the state. Id. Where a foreign corporation sued in a state court wishes to remove the case to the federal court and there have the service set aside on the ground of want of jurisdiction, it must enter a special appearance in the state court for the purpose of objecting to the jurisdiction, and then, after filing the objection but before a hearing thereon, remove the whole case into the federal court. Tallman v. Baltimore, etc., R. R., 45 Fed. Rep., 156 (1891).

"The members of a corporate body must be conclusively presumed to be citizens of the state in which the corporation is domiciled." Shaw v. Quincy Min. Co., 145 U. S., 444 (1892). A corporation organized in one state cannot be sued in the federal court in another state by a citizen of a third state. Id., holding, also, that the defendant may appear specially. Service upon the highest officer within the county is sufficient where the statutes so prescribe. Kansas, etc., R. R. v. Daughtry, 138 U. S., 298 (1891). Service upon an attorney of a corporation, appointed under a state statute to accept service, is good service for the federal courts. In re Lonisville Underwriters, 134 U. S., 488 (1890). Under a state statute authorizing service of process upon a local agent of a foreign corporation, inrisdiction may be obtained by the federal courts. Societé Fonciere, etc., v. Melliken, 135 U. S., 304 (1890). The status of a corporation in regard to the jurisdiction of the federal courts is stated in United States v. Soutbern P. R. R., 49 Fed. Rep., 297 (1892). A foreign corporation doing business in Ohio and having a managing agent there may be garnished there under the statutes of Ohio. Rainey v. Maas, 51 Fed. Rep., 580 (1892). A railroad corporation is a resident of each federal district through which it runs. East Tenn., etc., R. R. v. Atlanta, etc., R. R., 49 Fed. Rep., 608 (1892).

Where an alien corporation appoints a resident agent to accept service, it becomes an "inhabitant," and may be sued in the federal court. Gilbert v. New Zealand Ins. Co., 49 Fed. Rep., 884 (1892). The word "inhabitant" applies to corporations, in respect to statutory jurisdiction of courts. Gilbert v. New Zealand Ins. Co., 49 Fed. Rep., 884 (1892). A corporation is not an "inhabitant" of any state except the one wherein it is incorporated. Campbell v. Duluth, etc., R'y, 50 Fed. Rep., 241 (1892). It has been held that a limited partnership organized under the laws of Pennsylvania is not a citizen of that state so as to enable it to remove a case to the federal court, irrespective of the citizenship of its members. Carnegie, etc., Co. v. Hulbert, 53 Fed. Rep., 9 (1892). These limited partnerships in Pennsylvania are practically corporations. A foreign corporation may be sued in the federal court in the state where the plaintiff resides, although it had filed its certificate of incorporation with the secretary of state under the statute, and had stipulated not to remove any case into the federal court. Such a stipulation is unconstitutional and void. Southern Pacific Co. v. Denton, 146 U.S., 202 (1892). The place of residence of a corporation is the state wherein it is incorporated. So held under the act for the removal of causes. Miller v. Wheeler, etc., Co., 46 Fed. Rep., 882 (1891); Overman Wheel Co. v. Pope Mfg. Co., 46 Fed. Rep., 577 (1891). Foreign corporation filing a certificate as required by statute is not a A corporation incorporated by the United States may, by reason of that fact, bring suits in or remove them to the federal courts

non-resident as regards the right to remove cases to the federal courts. Scott v. Texas, etc., Co., 41 Fed. Rep., 225 (1889). A corporation is a resident only of the state wherein it is incorporated, as regards the jurisdiction of the United States courts. Although another party defendant is an actual resident in the district where suit is brought, yet the foreign corporation cannot be sued there on that account. Bensinger, etc., Co. v. National, etc., Reg. Co., 42 Fed. Rep., 81 (1890). If two corporations sued on a tort are liable severally, one may remove the case, although the other cannot, to the federal court. Spangler v. Atchison, etc., R. R., 42 Fed. Rep., 305 An alien corporation may remove a case to the federal courts. Purcell v. British, etc., Co., 42 Fed. Rep., 465 (1890).

A consolidated railroad running into two states is a separate corporation in each state, and being sued in one state cannot remove the case to the federal court on the ground that it is a citizen of the other state. Paul v. Baltimore, etc., R. R., 44 Fed. Rep., 513 (1890). foreign corporation defendant may remove a case to the federal court although it has filed a statutory certificate authorizing service on a designated agent. Amsden v. Norwich, etc., Ins. Soc., 44 Fed. Rep., 515 (1890). A statute prohibiting a foreign corporation from suing in the state courts unless it has filed a copy of its articles, etc., in the state, if it is doing business in the state, does not prevent such a corporation from bringing suit in the federal courts, although it has not filed its articles, etc. Bank of British N. A. v. Barling, 44 Fed. Rep., 641 (1890). A judgment creditor of an insolvent corporation may file a bill in equity in the federal court to subject the property to the payment of the debt, although a suit is pending in the state court to reduce the amount

of complainant's claim to a less figure. The issues are different. Coffin v. Chattanooga, etc., Co., 44 Fed. Rep., 533 (1890). A suit cannot be brought in the federal court against a corporation except in the district where the company is incorporated. Nat'l Typographic Co. v. N. Y., etc., Co., 44 Fed. Rep., 711 (1890). When a defendant foreign corporation seeks to remove a case to the federal courts it must aver it is a nonresident. An averment of its citizenship is insufficient. Hirschl v. J. P., etc., Co., 42 Fed. Rep., 803 (1890). A foreign corporation may be sued in the federal courts although it has an office and does business in the state. Henning v. Western U. T. Co., 43 Fed. Rep., 97 (1890). A corporation is a resident only of the state that incorporates it so far as the jurisdiction of the federal courts is concerned. Myers v. Murray, ctc., Co., 43 Fed. Rep., 695 (1890). Although a Missouri corporation is made an Arkansas corporation also by statute, vet it may remove cases to the federal court as though it were a Missouri corporation alone. Stephens v. St. Louis, etc., R. R., 47 Fed. Rep., 530 (1891).

The fact that the C., B. & Q. R. R. Co., an Illinois corporation, first took a lease of and then purchased the road of the B. & M. R. R. Co. in Iowa, does not make the former company an Iowa corporation. It continues an Illinois corporation. Conn v. Chicago, etc., R. R., 48 Fed. Rep., 177 (1891). A railroad corporation of one state purchasing a railroad in another state does not thereby become a resident of the latter state so as to prevent its removing cases to the federal court. Morgan v. East Tenn., etc., R. R., 48 Fed. Rep., 705 (1883). If no objection is raised in the proper manner the jurisdiction of the federal court cannot be questioned. The proceedings are not void. McBride v. Grand, etc., Co., 40 Fed. Rep., 162 (1889).

unless the statute provides otherwise.1 If a foreign corporation

An alien corporation doing business in Oregon may be sued there in the federal courts. It is an "inhabitant" to that extent. Miller v. Eastern, etc., Min. Co., 45 Fed. Rep., 345 (1891). A statute requiring foreign corporations to file a stipulation which is forfeited in case the corporation removes any case to the federal courts is void. And even if valid the corporation cannot be forbidden to litigate past rights or recover property already acquired. Texas, etc., Mortgage Co. v. Worsham, 13 S. W. Rep., 384 (Tex., 1890). Although a New York corporation does practically all of its business in Missouri, vet it is a citizen of New York. Baughman v. National, etc., Co., 46 Fed. Rep., 4 (1891). A company organized under the statutes of Pennsylvania and having mixed characteristics of a partnership and corporation is a corporation so far as removal to the federal court is concerned. Bushnell v. Park Bros. & Co., 46 Fed. Rep., 209 (1891). The place of residence of a corporation is the state wherein it is incorporated. So held under the act for the removal of causes. Miller v. Wheeler, etc., Co., 46 Fed. Rep., 882 (1891); Overman Wheel Co. v. Pope Mfg. Co., 46 Fed. Rep., 577 (1891); Railway Co. v. Whitten, 13 Wall., 283 (1871), holding that a corporation is deemed to be a citizen of the state creating it for the purpose of conferring jurisdiction upon the courts of the United States, and the legislation of other states will not affect this presumption; Insurance Co. v. Francis, 11 Wall., 210 (1870), holding that an allegation that a New York corperation is located and doing business in Mississippi was not an allegation that it was a citizen of the latter state; Steamship Co. v. Tugman, 106 U.S., 118 (1882), holding that the residence of the corporation does not at all depend on the residence of its stockholders; Blackburn v. Selma, etc., R. R. Co., 2 Flipp., 525 (1879), holding that entering appear-

ance waives the right to object to the jurisdiction of a federal court. To same effect. De Sobry v. Nicholson, 3 Wall., 386 (1865); Hayden v. Bates Mfg. Co., 1 Fed. Rep., 93 (1879), holding that it may be sued in federal courts though its property has been attached, if doing business in the state and process can be served; Boston Electric Co. v. Electric. etc., Co., 23 Fed. Rep., 838 (1885). In this case a Maine corporation had its principal office in Massachusetts, where also a majority of its officers and directors resided. Held, that the federal courts of Massachusetts had no jurisdiction over it though suit was begun by attachment and service upon the corporate officers. Union National Bank v. Miller, 15 Fed. Rep., 703 (1883), holding that the act of July 20, 1882, placed national and other banks, as to their right to sue in the federal courts, on the same footing; Hatch v. Chicago, R. L, etc., Co., 6 Blatch., 105 (1868), holding that having an office and doing business in another state does not affect its citizenship; Williams v. Missouri, K. & T. R. R. Co., 3 Dill., 267 (1875); Stevens v. Phœnix Ins. Co., 41 N. Y., 149 (1869).

¹ Pacific R. R. Removal Cases, 115 U. S., 2 (1884); Union Pac. R. R. Co. v. McComb, 1 Fed. Rep., 799 (1880); Eby v. Northern P. R. R., 36 Legal Intel. 164 (1879); Hughes v. Northern Pac. R'y Co., 18 Fed. Rep., 106 (1883); Allen v. Texas, etc., R'y Co., 25 Fed. Rep., 513 (1885), where even a consolidation with domestic corporations had been made and state statutes prohibited the removal. A case to the contrary is Myers v. Union Pac. R'y Co., 16 id., 292 (1882). As to national banks, see Cruikshank v. Fourth Nat. Bank, 16 id., 888 (1883); Farmers' Nat. Bank v. McElhinney, 42 Fed. Rep., 801 (1890). A company incorporated in a territory cannot thereby remove a case to the United States courts. Adams Ex. Co. v. Denver, etc.,

desires to deny that it has been properly served, it may put in a special appearance and raise the objection of no jurisdiction.

R'v Co., 16 id., 712 (1883). A right to change of venue to the residence of the defendant may enable a corporation defendant to change it to the place where it does its business, though incorporated elsewhere. Guinn v. Iowa Cent. R'v Co., 14 id., 323 (1882). A District of Columbia insurance company cannot remove cases to federal court for that cause alone. Scheffer v. Nat. Life Ins. Co., 25 Minn., 534 (1879). banks are citizens of the state wherein thev are located. Nat. Park Bank v. Nichols, 4 Biss., 315 (1869); Manufacturers' Nat. Bank v. Baack, 8 Blatch., 137 (1871); Davis v. Cook, 9 Nev., 134 (1874). Cf. Kennedy v. Gibson, 8 Wall., 498 (1869); R. S. of U. S., § 640; County of Wilson v. Nat. Bauk. 103 U. S., 770 (1880); Osborn v. U. S. Bank, 9 Wheat., 738 (1824); Cooke v. State Nat. Bank, 52 N. Y., 96 (1873); St. Louis Nat. Bank v. Allen, 5 Fed. Rep., 551 (1881); First Nat. Bank of New Orleans v. Bohne, 8 Fed. Rep., 115 (1881); Third Nat. Bank of St. Louis v. Harrison, 8 Fed. Rep., 721 (1881); ch. 866, Acts of Congress, 1888. As to unincorporated joint-stock companies, see Chapman v. Barney, 129 U. S., 677 (1889). A railway corporation created by act of congress "is, in every state and territory of the Union in which it may lawfully exercise its powers, a domestic institution," and may be sued in the federal courts in any district where it is doing business and has an agent upon whom service can be made. Where a lease is made without statutory authority the lessor may be served with process as though no lease had been made. Where the statutes of a state prescribe the mode in which service may be made, all corporations subsequently doing business in the state are bound by service so made. Van Dresser v. Oregon, etc., Nav. Co., 48 Fed. Rep., 202 (1891).

¹Provident Sav. Bank v. Ford, 114 U. S., 635 (1885); Friezen v. Allemania. etc., Ins. Co., 30 Fed. Rep., 349 (1886), holding that a general appearance waives the objection to jurisdiction. See, also, Brooks v. N. Y., etc., R. R. Co., 30 Hun, 47 (1883), holding that a general answer has the same effect: also Cook v. Champlain, etc., Co., 1 Denio, 91 (1845); North Mo. R. R. Co. v. Akers, 4 Kan., 453 (1868), holding that after entering appearance it cannot question the jurisdiction of the court in an action upon contract. See, also, § 752, supra; McCormick v. Penn. Central R. R. Co., 49 N. Y., 303 (1872); Lung Chung v. Northern Pac. R'v Co., 19 Fed. Rep., 254 (1884); Moch v. Virginia, etc., Co., 10 Fed. Rep., 696 (1882). Where a foreign corporation, served in the state where it is incorporated, answers by pleas to the jurisdiction and also files pleas to the merits, reserving its rights under the former pleas, it waives any objection to the jurisdiction. St. Louis, etc., R'y v. Whitley, 13 S. W. Rep., 852 (Tex., 1890).

PART V.

BONDS, MORTGAGES, FORECLOSURES, RECEIVERS AND REORGANIZATIONS.

CHAPTER XLVI.

BONDS, NOTES, ETC., OF A CORPORATION—GUARANTIES AND ACCOMMODATION PAPER.

§ 760. A corporation may borrow money — Loans in excess of the charter or contract limit.

761. Bills, notes and acceptances may be made and issued by corpora-

762. Bonds may be issued by corporations — Re-issues — Pledges of bonds — Forgeries — Overissues — Priorities among bonds — Incomplete bonds — References to the mortgage — Purposes of the issue — Attachments of bonds — Form of bonds — Seal — Cancellation and subrogation.

763. Bonds may be issued below par for cash — Bond dividend — Usury.

764. Bonds issued below par for property or construction work — Construction contracts and performance.

765. Bona fide purchasers of bonds issued at less than their par value are protected.

value are protected.

766. Fraudulent issues of bonds and issues to the directors or through directors who are "dummies" or to construction companies in which the directors are interested.

767. Who may complain of an issue of bonds at less than par—Stockholders—The corporation itself—Corporate creditors.

768. The bonds of a corporation payable to order or bearer are negotiable.

§ 769. Miscellaneous features of bonds— Issue in payment of the property of another corporation— Consolidations—Bondholders' suits—Bonds exchangeable into stock.

770. The negotiability of the bonds extends also to the mortgage.

771. Suits at law on bonds — Demand of payment — Form of action — Statute of limitations.

772. Coupons and interest on bonds — Negotiability of coupons—Participation in foreclosure — Interest on overdue bonds and coupons — Purchase of coupons when presented for payment.

778. Suit to collect coupons — Execution cannot be levied upon the mortgaged property — Demand of payment.

773a. Income bonds.

774. Accommodation paper cannot legally be signed by a corporation — A consideration must exist — Bona fide holders.

775. Guaranty by one corporation of the bonds or dividends of another corporation — Guaranty by an individual.

776. Debentures in England.777. Debentures in America.

778. Mode of drafting, signing, sealing and acknowledging corporate obligations to pay money—Liability of the corporation and the corporate officers on irregularly executed instruments—Charter provisions as to authorizing the instruments.

§ 760. A corporation may borrow money — Loans in excess of the charter or contract limit.— The power of a corporation to borrow money is implied, and exists without being expressly granted by charter or statute.¹

¹ Memphis & L. R. Co. v. Dow, 19 Fed. Rep., 388 (1884), citing Philadelphia, etc., R. R. Co. v. Stickler, 21 Am. L. Reg., 713 (Pa.); Barry v. Merchants' Exch. Co., 1 Sandf. Ch., 280 (1844); Beers v. Phœnix Glass Co., 14 Barb., 358 (1852); Mead v. Keeler, 24 Barb., 20 (1857); Partridge v. Badger, 25 Barb., 146 (1857); Clark v. Titcomb, 42 Barb., 122 (1864): Curtis v. Leavitt. 15 N. Y., 9 (1857); Barnes v. Ontario Bank, 19 N. Y., 152 (1859); Smith v. Law, 21 N. Y., 296 (1860); Nelson v. Eaton, 24 N. Y., 410 (1863): Kent v. Quicksilver Mining Co., 78 N. Y., 159, 177 (1879); Coats v. Donnell, 94 N. Y., 168 (1883); Oxford Iron Co. v. Spradley, 46 Ala., 98 (1871); Alabama Gold L. I. Co. v. Central, etc., Association, 54 Ala., 73 (1875); Taylor v. Agricultural & M. Asso., 68 Ala., 229 (1880); Hays v. Galion Gas L. & C. Co., 29 Ohio St., 330, 340 (1876); Hope Ins. Co. v. Perkins, 38 N. Y., 404 (1868); Magee v. Mokelumne Hill Canal & M. Co., 5 Cal., 258 (1855), where a statute prohibiting corporations from issuing bills, notes, etc., "upon loans or for circulation as money," was held to be intended to prevent their loaning their credit, and not to restrict their right to borrow for business purposes; affirmed in Smith v. Eureka Flour Mills Co., 6 Cal., 1 (1856); Santa Cruz R. R. Co. v. Spreckles, 65 Cal., 193 (1884), holding that the loan may be obtained from a director; Union Gold Mining Co. v. Rocky Mt. Nat. Bank, 2 Col., 248 (1873); Commercial Bank, etc., v. Newport Mfg. Co., 1 B. Mon., 14 (1840); Donnell v. Lewis Co. Savings Bank, 80 Mo., 165 (1883); Lucas v. Pitney, 27 N. J. L., 221 (1858); Hackettstown v. Swackhamer, 37 N. J. L., 191 (1874); Thompson v. Lambert, 44 Iowa, 239 (1876); Larwell v. Hanover Svgs. Fund Soc., 40 Ohio St., 274 (1883); Bradley v. Ballard, 55 Ill., 413 (1870); Fay v. Noble,

12 Cush., 1 (1853); Commissioners, etc., v. Atlantic & N. C. R. Co., 77 N. C., 289 (1877); Ridgway v. Farmers' Bank, etc., 12 S. & R., 256 (1824); Moss v. Harpath Academy, 7 Heisk., 283 (1872); Union Bank v. Jacobs, 6 Humph., 515 (1845); Rockwell v. Elkhorn Bank, 13 Wis., 653 (1861); Furniss v. Gilchrist & Co., 1 Sandf., 53 (1847); Holbrook v. Basset, 5 Bosw., 149 (1859); Life & F. Ins. Co. v. Mechanics' F. I. Co., 7 Wend., 31 (1831); Barnes v. Ontario Bank, 19 N. Y., 152 (1859). If a bank borrows money, the fact that its officers misappropriate the money cannot defeat the right to recover it from the bank. Donnell v. Lewis Co. Svgs. Bank, 80 Mo., 165 (1883): Australian A. S. C. Co. v. Mounsey, 4 K. & J., 733 (1858); Re National Patent S. F. Co., Baker's Case, 1 Dr. & Sm., 55 (1860); Ulster R'y Co. v. Banbridge, L. & B. R'y Co., Ir. Rep., 2 Eq., 190 (1868); Bank of Australia v. Breillat, 6 Moore's P. C., 152 (1847); Laing v. Reed, L. R., 5 Ch., 4 (1869); Re Cork & V. R'y Co., L. R., 4 Ch., 748 (1869): Maclae v. Sutherland, 3 E. & B., 39 (1854); Gibbs' Case, L. R., 10 Eq., 312 (1870) - an insurance company. also, Hamtayne v. Bourne, 7 M. & W., 595 (1841); Lowndes v. Garnett & Moseley G. M. Co., 33 L. J., Eq., 418 (1863); Ex parte Pitman, L. R., 12 Ch. D., 707 (1879); Hill's Case, L. R., 9 Eq., 605, 618 (1870): Burmester v. Morris, 6 Ex., 796 (1851), holding that a mining company cannot borrow. But in Manchester, etc., R'y v. Brown, 50 L. T. Rep., 281 (H. of Lt, 1884), reversing 47 L. T. Rep., 290, and sustaining 45 L. T. Rep., 747, a railway company which had exhausted its borrowing powers sold its unincumbered rolling-stock and took it back at an annual rental equal to seven and a half per cent. of the money received on the sale, with a privilege of repurchasing

It is legal for the company to borrow money of its directors. The fiduciary relation of the directors towards the stockholders does not prevent such a loan. The law places no limit upon the amount which the corporation may borrow. The amount borrowed may be greater than the capital stock.

Even if the corporation has no implied power to borrow, it will be compelled to repay the money actually received by it.3

Although a statute forbids a corporation from borrowing more than a specified amount, yet if the corporation actually does borrow in excess of that amount it cannot escape payment to the lender 4

for the same price after five years. Some of the directors guarantied the rental. Held, that the transaction was in fact a borrowing, and as such ultra vires the railway company, and that the plaintiffs could not recover of the company, but that the directors were liable upon their guaranty. Cf. 21 N. E. Rep., 907. Where a corporation has power to borrow money, neither it nor its stockholders can evade payment of a loan by the defense that the money was used for an unauthorized business, and that the party loaning the money knew that fact. Bradley v. Ballard, 55 Ill., 413 (1870). Under a power to borrow on bonds or debentures, the company may borrow without issuing bonds or debentures. Commercial Bank v. Great Western R'v, 3 Moore's P. C. Rep. (N. S.), 395 (1865). The attorney-general may enjoin a corporation from incurring debts in excess of a limit fixed by the charter. Lehigh, etc., R'y Co.'s Appeal, 18 Atl. Rep., 498 (Pa., 1889). Concerning the constitutional and statutory provision limiting corporate debts in Pennsylvania, see Manhattan Hardware Co. v. Phalen, 18 Atl. Rep., 428. A canoe club may borrow money to erect a building. Bradbury v. Boston, etc., Club, 26 N. E. Rep., 132 (Mass., 1891). A building association has power to borrow money and give security for it. North, etc., Assoc. v. First Nat. Bank, 47 N. W. Rep., 300 (Wis., 1890). A bylaw limiting the debts of the company is waived where such excess of debt is

reported to the stockholders and acquiesced in by them. The by-law does not bind strangers who do not know of it. Underhill v. Santa Barbara, etc. Co., 28 Pac. Rep., 1049 (Cal., 1892).

¹ See § 661, supra.

² Barry v. Merchants' Exch. Co., 1 Sand. Ch., 280 (1844).

⁸ Manville v. Belden Mining Co., 17 Fed. Rep., 425 (1883); Memphis & L. R. R. Co. v. Dow, 19 Fed. Rep., 388 (1884); Union Gold M. Co. v. Rocky M. Nat. Bank, 2 Colo., 248 (1873); Humphrey v. Patrons' Mercantile, etc., 50 Iowa, 607 (1879); Larwell v. Hanover Svgs. F. Soc., 40 Ohio St., 374 (1883); Re Magdalena Steam Nav. Co. v. Johnson, V. C., 690 (1860); Bradley v. Ballard, 55 Ill., 413, 417 (1870); Darst v. Gale, 83 Ill., 136, 141 (1876); Hays v. Galion Gas L. & C. Co., 29 Ohio St., 330, 340 (1876); Hoare's Case, 30 Beav., 225 (1861); Troup's Case, 29 Beav., 353 (1860). Compare White v. Carmarthen & C. R'y Co., 33 L. J., Eq., 93 (1864). Contra, Burmester v. Norris, 6 Ex., 796 (1851). A person who loans money to a corporation cannot petition to have it wound up under the English act. Ex parte Williamson, L. R., 5 Ch., 309 (1869).

⁴ Ossipee H. & W. Mfg. Co. v. Canney, 54 N. H., 295 (1874); De Camp v. Dobbins, 29 N. J. Eq., 36 (1878); Humphrey v. Patrons' Mercantile Asso., 50 Iowa, 607 (1879); Garrett v. Burlington Plow Co., 70 Iowa, 697 (1886); Auerbach v. Le Soeur Mill Co., 28 Minn., 291 (1881). In England the rule is contra. Foun-

Bonds secured by mortgage and issued by a corporation are valid and enforceable although they exceed in amount the limit prescribed by charter or statute.¹

tains v. Carmarthen R'y Co., L. R., 5 Eq., 316 (1868), where debentures issued in excess of authority were held void: Lady Henloch v. River Dee Co., 53 L. T. Rep., 62 (H. of L., 1885); Re Pooley Hall Colliery Co., 21 L. T. (N. S.), 690 (1869), where similar debentures were said to be "not voidable but absolutely And see two cases turning upon the construction of "rules" or by-laws. Davis' Case, L. R., 12 Eq., 516 (1871), and Wilson's Case, id., 521 (1871). But see Gordon v. Sea Fire Life Ins. Co., 1 H. & N., 599 (1857). Municipal bonds issued in excess of a limit fixed by constitutional provision are void. Bona fide holders are not protected. Borough v. Frederick, 7 Atl. Rep., 156 (Pa., 1886). Defense of debt in excess of amount allowed must be pleaded. German, etc., Inst. v. Jacoby, 11 S. W. Rep., 256 (Mo., Where the charter prescribes that the debts shall not exceed one-half of the capital stock, capital stock means the paid-in capital stock and not the capital stock as stated in the charter. Lehigh, etc., R'y Co.'s Appeal, 18 Atl. Rep., 498 (Pa., 1889). Although the power of a railroad to borrow be limited, yet preferred stock may be issued, secured by a mortgage, where the power to mortgage has been given, and such preferred stock may be deprived of the power to vote. Miller v. Ratterdam, 24 N. E. Rep., 496 (Ohio, 1890). Concerning the advisability of restricting the borrowing and mortgaging power of corporations, see Cook on The Corporation Problem, pp. 85-86.

¹ Bonds are valid although the amount exceeds twice the capital stock of the company, the limit fixed by statute. Fidelity, etc., Co. v. West Pa., etc., R. R., 21 Atl. Rep., 21 (Pa., 1891). Cf. Pittsburg, etc., R. R. Co.'s Appeal, 4 Atl. Rep., 385 (Pa., 1886). A mortgage is enforceable although it is given to secure a debt

contracted in excess of the amount limited by the charter of the corporation. Allis v. Jones, 45 Fed. Rep., 148 (1891), holding, also, that a subsequent creditor whose claim also is open to this objection cannot have the mortgage set aside. Bonds in excess of charter limit may be valid. Des Moines Gas Co. v. West, 50 Iowa, 16 (1878): Warfield v. Marshall. etc., Co., 34 N. W. Rep., 467 (Iowa, 1887). A corporate mortgage is valid though it secures a sum in excess of the amount allowed by statute. Warfield v. Marshall, etc., Co., 34 N. W. Rep., 467 (Iowa, 1887); 9 S. E. Rep., 748. Although the statutes authorize a mortgage for an amount not exceeding twothirds of the capital paid in, yet if a mortgage is given for an amount in excess of the limit but not in excess of two-thirds of the authorized capital, bona fide holders of the bonds may enforce the mortgage. Hackensack Water Co. v. De Kay, 36 N. J. Eq., 548 (1883). A contractor who takes part in the issue of bonds in excess of the capital stock, an act prohibited by statute, is estopped from questioning the validity of the mortgage securing the bonds. Appeal of Reed, 122 Pa. St., 565 (1888). Although bonds issued by the company to raise money are unauthorized and illegal by statute, yet the bolders may collect from the company the amount received by the company on the bonds. In re Cork, etc., R'y, L. R., 4 Ch., 748 (1869). But see Davis' Case, L. R., 12 Eq., 516 (1871). Although the amount of dehts which the corporation may incur is limited, yet the directors are not liable for debts in excess of that limit. See notes below. Bonds in excess of the charter limit of two of the three states in which the company is incorporated are nevertheless valid in the third. Atwood v. Shenandoah, etc., R. R., 9 S. E. Rep., 748 (Va., 1889). In CommonWhere there is an overissue of bonds great difficulty is found in determining whether all of the bonds participate in the benefit of the mortgage security. The rule is that all bona fide holders participate in the security, even though this includes some or all of the overissue.

In England it has been held that where a company had power to borrow, but the power had been already exhausted and the directors nevertheless raised more money, they were personally liable to repay it.²

wealth v. Smith, 92 Mass., 448 (1865), it is held that mortgage bonds issued in excess of the charter limit are void. When the constitution of a state forbids "county, political or other municipal corporations" within the state to "become indebted in any manner" beyond a named percentage "on the value of the taxable property within such county or corporation," negotiable bonds issued by such corporation in excess of such limit are invalid without regard to any recitals which they contain. Nesbit v. Riverside Independent District, 144 U. S., 610 (1892). Where the power to mortgage does not exist, except it be expressly given by statute, as in the case of railroads, a mortgage in excess of the statutory authorization is void. Commonwealth v. Smith, 92 Mass., 448. An agreement of a corporation to issue a certain amount of bonds does not limit the bonded debt to that amount. If the bonds are not issued but the land in payment therefor is deeded to the company, the party has a lien on the land, but must demand the bonds before suing. Cordova. etc., Co. v. Long. 8 S. Rep., 765 (Ala., 1891).

1Where there are two sets of numbers for two sets of bonds, all secured by the same mortgage, a purchaser is not bound to know of an overissue where the method of numbering is not explained. Stephens v. Benton, 1 Duv., 112 (Ky., 1863). Where by error \$420,000 of bonds are issued while the mortgage secures but \$400,000, the extra \$20,000 are secured also by the mortgage as against the company, and

also as against income bondholders not secured by mortgage; but as against a subsequent recorded second mortgage. the \$20,000 of bonds are unsecured, and the income bondholders take the rights of the second mortgage bondholders to come in ahead of this \$20,000. Where a mortgage is given to secure bonds to the amount of \$16,000 per mile of road thereafter built, to be determined on certain certificates to be given by the chief engineer and others, and more than \$16,000 of bonds per mile are issued, all of the bonds share equally in the foreclosure assets, since it is impossible to tell which are overissued bonds except by the numbers, which are not sufficient proof of the date of issue. Stanton v. Ala., etc., R. R., 2 Woods, 523 (1875). See, also, State v. Cobb, 64 Ala., 127 (1879), sustaining the validity of the same bouds and enforcing the state's guaranty of them. But neither the court nor the trustees have power to make an overissue of bonds in order to fulfill a corporate contract. Vose v. Bronson, 6 Wall., 452 (1867)

² Weeks v. Propert, L. R., 8 C. P., 427; Chapleo v. Brunswick Building Soc., 6 Q. B., 276, explained by Mellish, L. J., in 7 Ch., 801. Where a person advanced money to a company on the security of an invalid Lloyd's bond of the company, the directors who issued it were held not to be personally liable to repay the money advanced. Rashdall v. Ford, 2 Eq., 750. See on this case 13 Q. B. D., 363. Where the directors of a benefit building society had power to borrow if

Sometimes the statutes make the directors personally liable for debts of the company contracted in excess of a certain amount.¹

The defense of usury on the part of a corporation is considered elsewhere.²

§ 761. Bills, notes and acceptances may be made and issued by corporations.— A private corporation may make and issue a promissory note.³

a rule enabling them to do so had been passed, and they borrowed money for the society in the absence of any rule enabling them so to do, it was held that they were personally liable to repay it. Richardson v. Williamson, L. R., 6 Q. B., 276, explained by Mellish, L. J., in 7 Ch., 801. Where a company had power to issue debenture stock to a limited extent, and the directors, after the power was exhausted, issued more debenture stock, they were held personally liable to the holders of the unauthorized stock. The damages were held to be the value which the stock would have had if it had been authorized. Firbank's Ex'rs v. Humphreys, 18 Q. B. D., 54. Although the statute requires the articles to state the amount of indebtedness which may be incurred, the articles may fix the amount with the right to the stockholders to increase it up to the statutory limit. Thornton v. Balcom et al., 52 N. W. Rep., 190 (Iowa, 1892). Although the directors have agreed to pay for goods in debentures, and although the company is unable to fulfill by reason of all its authorized debentures having already been issued, nevertheless the directors are not personally liable to the vendor to make good the failure to deliver the debentures. Elkington & Co. v. Hurter, 66 L. T. Rep., 764 (1892). Where a person bought new preference stock of a railway company which both he and the directors bona fide believed they had power to issue, but which in truth they had not, it was held that he had no remedy against them, for there was nothing more than a common mistake of law. Eaglesfield v. Marquis of Londonderry, 4 Ch. D., 693.

1 Where the statutes provide that directors are liable for an excess of indebtedness, this liability has been held to be a general one, inuring to the benefit of all creditors upon bill filed and not for the benefit of individual creditors. Hornor v. Henning, 93 U.S., 228 (1876). Cf. Rossiter v. Rossiter, 8 Wend., 494 (1832); Palmer v. Stephens, 1 Denio, 471 (1845). See, also, ch. XII, supra, and § 663a. The provision making the directors liable for corporate debts in excess of the capital stock does not relieve the corporation from liability for such excess nor invalidate the debt. Underhill v. Santa Barbara, etc., Co., 28 Pac. Rep., 1049 (Cal., 1892). Under the Illinois statute rendering directors liable for debts in excess of the capital stock, if they assent thereto, directors who do not know of such excess until after it has been contracted are not liable, even though they allowed one director to transact all the business. Lewis v. Montgomery, 33 N. E. Rep., 880 (Ill., 1893). Where the statute renders the directors liable for money received in excess of a certain limit, they are liable, even though by reason of the fraud of the secretary they did not know that the excessive borrowing was being done. Cross v. Fisher, 66 L. T. Rep., 448 (1892). If directors give their personal notes for corporate debts contracted in excess of the charter limit, they cannot sue the stockholders for contribution. Heald v. Owen, 44 N. W. Rep., 210 (Iowa, 1890).

² See § 763.

³ Moss v. Averell, 10 N. Y., 449, 457 (1853), and cases cited; Barry v. Merchants' Ex. Co., 1 Sand. Ch., 280 (1844); Clark v. Farmers' Woolen Mfg. Co., etc.,

A note given under the seal of the corporation is not necessarily a sealed instrument, inasmuch as the seal is the old mode of signature to an instrument by a corporation. This rule affects not only the negotiability of the instrument, but also the remedy to enforce it, and the statute of limitations. There are cases, however, to the contrary.

A corporation may draw or accept a bill of exchange for the purposes of its business.³ But a note or bill of exchange issued or

15 Wend., 256 (1836); Mead v. Keeler, 24 Barb., 20 (1857): Kent v. Quicksilver M. Co., 78 N. Y., 159, 177 (1879); Mott v. Hicks, 1 Cow., 513 (1823); Att'v-Gen. v. Life & F. Ins. Co., 9 Paige, 470 (1842); Moss v. Oakley, 2 Hill, 265 (1842); Smith v. Law, 21 N. Y., 296 (1860); Lucas v. Pitney, 27 N. J. L., 221 (1858); Richmond, F. & P. R. R. Co. v. Snead, 19 Gratt., 354 (1869), a due-bill; Rockwell v. Elkhorn Bank, 13 Wis., 653 (1861); Union Bank v. Jacobs, 6 Humph., 515 (1845); Straus v. Eagle Ins. Co., 5 Ohio St., 59 (1855); Cartis v. Leavitt, 15 N. Y., 9 (1857); Oxford Iron Co. v. Spradley, 46 Ala., 98 (1871); Smith v. Eureka Flour Mills Co., 6 Cal., 1 (1856); Ex parte Estabrook, 2 Lowell, 547 (1887); Barnes v. Ontario Bank, 19 N. Y., 152 (1859); Mumford v. American L. I. Co., 4 N. Y., 463 (1851); McMasters v. Reed's Ex'rs, 1 Grant's Cases, 36 (1854), holding that they may also issue bonds; Pitman v. Kintner, 5 Blackf., 250 (1839); Commercial Bank v. Newport Mfg. Co., 1 B. Mon., 13 (1840); Leavitt v. Blatchford, 17 N. Y., 521 (1858); Magee v. Mokelumne Hill C. & M. Co., 5 Cal., 258 (1855); Hamilton v. Newcastle & D. R. R. Co. 9 Ind., 359 (1857); Randolph on Com. Paper, §§ 327-335; Millard v. St. Francis, etc., Academy, 8 Bradw. (Ill.), 341 (1880), where an educational institution borrowed money and gave a note therefor. A corporation may make a promissory note. Barker v. Mechanics', etc., Ins. Co., 3 Wend., 94 (1829). Corporations may issue notes and bills of exchange "where the nature and character of their business warrants it." In re General Estates Co., L. R., 3 Ch., 758 (1868).

¹ An instrument in the form of a promissory note does not become an instrument under seal by having the corporate seal affixed. The corporate seal is the corporate mode of signing. In re General Estates Co., L. R., 3 Ch., 758 (1868). The seal of a corporation stamped on its promissory note does not destroy the negotiability of the note. The seal is the proper signature of the corporation. Id. It is not necessary that the corporate seal be attached. Mott v. Hicks, 1 Cow., 513 (1823); Hamilton v. Newcastle & D. R. R. Co., 9 Ind., 359 (1857). See, also, Buckley v. Briggs, 30 Mo., 452 (1860); also, § 721, supra.

² Clark v. Farmers', etc., Co., 15 Wend., 256 (1836), holding that such a note is not negotiable so as to authorize a suit by an indorsee in his own name. The note may be sued upon as a sealed instrument. St. James Parish v. Newburyport H. R. R., 141 Mass., 500 (1886). An instrument in form a note, but signed by the corporate seal, must be sued on as a sealed instrument. Benoist v. Inhabitants, etc., 8 Mo., 250 (1843). See, also, concerning this subject, §§ 768, 771, infra.

³ For instances of making bills, see Olcott v. Tioga R. R. Co., 40 Barb., 179 (1862); S. C., affirmed, 27 N. Y., 546 (1863); Safford v. Wyckoff, 4 Hill, 442 (1842), holding that a negotiable bill irregularly issued will bind the corporation in favor of a bona fide indorsee. For instances of accepting bills, see Munn v. President, etc., of Commission Co., 15 Johns., 44 (1818); Partridge v. Badger, 25 Barb., 146 (1857); Prairie Lodge v. Smith, 58 Miss., 301 (1880),

accepted by a corporation for purposes which the corporation is not authorized to engage in cannot be enforced by the payee or by an indorsee taking the same with notice. But a corporation cannot set up the defense of *ultra vires* to a note where it has received the property for which the note was given.²

A bona fide purchaser of a corporate note is protected as he would be if the maker were an individual.³

where the corporation accepted an order drawn by its contractor; City Bank of Columbus v. Beach, 1 Blatch., 425 (1849). In England it is held that a bill of exchange cannot be accepted by a mining company. Brown v. Byers, 16 Mees. & W., 252 (1847); Dickinson v. Valpy, 10 B. & C., 128 (1829). Nor by a railroad. Bateman v. Mid-Wales R'y Co., L. R., 1 C. P., 499 (1866). Nor a salt company. Bult v. Morrell, 12 Ad. & E., 745 (1840); Broughton v. Manchester, etc., Works, 3 B. & Ald., 1 (1819). Nor a salvage company. Thompson v. Universal, etc., Co., 1 Ex., 694 (1848). Nor a cemetery. Steele v. Harmer, 14 Mees. & W., 831 (1845). But the right may exist if specified in the articles of incorporation. In re Peruvian R'ys Co., L. R., 2 Ch., 617 (1867). Directors who had accepted bills on behalf of a company, which had no power under its private acts of parliament to accept bills, were held liable to the holders who had no notice in fact that the company was not empowered to accept bills. West London Commercial Bank v. Kitson, 12 Q. B. D., 157, and 13 Q. B. D., 360.

¹ Bacon v. Mississippi Ins. Co., 31 Miss., 116 (1856); State Bank v. U. S. Pottery Co., 34 Vt., 144 (1861); Pearce v. Madison & I. R. R. Co., 21 How., 441 (1858), where a note given by a railroad company for the purchase of a steamboat was held void; Ehrgott v. Bridge Manufactory, 16 Kan., 486 (1876), where the payee took the note in payment of a third person's debt. Cf. 21 N. E. Rep., 907. Parties taking a corporate bill of exchange in payment of business which they knew the corporation was not authorized to carry on cannot enforce it.

Balfour v. Ernest, 5 C. B. (N. S.), 601 (1859).

² Dewey v. Toledo, etc., R'y, 51 N. W. Rep., 1063 (Mich., 1892).

³ Bissell v. Mich., etc., R. R., 22 N. Y., 258, 289 (1860); Daniells on Neg. Inst., §§ 1502-1504; Stoney v. American, etc., Ins. Co., 11 Paige, 635 (1845). See Att'y-Gen'l v. Life, etc., Ins. Co., 9 Paige, 470 (1842), holding that the burden of proof is on the holder; Genesee, etc., Bank v. Mich., etc., Co., 52 Mich., 438 (1884). Although an agent duly authorized by the corporation to make notes for it issues its notes for accommodation, vet a bona fide holder cannot hold the agent liable in tort. He should sue the corporation on the notes. Bird v. Daggett, 97 Mass., 494 (1867); Monument National Bank v. Globe Works, 101 Mass., 57 (1869); Lafayette Bank v. St. Louis Stoneware Co., 2 Mo. App. — (1876). In these cases the agent indorsed paper for accommodation of third parties. Madison & I. R. R. Co. v. Norwich Savings Soc., 24 Ind., 457 (1865), where an agent represented a railroad company as being the owner of certain bonds, when in fact it was an accommodation guarantor. It was held liable upon the guaranty. Stoney v. American Life Ins. Co., 11 Paige, 635 (1845). In Merchants' Bank v. State Bank, 10 Wall., 604, 644, Mr. Justice Swayne said: "Where a party deals with a corporation in good faith - the transaction is not ultra vires - and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such A corporation has no power to become an accommodation indorser of a note, but where all the stockholders assent thereto and creditors are not injured, the indorsement is sustained. A corporation may of course draw checks on its bank account.

The authority of the president or cashier or other officer to issue

defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them." This remark was quoted with approval in Gano v. Chicago & N. W. R'v Co., 60 Wis., 12 (1884): Claflin v. Farmers' & Citizens' Bank, 25 N. Y., 293 (1862), where, however, the certification of his personal check by the president of a bank was considered to constitute such a suspicious circumstance as should put a purchaser upon his guard, and render the certification invalid even in the hands of a bona fide holder for value. See, also, ch. XLIII. Ridgeway v. Farmers' Bank, etc., 12 S. & R., 256 (1825), where a draft fraudulently drawn by a president was enforced against the corporation; Philadelphia & S. R. R. v. Lewis, 33 Pa. St., 33 (1859), holding that bonds were not void because secured by a mortgage executed without authority: Rowland v. Apothecaries' Co., 47 Conn., 384 (1879), a note of a corporation given by its treasurer for money for his personal use being held valid against the corporation; Mechanics' Banking Asso. v. New York & S. W. L. Co., 35 N. Y., accommodation 505 (1866). indorsement by president; In re Estabrook, 2 Lowell, 547 (1877), a note given by a manager without authority; Thompson v. Lambert, 44 Iowa, 239 (1876), misappropriation by officers of money detained on mortgage; Stone v. American Life Ins. Co., 11 Paige, 635 (1845); White v. How, 3 McLean, 291 (1843), where the corporate agent improperly issued notes; Genesee Savings Bank v. Michigan Barge Co., 52 Mich., 438 (1884), where the treasurer was au-

thorized to issue notes and did so, but improperly it was claimed. The rule was stated to be (p. 446) that "where a corporation has, under any circumstances, power to issue negotiable paper, the bong fide holder has the right to presume that it was issued under circumstances which gave the requisite authority; and the negotiable paper of a corporation which appears on its face to have been duly issued by such corporation, and in conformity with the provisions of its charter, is valid in the hands of a bona fide holder:" Western Maryland R'v Co. v. Franklin Bank, 60 Md., 36 (1882), where a clerk forged certificates of coupons surrendered for funding. Certificates of deposit issued by a bank cashier for the purpose of raising money for the bank's use. though not based on an actual deposit. have been held binding upon the bank when held by bona fide purchasers with-See ch. XLIII. out notice. Floyd Acceptances, 7 Wall., 666 (1868), it was held that acceptances of drafts due in the future for army supplies not delivered were void as not being within the authority of the secretary of war. Barnes v. Ontario Bank, 19 N. Y., 152 (1859); Ellsworth v. St. Louis, A. & T. H. R. R. Co., 98 N. Y., 553 (1885), where bonds were issued in violation of the charter; In re General Estates Co., L. R., 3 Ch., 758 (1868). See, also, In re Land Credit, etc., Co., L. R., 4 Ch., 460 (1869); Beers v. Phœnix Glass Co., 14 Barb., 358 (1852), secretary borrowing money without authority.

¹ See § 774, infra.

² Waterlow v. Sharp, L. R., 8 Eq., 501 (1869); In re Cefu Cilcen Min. Co., L. R., 7 Eq., 88 (1868).

a note in the name of the corporation is discussed elsewhere.¹ Sometimes the charter or a statute forbids a corporation from issuing a note. In such a case the note would be void.² The holder, however, may collect from the corporation the money or value advanced for the note.³ The power of a corporation to indorse notes is of course undoubted. It is a part of the every-day business of most corporations.⁴

§ 762. Bonds may be issued by corporations—Reissues—Pledges of bonds—Forgeries—Overissues—Priorities among bonds—Incomplete bonds—References to the mortgage—Purposes of the issue—Attachments of bonds—Form of bonds—Seal—Cancellation and subrogation.—A corporation has inherent power to issue bonds for the payment of money, and no express power is necessary to authorize the issue.

¹ See §§ 716, etc., supra.

²Leavitt v. Palmer, 3 N. Y., 19 (1849); Root v. Wallace, 4 McLean, C. C., 8 (1845); Davis v. Bank of River Raisin, 4 McLean, C. C., 387 (1848); Attorney-General v. Life & Fire Ins. Co., 9 Paige, 470 (1842); New York F L Co. v. Ely, 2 Cow., 678 (1824); Weed v. Snow, 3 McLean, 265 (1843); Root v. Goddard, id., 102 (1842); Havden v. Davis, id., 276 (1843), where an acceptance and bond given to secure it were held void: Bank of Chillicothe v. Dodge, 8 Barb., 233 (1848), holding, however, that a foreign corporation innocently holding a draft issued in violation of a statutory prohibition stands in the same situation as if it had paid money under a mistake of material facts and may recover the money paid for it. See, also, Smead v. Indianapolis, P. & C. R. R. Co., 11 Ind., 104 (1842), holding that certificates of deposit payable to bearer are not within the New York restraining statutes prohibiting the issue of notes for circulation as money; Mumford v. American Life Ins. & T. Co., 4 N. Y., 463 (1851).

³ Oneida Bank v. Ontario Bank, 21 N. Y., 490 (1860). Cf. Attorney-General v. Life, etc., Ins. Co., supra. Contra, Broughton v. Manchester, etc., Co., 3 Barn. & C., 1 (1819), where the bill of exchange contravened the statute giving the Bank of England a monopoly. See, also, other English cases supra. 4 Olcott v. Tioga, etc., R. R., 27 N. Y., 546 (1863); Hardy v. Merriweather, 14 Ind., 203 (1860); Frye v. Tucker, 24 Ill., 180 (1860); Buckley v. Briggs, 30 Mo., 452 (1860); Smith v Johnson, 3 H. & N. 222 (1858), the last case being that of a bill of exchange.

⁵ Phil., etc., R. R. Co. v. Lewis, 33 Pa. St., 33 (1859); Commonwealth v. Smith, 92 Mass., 448 (1865). Also many cases infra. They may be issued to carry out a reorganization scheme. Memphis, etc., R. R. v. Dow, 19 Fed. Rep., 388 (1884); aff'd, 120 U.S., 287. A railroad company has inherent power to issue bonds. Commissioners of Craven v. Atlantic. etc., R. R., 77 N. C., 289 (1877); Miller v. N. Y., etc., R. R., 18 How, Pr., 374 (1859); McMasters v. Reed's Ex'rs, 1 Grant's Cas. (Pa.), 36 (1854). A furnace and chemical company may issue first-mortgage bonds, and may sell them, partial payments to be made from time to time. These payments may be enforced. Davis v. Montgomery, etc., Co., 8 S. Rep., 496 (Ala., 1890). A subscription for bonds, the amount being payable on call, may be paid at once and the bonds demanded. Watjen v. Green, 21 Atl. Rep., 1028 (N. J., 1891). A railroad corporation may issue bonds without express authority so to do. Miller v. N. Y., etc., R. R., 8 Abb. Pr., 431 (1859). "There seems to be no reason why a railroad corporation should not be considered as The corporation may issue bonds unsecured by mortgage. Moreover, although a mortgage is made to secure the bonds and that mortgage is illegal and declared void by the courts, yet the bonds will be valid as unsecured obligations. A bond divi-

having power to make a bond for any purpose for which it may lawfully contract a debt, without any special authority to that effect unless restrained by some restriction, express or implied, in its charter or in some other legislative act. A bond is merely an obligation under seal." But in Massachusetts the statute specifying the purposes for which bonds may be issued and regulating their issue prevents a commonlaw issue of them. Commonwealth v. Smith, 92 Mass., 448 (1865). In the case of McLanahan v. North River Bridge Co., N. Y. L. J., Nov. 22, 1892, the court sustained a proposed issue of \$100,000,000 of bonds payable in the year 4343, and to draw interest at six per cent. annually, two per cent. to be paid semiannually, and the remaining two per cent, at the maturity of the bonds, two thousand four hundred and fifty years hence. A sinking fund was to be established for gradual redemption. was to be made up of \$500,000 deposited with the trustee of the mortgage before each interest day, and also a sum equal to the semi-annual interest, two per cent., on all bonds previously redeemed. The bonds to be redeemed were to be designated by the trustees by lot one month before the bonds were redeemed. They were to be redeemed "at their maturity value;" and this language was construed by the directors to mean that each hond was to be redeemed by the payment of \$5,000, such amount being arrived at by taking the principal of the bond, \$100, and adding to it items of the annual interest at two per cent. for two thousand four hundred and fifty years. Rev'd Nov. 17, 1893. Power to mortgage property gives power to borrow money and issue bonds. Gloninger v. Pittsburg, etc., R. R., 21 Atl. Rep., 211 (Pa., 1891). "Lloyds" bonds are evidences of debt

issued by a railroad company for construction work, supplies, etc. Where a corporation has power under the statute to execute bonds and mortgages, neither a preferred nor common stockholder can prevent it on the theory that the directors may possibly use the bonds for other purposes than those specified in the statute and mortgage. Thompson v. Erie R'y, 42 How. Pr., 68 (1871).

¹ Union Trust Co. v. N. Y., etc., R. R., 1 R'v & Corp. L. J., 50 (Ohio Com. Pl., 1887). Where a stockholder of a vendor corporation sets aside the sale of a railroad as ultra vires, a mortgage given by the vendee corporation is void. The bondholders are, however, entitled to enforce payment from any other property owned by the vendee. City of Knoxville v. Knoxville, etc., R. R., 22 Fed. Rep., 758 (1884). Bonds may be issued which are not a lien upon any property and are not secured by any mortgage or deed of trust. It is immaterial that they are called "equipment bonds." They may, however, by contract constitute an equitable lien, Tysen v. Wabash R'v. 15 Fed. Rep., 763 (1883). Where one road has been leased to another, the two roads may subsequently be consolidated and consolidated mortgage bonds issued, of which a part shall go to the former lessor company in extinguishment of its claim to rent under the old lease. If the transaction is a fair one towards the stockholders of the lessor, the court will not disturb it. Hazard v. Vermont, etc., R. R., 17 Fed. Rep., 753 (1883). The bonds of a railroad company are not rendered void in consequence of being secured by a mortgage which is void because the company had no authority to execute it. Phil., etc., R. R. v. Lewis, 33 Pa. St., 33 (1859). Equipment bonds unsecured by mortgage are subject to future mortdend is sometimes made. When made under proper circumstances it is legal.¹

It is legal for a corporation to sell its bonds to its directors provided the sale is a fair one. Directors hold a fiduciary relation towards the stockholders, and sales of corporate property to the directors are voidable at the instance of a stockholder.² But unless a stockholder objects, the sale is valid. These principles apply to a director's purchase of bonds.³ Although the amount of bonds that may be issued is limited by the charter or by statute, yet bonds in excess of that amount may be enforced against the corporation.⁴ An agreement of a corporation to issue a certain amount of bonds does not limit the bonded debt to that amount.⁵ The company may re-issue such of its own bonds as it has purchased.⁶ A corporation may pledge its unissued bonds,⁷ but upon the

gages made by a consolidated company into which the company issuing the bonds has been consolidated. Though the holders might have exchanged their bonds for consolidated mortgage bonds, a failure to exercise the right is fatal. Wabash, etc., R'y v. Ham, 114 U. S., 587 (1885).

¹ See § 764.

² See § 653, supra.

³See § 661, supra.

4 See § 760, supra.

⁵ Cordova, etc., Co. v. Long, 8 S. Rep., 765 (Ala., 1891), holding also that if the bonds are not issued but the land in payment therefor is deeded to the company, the party has a lien on the land but must demand the bonds before suing.

⁶ Claffin v. South Carolina R. R., 8 Fed. Rep., 118 (1880); Id., 4 Hughes, 12; In re Fifty, etc., Bonds, 15 S. C., 304; Ex parte Williams, 18 S. C., 299. Although a mortgage is given to secure bonds in order to retire previous bonds, yet, if after retiring such bonds some of the new issue still remain, the company may issue them. Claffin v. South Carolina R. R., supra.

⁷Peck v. New Jersey, etc., R. R., 22 Hun, 129 (1880); Duncomb v. N. Y., etc., R. R., 84 N. Y., 190 (1881); Peck v. N. Y., etc., R'y, 85 N. Y., 246 (1881). Bonds made to retire and pay other bonds and debts may be issued as collateral security for such other debts. Claffin v. South Carolina R. R., 8 Fed. Rep., 118 (1880); 4 Hughes, 12; County Court v. Baltimore, etc., R. R., 35 Fed. Rep., 161 (1888). Where bonds are authorized for extension purposes and the mortgage and bonds so provide, they cannot, after the company becomes insolvent, be used as a pledge for old debts where the pledgees are really the directors. Farmers' L. & T. Co. v. San Diego, etc., St. R'y Co., 45 Fed. Rep., 518 (1891). Bonds may be pledged by the company for past or new debts. Lehman v. Tallassee, etc., Co., 64 Ala., 567 (1879); Grand Rapids, etc., R. R. v. Sanders, 54 How. Pr., 214 (1877); In re Regent's, etc., Co., 24 W. R., 687 (1876). A corporation may deposit its bonds as collateral security for notes made for its benefit by its stockholders under a verbal agreement that the bonds shall be held for the protection and security of the makers against liability on the note, their respective interests in the bonds being proportionate with their agreed liability on the note as between themselves. Reid v. Bank of Mobile, 70 Ala., 199 (1881); Rice's Appeal, 79 Pa. St., 168 (1875), holding that the accommodation indorser for the company may enforce the bonds to the extent of his liability. The company may pledge its unissued

foreclosure of the mortgage and the distribution of the assets such

bonds to secure its debts. Union, etc., Co. v. Southern, etc., Co., 51 Fed. Rep., 840 (1892). A bona fide pledgee of bonds from the company is protected in his pledge. Allen v. Dallas, etc., R. R., 3 Woods, 316. But not if the pledge was in bad faith in order to buy the property in cheaply. See § 766. The issue of bonds as a pledge and security for an antecedent iudebtedness of the company has been held to be contrary to the provisions of the constitution of California relative to watered bonds. Farmers' L. & T. Co. v. San Diego, etc., St. R'v Co., 45 Fed. Rep., 518 (1891). Where a subscriber to bonds fails to pay and the corporation then pledges them, it can hold him liable only for the value of the bonds at the time of the pledge, and not the value at a later date. Cleveland Iron Co. v. Ennor, 14 N. E. Rep., 673 (Ill., 1888). Where a statute forbids the issue of bonds at less than seventy-five cents on the dollar, and they are pledged by the company at forty cents on the dollar, they are void in the hands of the pledgee. Nat'l, etc., Works v. Oconto, etc., Co., 52 Fed. Rep., 29 (1892). Pledgees from the company itself may be bona fide holders and will then be protected as such. Allen v. Dallas, etc., R. R., 3 Woods, 316 (1878). It is legal for a railroad company to pledge its bonds. Power to sell gives power to pledge. Farmers' L. & T. Co. v. Toledo, etc., Co., 54 Fed. Rep., 759 (1893). Where a person pledges his stock as additional security to a corporate creditor who has bonds of the company in pledge for the same debt, such pledge of bonds, however, being illegal, the pledgor of the stock cannot compel the creditor to resort to the bonds first; nor, although a fictitious sale of the stock is alleged, can he compel the transferee of the stock to return the stock so that the pledgor may vote it unless the pledgor pays the amount due. Hinckley v. Pfister, 53 N. W. Rep., 21 (Wis., 1892). Where the

pledgor is the corporation itself, and by agreement the pledgee is authorized to purchase the bonds at a pledgee's sale upon default, and does so, and the mortgage is foreclosed, an outside creditor cannot question the full title of the pledgee to the bonds, the company itself not objecting. Farmers', etc., Co. v. Toledo, etc., Co., 54 Fed. Rep., 759 (1893). The bonds of a corporation not secured by mortgage, when given as collateral security for the debt of the company. do not entitle the creditor to any greater dividend in the assets of the company upon its insolvency and winding up than he would have if he did not hold such collateral security. International, etc., Co. v. Union, etc., Co., 31 Pac. Rep., 408 (Wy., 1892). Bonds issued in Wisconsin in pledge for a debt of the company, with a stipulation that they should be accounted for at least seventy-five cents on the dollar, are void by statute, and the pledgees cannot maintain a bill in equity to enforce their lien by reason of the bonds. Pfister v. Milwaukee, etc., R'y Co., 53 N. W. Rep., 27 (Wis., 1892). A corporation may pledge its unissued bonds. Nelson et al. v. Hubbard, 11 S. Rep., 428 (Ala., 1892). Although bonds are issued illegally, being given in pledge for less than seventy-five cents on the dollar, yet neither the company nor an officer, nor a stockholder, can maintain an action for the surrender or cancellation of such bonds. unless they tender the amount for which the bonds were pledged. The company and its officers are in equal wrong with the pledgee. Hinckley v. Pfister, 53 N. W. Rep., 21 (Wis., 1892). A bondholder cannot cause to be canceled bonds issued to stockholders on the ground of no consideration, where the bonds are not yet due, and there has been no default, and the plaintiff has no control over the management or the earnings or money of the corporation. Bibb v. Montgomery, etc., Works, 13 S. Rep., 224 (Ala., 1893).

a pledgee can claim only the amount of his debt and interest.¹ A pledge of bonds by one person to another is similar to a pledge of stock, a subject which is fully considered elsewhere.²

If any material part of the bond is forged the bond is void.³ An alteration of the number, however, is immaterial and does not affect the bond itself.⁴ The bonds may be incomplete in that the

In the case of Ex parte Carolina Nat'l Bank, 18 S. C., 289 (1882), the receiver borrowed money to operate the railroad and pledged the unissued bonds of the company. He borrowed \$20,000 and pledged \$134,000 of bonds. The pledgee sold them out for \$13,000 and then applied to have the remaining \$7,000 paid out of the income. The court so ordered, the bondholders having failed to object for six years.

1 Where the company pledges its debentures the pledgee can prove up only the amount of his debt and not necessarily the par value of the debentures. In re Blakely, etc., Co., L. R., 8 Eq., 244 (1869); Newport, etc., Co. v. Douglass, 12 Bush (Ky.), 673. But a pledge of bonds from an individual pledgor may, however, prove or sue for the entire amount of the collaterals, but can recover no surplus over and above the amount of his debt or advances with proper costs of suit. The pledgor takes the remainder. Morton v. N. O., etc., R'y, 79 Ala., 590 (1885). Where the company pledges its own bonds they may be sold upon notice to pay the debt the same as shares of stock, even though the bonds are promises to pay and the sale has been enjoined in another state. Union Cattle Co. v. International Trust Co., 21 N. E. Rep., 962 (Mass., 1889). A sale by a pledgee after insolvency proceeding are commenced gives the purchaser none except equitable rights. Id. Cf. Jerome v. McCarter, 94 U.S., 734, 739 (1876). Such part of the first-mortgage bonds as are reissued may be issued and deposited as additional security for second-mortgage bonds. Atwood v. Shenandoah, etc., R. R., 9 S. E. Rep., 748 (Va., 1889). Bonds

issued as collateral security have the right to participate in the benefits of the foreclosure to the extent of their par value, the debt being equal to that. Peck v. N. Y., etc., R'y, 85 N. Y., 246 (1881); In re Regent's, etc., Co., L. R., 3 Ch. D., 411; Jerome v. McCarter, 94 U. S., 734, 740 (1876): Third Nat'l Bank v. Eastern R. R., 122 Mass., 240; Morton v. N. O., etc., R'y, 79 Ala., 590.

² See ch. XXVI. Bona fide pledgees have the same rights as a bong fide purchaser to the extent of their pledge. Allen v. Dallas, etc., R. R., 3 Woods, 316 (1878). Where a bank receives a pledge of bonds in good faith its title is good. although it advanced money on the bonds by certifying checks contrary to the national banking act. Thompson v. St. Nicholas Nat'l Bank, 146 U. S., 240 (1892). The indorser of a note secured by bonds is released if the bonds are subsequently by the indorser made subject to liens which originally were second to the mortgage securing the Nassau Bank v. Campbell, 63 Hun, 229 (1892).

³ Bonds containing a forged seal of the corporation and a forged certificate by the trustee are invalid and void, and not enforceable. A consolidated road is not liable therefor. Maas v. Missouri, etc., R'y, 83 N. Y., 223 (1880). See, also, §§ 363-367, supra. But it is no defense to an action on coupons that certain forged bonds are out. Wood v. Consolidated, etc., Co., 36 Fed. Rep., 538 (1888).

⁴ In State v. Cobb, 64 Ala., 127, 158 (1879), the court said: "The change or mutilation of the number would be a mere change or mutilation of a mark, placed upon the bond, it may be, by the maker, or the indorser, or it may be by

payee or place of payment may be omitted. In such cases the validity and enforceability of the bond depend on the extent of the omission and the facts connected with the case.¹

Where the bonds are stolen before the trustee's certificate is attached, such certificate being required by the terms of the bond, the bonds are void absolutely, and there can be no bona fide purchaser of them.²

The vendor of bonds does not impliedly warrant that they were legally issued, nor does he guaranty payment. The numbers on the bonds do not give one bond any priority as against other bonds having a larger number. Nor does the fact that they were issued

any holder, for the convenience and protection of the one or the other." The alteration of the number on a bond does not destroy their negotiability, and a bona fide purchaser of them from a thief is protected. The number is merely for convenience in identifying them, the same as the private mark of the owner upon them would be. Commonwealth v. Emigraut, etc., Bank, 98 Mass., 12 (1867), citing Smith v. Ill., etc., R. R. (N. Y. Super. Ct.). To same effect City of Elizabeth v. Force, 29 N. J. Eq., 587 (1878); Birdsall v. Russell, 29 N. Y., 220 (1864). The numbers on coupous do not destroy their negotiability. Evertson v. National Bank, 66 N. Y., 14 (1876); Commonwealth v. Susquehanna, etc., R. R., 122 Pa. St., 306 (1888). Even though the thief of negotiable railroad bonds changes the numbers on the bonds, yet the bona fide purchaser is protected. Such an alteration is an immaterial one. Wylie v. Missouri Pac. R. R., 41 Fed. Rep., 623 (1890).

¹Railroad bonds may be negotiable though payable to a blank person. White v. Vermont, etc., R. R., 21 How., 575 (1858). Where in a railroad bond the place of payment is left blank, with power to the president to fill it in, until so filled in the bond is not negotiable, and a thief can give no title to a purchaser. Ledwick v. McKim, 53 N. Y., 307 (1873). Where the place of payment is left blank, with authority to the president to fill it in, but he does not fill it in, and the bonds are stolen from

the company, they are not negotiable. Jackson v. Vicksburg, etc., R. R., 2 Woods, 141 (1875). Where the bonds state that the president is authorized to fix the place of payment and the bonds are stolen from the company before he does so, they are not negotiable nor collectible. Parsons v. Jackson, 99 U. S., 434 (1878). In the case of a note by a firm the date may be filled in by any holder. Michigan Bank v. Eldred, 9 Wall., 544 (1869). Municipal bonds payable "to -, his executors, administrators and assigns," are negotiable. Dutchess, etc., Ins. Co. v. Hachfield, 1 Hun, 675 (1874). Bonds stolen before completed are void. Maas v. Missouri, etc., R. R. Co., 11 Hun, 8 (1877), where forgery completed the bonds.

² Maas v. Missouri, etc., R'y, 83 N. Y., 223 (1880).

³ Otis v. Cullum, 92 U. S., 447 (1875).

⁴ Ketchum v. Duncan, 96 U. S., 659 (1877).

5"The bonds all bear the same date, and fall due on the same day. Bond number one has therefore no advantage over any other bond, and no presumptions are to be indulged in its favor." Stanton v. Ala., etc., R. R., 2 Woods, 523 (1875). The fact that bonds are numbered does not give priority in payment to one hondholder as against another. Commonwealth v. Susquehanna, etc., R. R., 122 Pa. St., 306, 321 (1888).

at different times give any prior right to payment of those first issued.¹ The bond and mortgage may, however, provide for the priority of one part of the bonds over another part. Such priorities are matters of contract and are legal.² All the bonds are conclusively presumed to have been issued at their date.³

First-mortgage bonds have priority over second-mortgage bonds, although issued after the latter.4

Where the bonds refer to a mortgage securing them, the mortgage becomes thereby a part of the bond and is construed with it.⁵ And statements and representations in the bonds are controlled by explanations contained in the mortgage, but if the terms conflict the bond controls.⁶

¹Appeal of Reed, 122 Pa. St., 565 (1888).

² There may be a perference to certain bouds as against others of the same issue, all secured by the same mortgage. Chicago, etc., Land Co. v. Peck, 112 Ill., 408 (1885). Although part of the hondholders purchased by reason of fraudulent representations of brokers to whom the other bondholders had sold part of their holdings, this does not give any priority to the former over the latter. Coe v. East, etc., R. R., 52 Fed. Rep., 531 (1892). In the case Commonwealth v. Chesapeake, etc., Canal Co., 32 Md., 501 (1870), various complicated questions as to priority of different classes of bonds were passed upon.

³ The purchasers of bonds bearing the same date as the mortgage may rely on the fact that they were made and issued simultaneously and that there was no intervening time for the liens of material-men to attach. Nelson v. Iowa, etc., R. R., 8 Am. R'y Rep., 82 (Iowa, 1875). Engraved bonds substituted for temporary printed bonds are good. McKee v. Vernon County, 3 Del., 210 (1874). Each bond shares pro rata in the distribution. Hodge's Appeal, 84 Pa. St., 359 (1877).

⁴ Claffin v. South Carolina R. R., 8 Fed. Rep., 118 (1880).

⁵Bondholders are bound to take notice of what is indorsed and "of what was contained in their deed of mortgage, and of the laws of the state re-

ferred to in the deed of mortgage." Stanton v. Ala., etc., R. R., 2 Woods, 523 (1875); Morton v. N. O., etc., R. R., 79 Ala., 590 (1885). A bondholder is bound to take notice of ordinary matters contained in the trust deed. Guilford v. Minn., etc., R'y, 51 N. W. Rep., 658 (Minn., 1891). But he need not take notice of a provision that he cannot sue at law on his bond unless one-fourth of the bondholders assent. Id. Bondholders are bound by recitations in the deed of trust recognizing unrecorded prior liens. Skiddy v. Atlantic, etc., R. R., 3 Hughes, 320, 356 (1878). A statute referred to in the bond becomes thereby a part of the bond. Gilman v. N. O., etc., R'y, 72 Ala., 566 (1882); Morton v. N. O., etc., R'y, 79 id., 590; Commonwealth v. Chesapeake, etc., Co., 32 Md., 501 (1870). Purchasers are bound to know the contents of the mortgage which secures the hond. Caylus v. New York, etc., R. R. Co., 10 Hun, 295 (1877); affirmed, 76 N. Y., 609. The holders of consolidated bonds are, it has been held, chargeable with notice of the prior bonds and mortgages and of the terms upon which their own bonds were issued. Hence they cannot impeach the validity of the honds which were retired. Coe v. East, etc., R. R., 52 Fed. Rep., 531 (1892).

6 Although the bonds bear upon their face the words "consolidated first-mortgage bonds," yet if they refer to a mortgage, and the mortgage shows that there were underlying first-mortgage bonds

The purchasers of railroad bonds cannot rescind on the ground that the railroad has used the proceeds for purposes other than those stated in its prospectus.¹

Although the statute restricts the mortgage to certain purposes, yet if the bonds are used for other purposes, bona fide purchasers are protected.² When part of the bonds are issued the corporation may agree not to issue the others except on certain conditions.³ Bonds are sometimes issued convertible into stock, and

which were to be exchanged or taken up if possible by the consolidated bonds, the directors and the trustee are not liable for fraud in issuing the consolidated bonds, a part of the bonds having been used for new construction. Caylus v. New York, etc., R. R., 10 Hun, 295 (1877); aff'd, 76 N. Y., 609. Cf. p. 1203, notes. If the wording of the bond is different from the wording of the mortgage, the bond controls. A purchaser for value and without notice of bonds to which overdue coupons are attached is nevertheless a bona fide purchaser. Railway Co. v. Sprague, 103 U. S., 756 (1880).

Banque, etc., v. Brown, 34 Fed. Rep., 145, 196 (1888). Although bonds and a mortgage are authorized to pay debts, but are partially used to carry on the business, bona fide purchasers of the bonds are protected. Carpenter v. Black Hawk, etc., Min. Co., 65 N. Y., 43 (1875). Representations that the proceeds from the bonds will be used in a particular way do not form the basis of a suit by a bondholder. Banque, etc., v. Brown, 34 Fed. Rep., 162 (1888); Van Weel v. Winston, 115 U.S., 228 (1885). After the purpose of the issue is fulfilled, the remaining bonds may be issued for other purposes. Claffin v. South Carolina R. R., 8 Fed. Rep., 118 (1880). Cf. Belden v. Burke, infra. A mortgage reciting that it is made for the purpose of borrowing money to carry on the operations of the company is valid, although the bonds are issued in payment for the plant. Davidson v. Westchester, etc., Co., 99 N. Y., 558 (1885). Although bonds are issued expressly according to their terms to take up outstanding bonds, yet a bona fide purchaser is not bound to ascertain whether the bonds were used for that purpose. Galveston R. R. v. Cowdrey, 11 Wall., 459 (1870). But where by statute new mortgage bonds are issued to take up old bonds, purchasers of such new bonds must see to it that the old bonds are taken up, even though the new bonds are stated to be first-mortgage bonds. Spence v. Mobile, etc., R'y, 79 Ala., 576 (1885). The understanding of a bondholder as to the use of the funds does not bind the corporation. Ives v. Smith, 3 N. Y. Supp., 645 (1888).

² Where bonds and a mortgage are prohibited except to pay debts, but instead of that are partially used to carry on the business. bona fide purchasers of the latter are protected. Carpenter v. Black Hawk, etc., Min. Co., 65 N. Y., 43 (1875); Lord v. Yonkers, etc., Co., 99 N. Y., 547 (1885). Where a company has power to mortgage but not to give bills of exchange, a mortgage securing bills of exchange is good as security for the money represented by the bills of exchange. Scott v. Colburn, 26 Beav., 276 (1858).

³ In general all the bonds share equally in the proceeds of a foreclosure sale; but where the corporation agreed with the first purchasers to issue only \$10,000 per mile, although the mortgage provided for a much larger issue, a purchaser of bonds in excess of that amount who purchases with knowledge of the above agreement will share in the proceeds only after such first purchasers' bonds have been paid. McMurray v. Moran, 134 U. S., 150 (1890),—the court

sometimes stock is issued convertible into bonds. The questions connected with such issues are considered elsewhere. The unissued bonds of a corporation cannot be attached for corporate debts. Bonds may be taxed, and an attachment may be levied on them at the place where they actually are, but not at the place where the corporation is and they are not.

A suit at law will lie for the conversion of bonds,⁵ or a suit in equity for their value; ⁶ but an equitable suit does not lie to rescind a sale of worthless bonds. A suit at law for damages is the proper remedy.⁷

There is no particular form in which the bonds of a corporation must be drawn. In order to be negotiable they of course must contain the essential features of negotiable paper.⁶

stating also that the mortgage might have provided for priority among the bonds if it had been so drawn.

¹ See § 283, supra.

² An attachment of unissued bonds is not good. Richardson v. Green, 133 U. S., 30, 47 (1890); Coddington v. Gilbert, 17 N. Y., 489 (1858); Barnes v. Mobile, etc., R. R. Co., 12 Hun, 126 (1877); Sickles v. Richardson, 23 id., 559 (1881).

³ See ch. XXXIV, supra. The state cannot tax mortgage bonds held by non-residents. City of Davenport v. Miss., etc., R. R., 19 Iowa, 539 (1861); Commonwealth v. Chesapeake, etc., R. R., 27 Gratt. (Va.), 344 (1876). Contra, Maltby v. Reading, etc., R. R., 52 Pa. St., 140 (1866); Case of State Tax on Foreignheld Bonds, 15 Wall., 300 (1872); Murray v. Charleston, 96 U. S., 432 (1877).

⁴ Negotiable bonds held outside of the jurisdiction of the court cannot be attached by serving the attachment on the corporation which issued the bonds. Von Hesse v. Mackaye, 55 Hun, 365 (1890); aff'd, 121 N. Y., 694. Garnishee process does not lie against the company on bonds since the debtor may have sold them. Junction R. R. v. Cleneay, 13 Ind., 161 (1859).

⁵ For the allegations in an action for the conversion of a bond, see Saratoga, etc., Co. v. Hazard, 55 Hun, 251 (1889); aff'd, 121 N. Y., 677. Where bonds are loaned to use temporarily

upon an agreement to return them when called for, and the member of the firm to whom they are delivered uses them for his own purposes, he converts them. Birdsall v. Davenport, 43 Hun, 552 (1887).

⁶A suit by an equitable owner of bonds to recover the bonds, or their value, is properly brought in equity. Phelps v. Elliott, 29 Fed. Rep., 53 (1886).

⁷ United States Bank v. Lyon County, 46 Fed. Rep., 514 (1891). Concerning fraud inducing the purchase of bonds, see §§ 140, 157, supra. A bill in equity is proper to rescind when third parties with notice are to be reached. Banque, etc., v. Brown, 34 Fed. Rep., 145, 196 (1888).

⁸ See § 411, *supra*, concerning these requisites; also, § 768, *sub.*, concerning the various decisions on the negotiability of corporate bonds.

The following is an approved form of a railroad bond, coupon, etc. :

GENERAL MORTGAGE GOLD BOND.

Know all Men by these Presents, That the Chicago, Milwaukee & St. Paul Railway Company is indebted to the bearer, or, if registered, to the registered holder of this bond, in the sum of One Thousand Dollars, which indebtedness it promises to pay, in United States gold coin of the present standard of weight and fineness, on the first day of May, A. D. 1989, at its office in

The bonds may be payable to the bearer. If the payee of the bond is left blank, the holder may fill in his name; but if it is pay-

the city of New York, with interest thereon from the first day of May. A. D. 1889, at the rate of - per centum per annum, payable in like gold coin, semi-annually, on the first day of January and July in each year, at said office in the city of New York, on the presentation and surrender of the annexed coupons, as they severally become due. If the obligor or its successors shall make default in the payment of any semi-annual interest on this bond for six months from the day it becomes due, then the principal hereof shall, at the election of the Trustee or Trustees, as provided in the mortgage securing this bond, become due and payable, and may at once be enforced against the Company or its successors.

All payments upon this bond of both principal and interest are to be made without deduction for any tax or taxes which said railway company may be required to pay or to retain therefrom, by any present or future laws of the United States of America or any of the States thereof, said railway company hereby covenanting and agreeing to pay any and all such tax or taxes.

This bond is one of a series of honds of the same tenor and date, the payment of which is secured by a mortgage deed of trust, duly executed and delivered by the Chicago, Milwaukee & St. Paul Railway Company, the obligor, to the United States Trust Company of New York, bearing date May 1, 1889.

This bond shall pass by delivery, or by transfer upon the transfer books of the Company in the city of New York. After registration of ownership certified hereon by the transfer agent of the Company, no transfer, except on the books of the Company, shall he valid, unless the last transfer is to bearer, which shall restore transferability by delivery; and it shall continue subject to successive registrations, and transfers to bearer as aforesaid, at the option of each holder. Or the holder may, at his option, surrender the annexed coupons to the Company to be canceled, and have this bond registered and such cancellation certified hereon; and thereafter it shall not be transferable to hearer, but

the interest shall be payable to the registered holder hereof, on the first day of January, April, July and October in each year, at the office of the Company in the city of New York.

This hond shall not be valid until it shall have been authenticated by the certificate indorsed hereon, duly signed by said trustee or its successor or successors.

In Witness Whereof, the said Chicago, Mil waukee & St. Paul Railway Company has caused its corporate seal to be hereto affixed, and the same to be attested by its President or Vice-President and Secretary or Assistant Secretary.

MILWAUKEE. WIS., May 1, 1889.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

By — —,
President.

ATTEST

Secretary.

(COUPON.)

On the first day of — the Chicago, Milwaukee & St. Paul Railway Company will pay to bearer — dollars in gold coin of the United States, at its office in New York, heing six months' interest due that day on its General Mortgage gold bond No. —

Secretary.

(INDORSED.)

No. ----

\$1,000.

CHICAGO, MILWAUKEE & St. PAUL RAILWAY
COMPANY.

General Mortgage Gold Bond.
Series ——. Due May 1, 1989.
—— per cent. Interest payable first day of
January and July.

(TRUSTEE'S CERTIFICATE.)

This is to certify that the within bond is one of the series of honds issued under the mortgage executed by the Chicago, Milwaukee & St. Paul Railway Company to the undersigned as Trustee, bearing date the first day of May, 1889, and

¹ Mercer County v. Hacket, 1 Wall., 83 (1863); Savannah, etc., R. R. v. Lancaster, 62 Ala., 555 (1878). Railway bonds may be payable to the trustees in the mortgage or bearer, or may be payable to bearer alone. Ide v. Conn, etc., R. R., 32 Vt., 297 (1859). The bearer may sue on them in his own name. Id.

² A bond incomplete in that the payee is left blank may be filled in by any holder and sued upon by him where the proceeds from the sale thereof went to the company and the legislature has ratified the bond. Chapin v. Vermont, etc., R. R., 74 Mass., 575 (1857); Hubbard v. N. Y., etc., R. R., 36 Barb., 286 (1862).

able only to a specified person, a written assignment is necessary.¹ If payable to a certain person, he may indorse them in blank and then they pass by delivery.² A bondholder is a payee and not an assignee.³ The bonds should not be described as first-mortgage bonds if there are underlying mortgages on divisions of the property.⁴ The seal of the corporation is attached to the bond.⁵ This seal may be considered as merely the signature of the company, thereby rendering the "bond" merely a promissory note and subject to the short statute of limitations,⁶ or it may be considered a seal the same as an individual's seal and making the instrument a sealed instrument.⁵

The execution of the bonds should be regularly and formally authorized by the proper corporate authorities.⁸

A mortgage and bonds secured thereby may be authorized by the board of directors, and no action or authorization by the stockholders is necessary.⁹

in accordance with the provisions of said mort-

United States Trust Company of New York,

rk, Trustee.

By —— , President.

(NOTICE AS TO REGISTRATION.)

This bond may be registered in the owner's name at the office of the company in New York City, but such registration shall not restrain the negotiability of coupons by delivery. After registration no transfer shall be valid unless made on the company's books. A transfer to Bearer will restore negotiability by delivery. If the holder of this bond shall surrender the coupons to be canceled, and have such cancellation certified bereon, it shall become a registered obligation, and thereafter interest will become payable quarterly; but in that case this bond shall not again be transferable to Bearer.

No one but an Officer or Agent of the company shall write upon or mark this bond in any manner.

¹The assignee of a bond payable to a certain person or assigns cannot sue thereon where the assignment to him is not in writing. Bunting's Adm'r v. Camden, etc., R. R., 81 Pa. St., 254 (1876).

² Brainerd v. N. Y., etc., R. R., 10 Bosw., 332.

³ Rutten v. Union Pac. R'y, 17 Fed. Rep., 480 (1883). A coupon is like a note

and not like a bill. Williamsport Gas Co. v. Pinkerton, 95 Pa. St., 62 (1880).

⁴ It is fraudulent to deliver as first-mortgage bonds, bonds which are denominated "first-mortgage consolidated bends" which are not secured by a first mortgage, but are second to underlying mortgages on divisions of the property. Williamson v. N. J. South. R. R., 29 N. J. Eq., 311, 318 (1878); affirming on this point 28 id., 277. But see p. 1199, n. 6.

⁵An official may, while out of the state, cause a new seal to be made and attach it to the bonds of the corporation out of the state. Lynde v. County, 16 Wall., 6 (1872). See, also, § 722, infra.

⁶ See §§ 768, 771, infra.

7 Td.

⁸ Where the stockholders build the road with their own money and take the mortgage bonds of the company as security without formal action of the corporation authorizing it, the bonds are not good in their hands and an execution sale of the property comes in ahead of the mortgage. McKee v. Grand Rapids, etc., R'y, 41 Mich., 274 (1879). See §§ 721-725, supra.

Hodder v. Kentucky, etc., R'y, 7 Fed.
 Rep., 793 (1881). See, also, § 808.

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Bonds and mortgages may be executed outside of the state incorporating the company.¹

If no date of payment of the principal is specified it may be collected at any time.²

The various questions arising concerning the interest on and coupons of bonds are considered elsewhere.3

The court cannot change the payments of interest from currency to gold.4

Where the owner of bonds delivers them up to the company in exchange for other bonds or securities, the courts are inclined to hold that he does not thereby waive the security of the mortgage that secured the bonds but that the new bonds are subrogated to such security.

The question of whether a provision that bonds may be issued by vote of the stockholders only and on certain notice may be waived is considered elsewhere.

¹Hervey v. Ill. Mid. R'y, 28 Fed. Rep., 169 (1884).

² Hopkins v. Worcester, etc., Canal, L. R., 6 Eq., 487 (1868).

3 See § 772.

⁴ Taylor v. Atlantic, etc., R'y, 55 How. Pr., 275 (1877).

⁵ Although bonds are tsken in payment of past-due coupons, yet those who take such bonds are subrogated to and may enforce the coupons. Gibert v. Washington, etc., R. R., 33 Gratt., 586, 596 (1880). But in the case Fidelity, etc., Co. v. Shenandoah, etc., R. R., 9 S. E. Rep., 759 (Va., 1889), the same court held that where coupons are exchanged for income bonds at sixty cents on the dollar, and the clear intent was to satisfy, discharge and cancel the coupons, there is no subrogation. Second-mortgage bonds taken in exchange for coupons on first-mortgage bonds share in the proceeds as though they were such coupons. Farmers', etc., T. Co. v. Green, etc., R. R., 6 Fed. Rep., 100 (1881). Bondholders taking certificates of indebtedness do not thereby waive their mortgage security. Skiddy v. Atlantic, etc., R. R., 3 Hughes, 320, 357 (1878). See, also, Memphis, etc., R. R. v. Dow, 120 U. S., 287 (1887), where a trustee for the

second-mortgage bondholders bought for them the property at a foreclosure sale under the first mortgage. Cf. Railroad v. Soutter, 13 Wall., 517 (1871), where the sale was fraudulent. See, also, in general, Gibbes v. Greenville, etc., R. R., 13 S. C., 228; Newbold v. Peoria, etc., R. R., 5 Bradw. (Ill.), 367; Blair v. St. Louis, etc., R. R., 23 Fed. Rep., 524 (1885); Ames v. N. O., etc., R. R., 2 Woods, 206. But a person advancing interest is not entitled to be equitably subrogated. Newport, etc., Co. v. Douglass, 12 Bush (Ky.), 673. See, also, § 772; Simpson v. Taylor, 38 Fed. Rep., 682 (1889); Ex parte White, 2 S. C., 469. Where the mortgage bondholders agree to waive their lien and take new second-mortgage bonds, and the trustee does discharge the mortgage, a failure of the company to issue the new secondmortgage bonds in accordance with the contract does not entitle the old bondholders to be restored to their position as first-mortgage bondholders. They may, however, have their bonds allowed as second-mortgage bonds upon foreclosure. Fidelity, etc., Co. v. Shenandoah, etc., R. R., 11 S. E. Rep., 58 (W. Va., 1890).

6 Ch. XLIII, and § 808, infra.

§ 763. Bonds may be issued below par for cash—Bond dividend—Usury.—It is clear that at common law a corporation may issue its bonds at less than their par value.

The person to whom stock has been issued in payment for property may donate a part of it as a bonus to go with bonds sold at par by the corporation to the person taking the bonus.² In New York the corporation may donate the bonus of stock.

The issue of bonds for cash at less than their par value is sometimes allowed or prohibited by statute or by the charter.³

¹The latest case clearly establishing this rule is Gamble v. Queens Co. Water Co., 123 N. Y., 91 (1890), where the court, after speaking with reference to the stock of the company, proceeded to say: "A different rule, however, prevails in regard to the bonds of a corporation. An extended discussion of the question is not needful. We think a corporation has the power to issue its bonds at less than par. So far as this point is concerned, it is not restricted to an issue only upon payment to the company of the par value of the bouds, either in money or property for its use." To same effect, The Lyceum v. Ellis, 8 N. Y. Supp., 867 (1890). The holder of a majority of the stock of a railroad company may legally cause its bonds to be issued to himself at ninety cents on a dollar in payment of a debt due him. Gloninger v. Pittsburg, etc., R. R., 21 Atl. Rep., 211 (Pa., 1891). In New York it has been held that unissued shares of stock may be issued gratuitously to stockholders: also bonds of the company; and they are not liable for the par value or any part thereof to the corporation or corporate creditors, unless they agree to pay therefor or the statute requires payment. Even though the stockholder has sold such stock and bonds, he is not liable to corporate creditors for the amount received from the sale. He has received nothing from the corporation except a promise to pay. (Skrainka v. Allen, 7 Mo. App., 434; S. C., 76 Mo., 384, not followed.) Christensen v. Eno. 106 N. Y., 97 (1887). See, also, Handley v. Stutz, 139 U.S., 417

(1891); Christensen v. Ill., etc., Co., 5 N. Y. Supp., 925 (1889). But an agreement of a corporation to issue bonds to a subscriber as a "bonus" was held to be void and the subscription was enforced, in Morrow v. Nashville, etc., Co., 10 S. W. Rep., 495 (Tenn., 1889). In Claffin v. South Carolina R. R., 8 Fed. Rep., 118 (1880), bonds were issued at the rate of eighty cents on the dollar, and no question was raised as to the validity of the issue. In England debentures may be issued at a discount in cash. Campbell's Case, L. R., 4 Ch. D., 470 (1876), where the issue was to a director; In re Regents', etc., Co., L. R., 3 Ch. D., 43 (1876), where pledgees of debentures shared equally with purchasers, on winding up, to extent of pledge; In re Anglo, etc., Co., L. R., 20 Eq., 339 (1875); In re Inns, etc., Co., L. R., 6 Eq., 82 (1868). Where railroad bonds are issued and paid for in Confederate currency, they can be enforced only to the extent of the purchasing value of the currency thus paid, at the time of the purchase, with interest upon that value. Spence v. Mobile, etc., R'y, 79 Ala., 576 (1885). See, also, on the subject of issuing stock and bonds at less than their par value, ch. III, supra. It is illegal to issue municipal bonds at a discount. See § 98. supra. In Sherlock v. Winnetka, 68 Ill., 530, the court held a sale of municipal bonds below a fixed price to be unlawful.

² Davis v. Montgomery, etc., Co., 8 S. Rep., 496 (Ala., 1890). Cf. cases in preceding note.

¹ In regard to the constitutional pro-

It is to be borne in mind, however, that the statute against usury may invalidate bonds issued below par. A bond bearing the full legal interest and yet issued below par is practically an agreement to pay more than the legal rate of interest. Consequently this defense may be set up by the corporation.

vision against the issue of fictitious bonds and stock, the supreme court of Alabama has said: "The constitutional provision, standing by itself, does not require that the amount of money, or the value of the labor or property, for which stock or bonds are issued, shall correspond with the face value of the stock or honds for which it is issued." Hence the court held that bonds might be issued at less than their par value. provided that some substantial value was paid for them, such value to be fair and reasonable, and "not a mere trick or device to evade the law." Nelson v. Hubbard, 11 S. Rep., 428 (1892). See, also, ch. III. supra. Under a charter power to sell bonds at such a rate as the directors thought best, the bonds may be issued below par and may be issued to pay for iron at less than par value. Coe v. Columbus, etc., R. R., 10 Ohio St., 372 (1859). Where the charter allows the directors to borrow money on such terms as they deem best, they may issue and sell mortgage honds at sixty-six and two-thirds cents on the dollar. Traders' Nat'l Bank v. Lawrence Mfg. Co., 96 N. C., 298 (1887). In the case of Junction Railroad v. Bank of Ashland, 12 Wall., 226 (1870), the court held a sale of bouds below par to be valid because the statute expressly authorized it. In White Water Valley Co. v. Vallette, 21 How., 414 (1862), the court held a sale of bonds below par to be valid because the legislature had expressly approved the particular transaction. Bonds may be sold at less than par. A provision in a charter of an Illinois and Indiana railroad company that its bonds shall not be sold at less than par does not invalidate the bonds of the company issued and sold in New York at ninety cents on the dollar.

Ellsworth v. St. Louis, etc., R. R., 98 N. Y., 553 (1885). Under a power to borrow at such rate of interest and upon such terms as the directors should think fit, the directors may sell £250 debentures for £95 each. In re Regents', etc., Co., 24 W. R., 687 (1876). power to make the issue in this case was given by the "articles of association," i. e., the by-laws. Bonds may be issued at sixty-five cents on the dollar even though the constitution and statutes of the state forbid the issue of watered bonds. Subsequent consolidated bondholders cannot complain. Coe v. East, etc., R. R., 52 Fed, Rep., 531 (1892). It is legal for a company to issue \$67,000 of bonds and \$67,000 of full-paid stock even to one of its directors for \$67,000 in cash, if this was all that the whole \$134,000 of securities were worth, and if all the directors and stockholders knew of it and agreed to The provision in the California constitution relative to watered stock and bonds does not invalidate them. Union, etc., Co. v. Southern, etc., Co., 51 Fed. Rep., 840 (1892). Where a statute forbids the issue of bonds at less than seventy-cents on the dollar and they are pledged by the company at forty cents on the dollar, they are void in the hands of the pledgee. Nat'l, etc., Works v. Oconto, etc., Co., 52 Fed. Rep., 29 (1892). See, also, cases on p. 1196.

¹ Commissioners of Craven v. Atlantic, etc., R. R. Co., 77 N. C., 289 (1877), where a stockholder brought action to have declared void railroad bonds so issued. In the case of Schermerhorn v. Talman, 14 N. Y., 93 (1856), the court came to the same conclusion, and said that the sale of the securities (certificates of deposit in that case) is not a sale, but a loan, and "that neither individuals nor cor-

A corporation, like any person, may at common law set up the defense of usury. But the statutes of many of the states now prohibit this defense on the part of the corporation, and in all the states the courts go to the extreme in defeating the defense if possible.¹

porations can sell their mere promises to pay." That which is called a sale is nothing but a loan. Page 117. "If it appears that, at the end of all the payments, the lender will have received more than his principal, with lawful interest, the contract is usurious." Page 121. See, also, Neuse, etc., Co. v. Commissioners of Newburgh, 7 Jones' L. R. (N. C.), 275 (1859). In Sturges v. Stetson, 1 Biss., 246 (1858), McLean, J., in a railroad case, says: "From the authority given to the directors to sell notes, bonds, scrip and certificates for the payment of money or property which the company had previously received as donations, or in payment of the subscriptions to the capital stock, above or below par, an argument is drawn that stock may be disposed of to subscribers for less than \$50 a share. It appears to me the provision authorizes an inference in conflict with the one drawn. If bonds or other instruments for the payment of money be transferred at less than their face, with legal interest on the entire sum, in payment for the money loaned, it would be usurious, and this was the reason for the above provision. Without it the sale of the bonds, etc., would have been illegal." Bonds may be issued at less than their par value where corporations are forbidden by statute from setting up the defense of usury. Stevens v. Watson, 4 Abb, App. Dec., 302 (1865). Where the charter authorizes the company to borrow money "on such terms as might be agreed upon by the parties," twelve per cent. interest may be agreed upon. Morrison v. Eaton, etc., R. R., 14 Ind., 110 (1860). If the rate of interest is legal where the corporation exists and the bonds are payable, there is no usury, although the rate is higher than in

other states where suit is brought. Butler v. Edgerton, 15 Ind., 15 (1860). Cf. Butler v. Myer, 17 id., 77 (1861). Where the bonds of a corporation were sold for cash by the corporation for eighty-seven and one-half cents on the dollar, with an agreement that if other bonds were sold at a less rate within a certain time, any difference would be paid to the first vendee, and bonds were sold later at seventy-one cents on the dollar, a suit will not lie by the first vendee to recover the sixteen and one-half cents on the dollar. The issue below par was held to be usurious. The Ohio statute relative to such issues was held to apply to domestic corporations. McGregor v. Covington, etc., R. R., 1 Disn. (Ohio), 509 (1857).

¹ For various statutes on this subject, see Dakota R. Civil Code 1883, § 464; Iowa, 1 R. Code 1880, § 1283; Maine, R. S. 1883. ch. 51, § 56; Minnesota, Stats. 1878, p. 382, § 71; Nebraska, Comp. Stat. 1885, ch. 16, § 117; New Jersey, 2 R. S. 1877, p. 931, § 108; Wisconsin, R. S. 1878, § 1690. Many states have no usury laws. See Jones on Mortg., § 633. A charter provision authorizing the corporation to issue securities at not over seven per cent. interest does not prevent the company borrowing money at a greater rate of interest. Union Nat'l Bank v. Wheeler, 60 N. Y., 612 (1875). "A foreign corporation sued in New York state cannot avail itself of the statute of limitations." Boardman v. Lake Shore, etc., R. R., 84 N. Y., 157, 185 (1881). See, also, Curtis v. Leavitt, 15 N. Y., 1, 66 (1857); Central Gold, etc., Co. v. Platt, 3 Daly, 263; Graham v. Atlantic, etc., Co., N. Y. Daily Reg., Oct. 14, 1884. The courts are inclined to extend the application of laws which forbid a corporation from setting up the defense of usury. Junction R. R. v. Bank of Where a corporation has used its surplus earnings to improve its property, it may issue bonds to its stockholders as a dividend in lieu of a cash dividend.¹

§ 764. Bonds issued below par for property or construction work—Construction contracts and performance.—It is customary to issue the bonds of a corporation in payment for property or construction work. In fact this is the favorite mode of issuing bonds at less than their par value. The real value of the property or construction work being uncertain, it is difficult to detect the real price

Ashland, 12 Wall., 226 (1870); Cromwell v. County of Sac, 96 U. S., 51 (1877). Coupons at an illegal rate do not prevent a recovery of the sum actually loaned and legal interest. Phil., etc., R. R. v. Lewis, 33 Pa. St., 33 (1859). A foreign corporation cannot set up the statute of limitations in New York. Rathbun v. Northern C. R. R., 50 N. Y., 656 (1872). But any corporation as assignee of a usurious contract may set it up. Merchants', etc., Nat'l Bank v. Commercial, etc., Co., 49 N. Y., 635 (1872).

¹ In the case of Wood v. Lary, 124 N. Y., 83 (1890), the court sustained the court below in refusing to cancel a mortgage and bonds, the bonds having heen issued as a bond dividend to preferred stockholders. S. C., 47 Hun, 550; State v. Baltimore, etc., Co., 6 Gill (Md.). 363 (1848); Frank v. Edison, etc., Co., N. Y. L. J., January 16, 1892; id., January 12, 1892. The case of Swift v. Smith, 3 Cent. Rep., 899 (Md., 1886), is in point. In that case a person had purchased all the stock of a corporation and paid for it by notes secured by a mortgage of the corporation on all of its property. The corporation became insolvent. A general creditor of the corporation attacked the mortgage, but the court held that it was legal and could be enforced by the person to whom the notes were given. The court said: "A man can certainly do what he pleases with his own property, if he does not thereby prejudice any of the rights of subsisting creditors. It does not appear that any existing creditors were injuriously affected thereby." Where scrip dividends convertible into bonds run to the holder. the holder may sue upon them in his own name. Chaffee v. Rutland R. R. 55 Vt., 110, 139 (1882). A railroad corporation may issue certificates of indebtedness, which the company agrees to redeem in money or bonds. Where the president causes the board to order a gratuitous distribution of bonds among the stockholders, though they hold fivesixths of the stock, there being dissenting stockholders, the company may enjoin foreclosure. Virginia, etc., Co. v. Mercantile T. Co., 12 N. Y. Supp., 529 (1890). Where three persons own all the stock of a company, two of them may buy the stock of the third and give the company's notes in partial payment for the same. The transaction is legal inasmuch as no one is injured and all consent. Neither subsequent purchasers of the stock, nor those who become stockholders after the notes are paid, nor stockholders who consent to the arrangement, can complain of it. Schilling, etc., Co. v. Schneider et al., 19 S. W. Rep., 67 (Mo., 1892). See, also, Boston, etc., Co. v. Bankers', etc., Co., 36 Fed. Rep., 288; aff'd, 147 U.S., 431. If on demand the company does not deliver the bonds, the holder may sue for the money. Pusey v. N. J. R. R., 14 Abb. Pr. (N. S.), 434 (1873). A corporation cannot have its mortgage and bonds declared void on the ground that they were issued to its stockholders, and were mostly "water," in violation of a constitutional provision. Memphis, etc., R. R. v. Dow, 19 Fed. Rep., 388 (1884); aff'd, 120 U.S., 287.

at which the bonds are issued; and when it is borne in mind that bonds may be issued below par even when issued for cash, the safety of issuing bonds far below par in payment for property or construction work becomes apparent. The courts have quite uniformly sustained such issues of bonds even though the value of the property or construction work is far less than the par value of the bonds ¹

¹In the case White Water Valley Canal Co. v. Vallette, 21 How., 414 (1862). the court held that bonds issued in payment for the completion of a canal were legal, although the sum for which they were issued was largely greater than the estimated cost of the work. In that case the bonds were issued at ahout fifty cents on the dollar. Boston, etc., Co. v. Bankers', etc., Tel. Co., 36 Fed. Rep., 288; affirmed, 147 U.S., 431 (1893). In that case the defendant in order to control the American Rapid Telegraph Company, bought the stock of the latter company and paid for it by giving to the vendor stockholders' first-mortgage bonds on all the property of the American Rapid Telegraph Company, those bonds being issued to the defendant under the defendant's contract with the American. etc., Company to construct new lines, etc. When the bondholders came to foreclose, the defense was set up that the transaction was fraudulent. ultra vires. illegal, etc. But the court upheld the bonds and enforced the mortgage. A delivery of bonds as payment in advance for services to be rendered in selling other bonds cannot be rescinded, where by subsequent agreement a loan with the bonds as collateral was negotiated; the bonds to be subsequently sold. American, etc., T. Co. v. Toledo, etc., R'y, 47 Fed. Rep., 343 (1890). The plan of issuing large quantities of stock and bonds of a railroad company to a contractor, the bonds being all "water," is declared illegal in Central Trust Co. v. N. Y. City, etc., R. R., 18 Abb. N. C., 381, 395 (1887), holding, also, that the full amount of the bonds can be claimed only by bona fide holders without no-

tice, and that the other bonds will be paid only in proportion to the actual value of the property given to the company for them. The celebrated case of Columbus, etc., R. R. v. Burke is in point here. It appears that in July, 1881. Burke purchased the entire capital stock (except seven shares which seem to have been lost) of three coal-carrying railroad companies in Ohio and consolidated them. He owned also the stock of another coal and railroad company. Accordingly he caused the consolidated company to issue \$8,000,000 of its mortgage honds in payment and purchase of the stock of the coal and railroad company, which was worth less than \$1,500,000. He then sold the bonds and kept the proceeds. The bonds recited on their face that they were for double tracking, equipment and improvement purposes. No default was ever made on the bonds. They passed into bona fide hands. The consolidated company also passed into other hands. In 1887 or thereabouts the company commenced suit against Bnrke and others to compel an accounting and to reach the stock of the company which Burke had paid for out of the proceeds of the \$8,000,000 of bonds. A preliminary injunction against his transferring the stock was obtained, and his motion to dissolve this injunction was denied. Columbus, etc., R'y v. Burke, 19 Week. L. Bull., 27 (Ohio, 1887). Subsequently the case was withdrawn from the courts and submitted to three arbitrators. These arbitrators decided in 1888 that the company had no remedy. Id., 20 Week. Law Bull., 287. Then a bona fide holder of some of the bonds brought

Generally a large amount of stock is issued together with a quantity of bonds in payment for the property or construction work. Upon the insolvency of the company, the bonds having passed into the hands of bona fide holders, these holders after realizing what they can from the property seek to hold the contractors liable for the par value of the stock on the theory that it has never been paid for. The great weight of authority, however, holds that the contractors are not liable on the stock whether they have disposed of it or not.¹

a suit in equity in the New York courts to compel Burke to account to the corporation for the value of the bonds so taken by him. A demurrer to the bill was overruled. Belden v. Burke, N. Y. L. J., Nov. 3, 1890. Upon the trial of this case, however, the suit was dismissed, chiefly on the ground that the plaintiff bondholder was estopped by the fact that the chain of title of his bonds ran through the guilty parties themselves, and on the ground that the negotiability of the bonds did not render the mortgage negotiable. Id., Oct. 13, '92, rev'd Oct. 13, '93. Next came a suit at law by the company to compel the associates of Burke - the parties to whom he sold the bonds - to pay over the proceeds of the bonds. The court directed a verdict for the defendants chiefly on the ground that all the stockholders had assented to the transaction. Columbus, etc., R'v v. Lanier, N. Y. L. J., Feb. 4, 1893. Where a corporation agrees to pay for a railway by bonds upon the same and does not fulfill, the vendor may hold it liable for the full par value of the bonds although they are worth less than par. Texas, etc., R'v v. Gentry, 8 S. W. Rep., 98 (1888). See, also, next note.

1 Where all the stock and a large quantity of bonds are issued by a rail-road corporation to its contractor in payment for the construction of the road, the contractor is not liable to corporate creditors on the stock, even though the bonds were a sufficient consideration for building the road, unless the corporate creditors prove that the stock at the time of its issue had a real

or market value. "If, when disposed of by the railroad company, it was without value, no wrong was done to creditors." Even the Missouri constitution and statutes do not change this rule. Fogg v. Blair, 139 U.S., 118 (1891); Van Cott v. Van Brunt, 82 N. Y., 535 (1880). The doctrine laid down in Van Cott v. Van Brunt was approved in Coe v. East, etc., R. R., 52 Fed. Rep., 531 (1892). It is legal for a railroad company to issue bonds and stock in payment for the construction of its road. If all the parties assent no one can complain. "As the stock was issued as a part of the consideration for construction it cannot be said that it was taken without value given." The par value is immaterial. "The fact that they were created for an expenditure less than the par value of the aggregate issues of capital stock and bonds does not affect the question at all." Barr v. N. Y., etc., R. R., 125 N. Y., 263 (1891). There are a few cases to the contrary. In the case of Northwestern, etc., Ins. Co. v. Cotton, etc., Co., 46 Fed. Rep., 22 (1891), the court held that where property worth \$157,000 is turned into a corporation for \$200,000. payable in \$125,000 of stock and \$75,000 of bonds, the creditors of the company might hold the parties liable on the stock as though it were unpaid stock, and the creditor is presumed not to have known of the transaction when he contracted the debt. Where a railroad worth \$112,000 is sold to a new corporation for \$1,120,000 of bonds and all its capital stock, the transaction is fraudulent. The bondholders may obtain In several of the states there are constitutional and statutory provisions to the effect that fictitious bonds and stock shall be void. The purpose of these provisions was to prevent the issue of bonds and stock at a price far below par. The courts, however, have practically construed them away.

judgment against the company on their bonds and then compel the stockholders to pay the full par value of their stock. Preston v. Cincinnati, etc., R. R. Co., 36 Fed. Rep., 54 (1888). In the case of Lloyd v. Preston, 146 U.S., 630 (1892), aff'g 36 Fed. Rep., 54 (1888), where the owner of a railroad sold it to a newly organized corporation for stock and bonds, the par value of which were fifty times the real value of the railroad, the bondholders and other creditors who had obtained judgment against the corporation, the execution being returned and satisfied, may hold the party receiving the stock liable thereon on the ground that the subscription price of such stock has never been paid. The court said: "The entire organization was grossly fraudulent from first to last, without a single honest incident or redeeming trait." The court also said: "It having been found, on convincing evidence, that the overvaluation of the property transferred to the railway company by Harper, in pretended payment of the subscriptions to the capital stock, was so gross and obvious as, in connection with the other facts in the case, to clearly establish a case of fraud, and to entitle bona fide creditors to enforce actual payment by the subscribers, it only remains to consider the effect of the defenses set up."

¹See ch. III, § 47, supra. Thus, although the constitution of Arkansas prohibits the issue of stock and bonds except for value, and declares void all fictitious stock and bonds, the supreme court of the United States held that although property worth only \$1,300,000 was turned in to a corporation for \$1,300,000 of stock and \$2,600,000 of bonds, yet that the bonds were valid. Memphis,

etc., R. R. Co. v. Dow, 120 U. S., 287. The court said: "Recurring to the language employed in the Arkansas constitution, we are of opinion that it does not necessarily indicate a purpose to make the validity of every issue of stock or bonds by a private corporation depend upon the inquiry whether the money, property or labor actually received therefor was of equal value in the market with the stock or bonds so issued. It is not clear, from the words used, that the framers of that instrument intended to restrict private corporations - at least when acting with the approval of their stockholders - in the exchange of their stock or bonds for money, property, or labor, upon such terms as they deem proper; provided. always, the transaction is a real one. based upon a present consideration, and having reference to legitimate corporate purposes, and is not a mere device to evade the law and accomplish that which is forbidden. We cannot suppose that the scheme whereby the appellant acquired the property, rights and privileges in question, for a given amount of its stock and bonds, falls within the prohibition of the state constitution. The beneficial owners of such interests had the right to fix the terms upon which they would surrender those interests to the corporation of which they were to be the sole stockholders," See, also, the important case of Peoria, etc., R. R. v. Thompson, 103 III., 187 (1882), where a very large amount of bonds and cash was given to a contractor for construction work, and the bonds were upheld by the court, although prohibited by a constitutional provision. similar to that in Arkansas, passed upon in the case cited supra. In the case of Coe v. East, etc., R. R., 52 Fed. Rep., 531 In Ohio the issue of bonds at less than par to a director is made illegal.¹ The invalidity of some of the bonds, however, does not render invalid the mortgage securing the bonds.²

(1892), the court held that the above provision in Alabama against watered stock and bonds did not invalidate bonds although \$10,000 of bonds and \$10,000 of stock were issued for every mile of road constructed, even though it cost much less than \$20,000 cash per Where \$100,000 of bonds and \$125,000 of stock are issued in payment of construction work of the value of \$121,000, the bonds are valid and may be enforced by bona fide purchasers. Wood v. Corry, etc., Co., 44 Fed. Rep., 146 (1890). This last case held, also, that only the state could object to an issue of "watered" stock and bonds as being in violation of this constitutional provision. In the case of Brown v. Duluth, etc., R'v, 53 Fed. Rep., 889 (1893), the court refused to enjoin an issue of stock, and refused to cancel stock already issued, although \$900,000 of bonds and \$945,000 of stock were issued for construction work which cost \$580,000. The court so held, although the statute required the stock to be fully paid, and prohibited issues except for property actually received. The plaintiff, however, was a holder who purchased with full knowledge of the facts. The court said: "This statute was not intended to prevent or interfere with the usual method of raising money to build railroads, or for any legitimate corporate purpose. It is not to be construed as obstructive to the extent of restricting and hampering corporations in their internal management, and embarrass them in procuring means to carry out the legitimate purposes of the corporation; and unless it appears that, under the guise of building its road, bonds and stock of the defendant company are to be issued and put upon the market fraudulently, that do not and are not intended to represent money

and property, this corporation is not prohibited from entering into a real transaction, based upon a present consideration, and having reference to legitimate corporate purposes," court also said that "such a provision does not necessarily indicate a purpose to make the validity of every issue of stock or bonds by a corporation depend upon the inquiry whether the money. property or labor actually received therefor was of equal value in the market with the stock or bonds so issued." A contractor who receives bonds in payment of construction work, and sells them, cannot claim that they are void as contrary to the statute prohibiting "watered" bonds. Reed's Appeal, 16 Atl. Rep., 100 (Pa., 1888). Where a consolidated company of New York and Pennsylvania issues bonds in New York, fictitiously, such bonds cannot be enforced in Pennsylvania, since they are void by its constitution. A foreclosure in New York of the mortgage securing the bonds may be set aside and the bonds declared void. Pittsburgh, etc., R. R. Co.'s Appeal, 4 Atl. Rep., 385 (Pa., 1886). In the case of Pittsburgh, etc., R. R. v. Rothschild, 4 Cent. Rep., 107, decided by the supreme court of Pennsylvania in 1886, the court held that bonds issued in contravention of section 7, article 16, of the constitution were void and the mortgage securing them was void, and a foreclosure of such mortgage in New York, where the interstate railroad ran, was not good as to the part of the railroad in Pennsylvania. A purchaser of stock that has voted for an issue of "watered" bonds and stock is estopped from complaining, even though the issue was prohibited by the constitution of the state - Pennsylvania, Wood v. Corry, etc., Co., 44 Fed. Rep., 146 (1890). Section 3313 of the Revised Statutes Where bonds have been illegally or fraudulently issued the court will allow those which are in the hands of the guilty parties, or persons taking with notice, to be collected only for such amounts as were actually received therefrom by the corporation. Bona fide holders may collect the par value.

Where bonds are issued to a contractor in payment for work which he afterwards fails to complete, the bonds cannot be enforced unless they have passed into bona fide hands.²

of Ohio sets forth that "all capital stocks, bonds, notes or other securities of a company purchased of a company by a director thereof, either directly or indirectly, for less than the par value thereof, shall be null and void." In Zabriskie v. Cleveland, C. & C. R. R. Co., 23 How., 381 (1859), this provision was held not to affect the liability of a guarantor of such bonds. But in Union Trust Co. v. N. Y., etc., R. R. Co., 1 R'y & Corp. L. J., 50 (Ohio Com. Pl., 1887), the court, in applying this statute, held that, where fifty millions of paid-up stock and fifteen millions of bonds are given to a syndicate of which a director is a member, for eighteen millions of money, the stock and bonds and the mortgage securing the bonds are void.

1 Thomas v. Brownville, etc., R. R., 109 U. S., 522 (1883). See Union Trust Co. v. N. Y., etc., R. R. Co., 1 R'y & Corp. L. J., 50 (Ohio Com. Pl., 1887). The courts will require substantial equity to be done to the persons receiving "watered" bonds before requiring them to account for the bonds. Thus, although bonds are irregularly issued to a contractor, yet his contract is not held invalid unless he is repaid the sums actually expended in good faith by him under the contract. Porter v. Pittsburg, etc., Co., 120 U. S., 649, 672 (1887). See, also, §§ 744, 765, and ch. XXXIX; Kappner v. St. Louis, etc., R. R., 5 Biss., 287.

² State v. Brown, 6 Atl. Rep., 172 (Md., 1885); Silliman v. Fredericksburg, etc., R. R., 27 Gratt. (Va.), 119 (1876); Chicago, etc., R'y v. Loewenthal, 93 Ill., 433 (1879), holding that the mortgage becomes invalid. Where a contractor who is paid

in stock assigns the stock and then fails to complete the contract, the assignee who took with full knowledge of the contract is not entitled to the stock, the contract saying that if it was not performed it should be null and void. Sargent v. Kansas, etc., R. R., 29 Pac. Rep., 1063 (Kan., 1892). Where, according to contract, bonds are issued to a contractor in payment for work before the work is done, a purchaser or pledgee of the bonds from him is protected, even though he took the bonds with full knowledge of all the facts. Mercantile T. Co. v. Zanesville, etc., R'y, 52 Fed. Rep., 342 (Ohio, 1892). It is no defense to bonds in bona fide hands that they were issued to a contractor for work which he did not finish in the time agreed upon. McElrath v. Pittsburg. etc., R. R., 55 Pa. St., 189 (1867). Where a contractor who has been paid in bonds in advance does not perform, and by compromise he gives up all the bonds except a few which it is agreed he may retain, such compromise cannot afterwards be repudiated by the company. Oregon, etc.. R. R. v. Forrest, 128 N. Y., 83 (1891). The court will not enjoin a corporation from selling its bonds and stock, although a contractor is entitled to receive them after his contract work is finished. The theory of this case is that the court could not compel the contractor to perform, and hence will not enjoin the other party. Peto v. Brighton, etc., R'y, 1 H. & M., 468 (1863). When one telegraph company agrees to extend the lines of another telegraph company and agrees to take pay therefor in advance in bonds of the latter § 765. Bona fide purchasers of bonds issued at less than their par value are protected.— The courts go very far in protecting bona fide holders of corporation bonds, and will nphold and enforce such bonds under almost all circumstances. The defense that the bond was issued below par does not avail as against a bona fide holder.

company, and then exchanges the bonds for the stock of the latter corporation, a subsequent mortgagee of the first corporation cannot attack the validity of the bonds and mortgage of the property of the second corporation. Boston, etc., Co. v. Bankers', etc., Co., 36 Fed. Rep., 288 (1888). The case Boston, etc., Co. v. Bankers', etc., Co., 36 Fed. Rep., 288, was affirmed sub nom. United Lines Tel. Co. v. Boston, etc., Co., 147 U. S., 431. The court said in regard to the method of issuing the stocks and bonds: "It violated no principle of law and no rule of good morals." Bonds which are to be issued for building an extension must be delivered when the extension is completed. San Antonio, etc., Co. v. Busch, 21 S. W. Ren. 164 (Tex., 1893). Where a road agrees to issue bonds and fails to do so, the measure of damages is the highest market price of the bonds between the time they should have been delivered and the time of the trial, with interest thereon, irrespective of the price which was to be paid for the bonds. San Antonio, etc., Co. r. Busch, 21 S. W. Rep., 164 (Tex., 1593). Although a party to whom bonds and stock have been sold or issued to be paid for in instalments has paid in part and is unable to pay the remainder, the vendor cannot rescind and demand back the securities unless he returns the money already American Water-works Co. r. Venner, 18 N. Y. Supp., 379 (1892). Where a corporation deposits stock with its treasurer to be delivered in payment for property according to contract, the treasurer is liable in trover for the value of the stock if he refuses to deliver the stock to the party after such party has completed the contract. McDonald v. McKinnon, 52 N. W. Rep., 303 (Mich., 1892). See, also, § 24, supra. Form of

a syndicate contract to build the Sonthern Pennsylvania Railroad. Action by a member to break it up. No injunction pendente lite. Bagaley v. Vanderbilt, 16 Abb. N. C., 359 (1885).

¹Conpon bonds of a railroad company "payable to bearer pass by delivery: and a bona fide purchaser of them before maturity takes them freed from any equities that might have been set up against the original holders of them. The barden of proof is on him who assails the bona fides of such purchase." Kneeland v. Lawrence, 140 U. S., 209 (1891): Ellsworth r. St. Louis, etc., R. R. Co., 98 N. Y., 553 (1885), where the issue below par was even prohibited by statute: Ex parte Chorley, L. R., 11 Eq., 157 (1870); Phil., etc., R. R. Co. r. Lewis, 33 Pa. St., 33 (1859) -- two cases in which the corporation received nothing for the bonds: Woods v. Lawrence County, 1 Black, 386 (1861); Mercer County v. Hacket, 1 Wall., 83 (1863); Whitney v. Peay, 24 Ark., 22 (1862), a case of pledge of bonds. A bond like a note purchased by a bona fide party may be enforced at its par value although purchased at less than the par value, Cromwell r. County of Sac, 96 U. S., 51 (1577): Bronson v. La Crosse, etc., R. R., 2 Wall., 283 (1863); Alexander r. Atlantic, etc., R. R. 67 N. C., 198 (1872); Railway Co. v. Sprague. 103 U.S. 756 (1880), where nothing was received by the corporation for the bonds; Grand Rapids, etc., R. R. v. Sanders, 17 Hun, 552 (1879). After many years' delay in foreclosing such a lien, the court will scrutinize closely the validity of the bonds. A purchaser of the bonds at from three to twenty cents on the dollar, after such ineffectual foreclosure, and after the unpaid accrued interest nearly equaled the principal, is not a bona fide purchaser, and if the

§ 766. Fraudulent issues of bonds and issues to the directors or through directors who are "dummies" or to construction companies in which the directors are interested.— It is an old and well established principle of law that a director is disqualified from contract-

original issue was for no consideration he cannot enforce them. But a bona fide purchaser from him, and any subsequent purchaser from such bona fide purchaser, may enforce the bonds. Bona fides must be proved in such a case. Simmons v. Taylor, 38 Fed. Rep., 682 (1889). A purchaser may be bona fide although he took the bonds in exchange for other bonds worth only ten cents on the dollar. Morton, etc., Co. v. Selma, etc., R'y, 79 Ala., 590 (1885).

Bona fide purchasers of bonds from a contractor are not affected by the fact that he did not complete the work according to contract, for which he received the bonds in payment. McElrath v. Pittsburg, etc., R. R., 55 Pa. St., 189 (1867). The fact that the proceeds received from the sale of the bonds are misappropriated by the stockholders does not affect the validity of the bonds in bona fide hands. North Car. R. R. v. Drew, 3 Woods, 692 (1879). The bona fide purchaser is not affected by the fact that the president sold the bonds and used all the proceeds for his individual purposes. Phil., etc., R. R. v. Lewis, 33 Pa. St., 33 (1859). Where bonds have been illegally or fraudulently issued the court will allow those which are in the hands of the guilty parties or persons taking with notice only for such amounts as were actually received therefor by the corporation. Bona fide holders may collect the par value. Thomas v. Brownville, etc., R. R., 109 U. S., 522 (1883). See Union Trust Co. v. N. Y., etc., R. R. Co., 1 R'y & Corp. L. J., 50 (Ohio Com. Pl., 1887). Bona fides is not presumed where the fraudulent issue has been proved. Gilman v. New Orleans, etc., R. R., 72 Ala., 566 (1882). Where overdue railroad mortgage bonds, which belong to the railroad company, are bought at forty cents on

the dollar from the vice-president of the company after suit to foreclose has been begun, and a receiver has taken possession of the mortgaged property. the purchasers of such bonds are not bona fide holders where inquiry on their part would have shown that the vicepresident had no authority to sell the bonds. American, etc., Co. v. St. Louis. etc., Co., 42 Fed. Rep., 819 (1890). person who purchases four bonds of \$1,000 each for \$150 is bound to inquire into the legality of the issue. Riggs v. Penn., etc., R. R., 16 Fed. Rep., 804 (1883). Where bonds have been declared void for fraud a partner of one of the conspirators is not a bona fide purchaser, when he took the bonds in payment of construction work. Smith v. Florida, etc., R. R., 43 Fed. Rep., 731 (1890). Where a purchaser of bonds knows that he is purchasing from an agent of the corporation and that the agent intends to use the proceeds for his private purposes, he is not a bona fide purchaser. Chew v. Henrietta, etc., Co., 2 Fed. Rep., 5 (1880). Where the holder is not a bona fide purchaser be stands in the shoes of his vendor, and where the officers use the corporate bonds to pay the debts of other corporations illegally, the court will order the bonds and mortgage canceled, there being no bona fide holders of the bonds. City of Chicago v. Cameron, 120 Ill., 447 (1887). The bona fide purchaser of municipal bonds may enforce them, although the railroad to which they were issued sold them at a discount of twenty-five per cent. contrary to the charter. Wood, etc., v. Lawrence County, 1 Black, 386 (1861). A partner of one of the contractors who is a party to a fraudulent issue of bonds was held not to be a bona fide purchaser under the facts in the case. Smith v. Florida, etc., R. R., 43 Fed. Rep., 731 ing with his corporation. He is acting as a trustee, and as trustee cannot contract with himself as an individual. In England it is held that a director may buy bonds at less than par.²

Among the many acts and contracts which he thus is disqualified from doing is that of purchasing from the corporation its bonds at less than par. Any stockholder may object to such bonds even though they were issued to the directors for construction work. Upon such objection, the mortgage securing the bonds being under foreclosure, the court will allow the bondholders taking with notice to prove only such part of the bonds as represent actual cash invested, while bona fide holders may enforce their bonds for the full par value.³

If, however, all the stockholders assent and the general creditors of the corporation are not injured, the issue is legal.⁴ In

(1890), a case involving the bonds which were passed upon in Schutte v. Railroad, 103 U. S., 127, and Trask v. Railroad, 124 id., 515. Though the directors fraudulently issue bonds to another railroad to build the latter, and the latter uses the proceeds to purchase control of the former, the bona fide holders of the bonds are protected. State v. Brown, 6 Atl. Rep., 172 (Md., 1885). Bonds issued below par or without consideration are nevertheless valid in bona fide hands. Ex parte Chorley, L. R., 11 Eq., 157 (1870).

1 See ch. XXXIX, infra.

²In re Champagnie, L. R., 4 Ch. D., 470. A purchaser at ninety cents on the dollar of bonds issued to a director at seventy cents is protected, even though he was informed of the facts. Union, etc., Co. v. Southern, etc., Co., 51 Fed. Rep., 840 (1892).

³Thomas v. Brownville, etc., R. R., 109 U. S., 522 (1883). As to bona fide holders, see notes supra. See, also, Wardell v. Union, etc., R. R., 103 U. S., 651 (1880); 4 Dill., 339. Where the incorporating act requires all the proceeds of sales of lots by a cemetery company to be used for embellishments, and the directors proceed to buy land for a consideration of \$500,000 in bonds, of which bonds \$480,000 are turned back by the vendor to the directors, who divide them among

themselves, the bonds are void in the hands of directors. The directors in this case had erected over the entrance to the cemetery a statue of Immortality. and had done so "with great pomp and solemnity." Campbell v. Cypress, etc., Cemetery, 41 N. Y., 34 (1869). Bonds may be issued by a corporation to a director as security for a debt from it to him. A director cannot buy bonds from the corporation at less than par, except at the risk that the company will undo the transaction. A director must give up bonds which he takes as a bonus on his subscription. But the bona fide purchasers may enforce them. Duncomb v. N. Y., etc., R. R., 84 N. Y., 190 (1881). Fraud in issuing them to a director does not affect a bona fide purchaser. Hulett's Case, 2 J. & H., 306 (1862). For a case that carefully considers the facts which render certain bonds legal and others fraudulent, see Bronson v. La Crosse R. R., 2 Wall., 283 (1863). Seven years' delay in complaining that the directors issued bonds to themselves for no consideration and then foreclosed and bought the road in is fatal. Burgess v. St. Louis, etc., R. R., 12 S. W. Rep., 1050 (Mo., 1890). On this subject of laches see, also, ch. XLIV, supra,

4 Bonds issued at their full par value to the president in payment for work done by him under a contract between Ohio this disqualification of directors from purchasing from the corporation its bonds at a discount is embodied in the statutes, and the bonds are declared not merely voidable but absolutely void. It is of course legal for the company to sell its bonds to stock-holders.²

A more difficult question arises when bonds are issued to persons who control the directors of the company, such directors being mere "dummies" of the persons to whom the bonds are issued. There have been decisions to the effect that bonds issued below par to the persons who have put in their "dummies" as directors of the company are invalid and may be attacked by stockholders or corporate creditors or by the corporation itself,³ If, however,

himself and his company are valid and enforceable, where all the stockholders assented to such contract. Arkansas, etc., Co. v. Farmers', etc., Co., 22 Pac. Rep., 954 (Colo., 1889). See, also, ch. XLIV, supra.

1 Union Trust Co. v. N. Y., etc., R. R., 1 R'y & Corp. L. J., 50 (Ohio Com. Pl., The court applied the statute and held that where fifty millions of paid-up stock and fifteen millions of bonds were issued to a syndicate, of which a director was a member, for eighteen millions of money, the stock, bonds and mortgage were void. The bondholders became unsecured creditors, the bona fide holders being unsecured creditors to the amount of the par value of their bonds, and interest, and the other holders being unsecured creditors to the amount actually invested by them.

²The holder of a majority of the stock of a railroad company may legally cause its bonds to be issued to himself at ninety cents on a dollar in payment of a debt due him. Gloninger v. Pittsburgh, etc., R. R., 21 Atl. Rep., 211 (Pa., 1891). A stockholder may of course purchase bonds upon their original issue by the corporation. Bergen v. Porpoise, etc., Co., 8 Atl. Rep., 523 (N. J., 1887).

³ In the case of Central Trust Co. v. N. Y., etc., R. R., 18 Abb. N. C., 381 (1887), the foreclosure of a railroad mortgage was sought. The corporation

defended against the bouds on the ground that they were issued below par to persous who controlled the board of directors by means of "duminies." The court sustained this contention and held that the bonds still in the hands of the guilty parties must be reduced in amount to the amount actually paid therefor. Judge Andrews said: "Upon principle it would seem that whatever practical difficulties might arise in ascertaining the facts in any given case, if it were proven that a board of directors had literally no wills of their own, but merely carried out the orders of a third person in making a contract, the corporation should, if it desired, be relieved from the contract, without being compelled to prove that it was fraudulent or disadvantageous to the company. It seems to be rather a dangerous doctrine to hold that, as a matter of law, a board of directors who are mere dummies can irrevocably bind a corporation by a contract with the person who has placed them in office for the express purpose of having them make the contract." In the case of Cleveland Rolling M. Co. v. Crawford, R'y & Corp. L. J. (Ill. Cir. Ct., 1891), corporate creditors sought to hold the defendant liable for corporate debts, by reason of the fact that bonds and stocks, whose par value was four times greater than the value of construction work done by defendant, had been issued to defendant for construction work, and that the corpothese decisions are correct, it is difficult to see how railroads are to be built and corporate enterprises launched. The usual way to obtain the necessary funds is by the sale of stock and bonds at less than par. and the only mode of profit to the originators, promoters and builders is by taking the construction contract or by realizing a profit by the sale of the stock and bonds. Unless there is a profit they will not undergo the labor, time and care. It is easy to declare that the board of directors must be independent of the parties who furnish the money or talent to carry the enterprise through and realize a profit, but as a matter of fact, the directors are always friends of the promoters or are "dummies" of the pro-In either case they readily vote as the promoters wish. Theoretically the principle of law laid down above may be correct. but practically it would overthrow probably nine-tenths of the railroad construction contracts. The law should render such contracts void only when they are actually fraudulent. The fraud should not be implied.

It is fraudulent for the directors to vote to issue a large amount of bonds, at less than their real value, to a construction company in which they have stock or in which they are directors. If, however, all the stockholders assent, the contract and issue are legal.2 It is fraudulent to issue bonds at less than their actual value in order to defraud other creditors and the stockholders and buy in the property cheaply at foreclosure sale.3

ration was controlled by defendant two contractors cause a railroad corpothrough "dummies." A demurrer was ration to be formed, in which one conoverruled, the court saving: "He could no more shield himself behind the nominal action of the corporation by its "dummy" board of directors than a guardian or executor de son tort could shield himself behind the accounts of the legal guardian or executor procured to be made in the name of such legal guardian or executor." Where two persons organize a railroad corporation by means of "dummy" stockholders, their clerks and employees, and put their clerks, etc., in as "dummy" directors, and these "dummies" issue all the stock and a large mortgage on the corporate property to the two promoters for construction work, one of the promoters cannot call the other to an account. The court will not aid the Jackson v. McLean's Ex'r. 13 S. W. Rep., 393 (Mo., 1890). And where

tractor becomes a director and the other directors are clerks of the second contractor, and the construction contract is made with these two by means of "dummy" intermediaries at an improvident price, one of the contractors cannot compel the other to divide the profits. Jackson v. McLean, 36 Fed. Rep., 213 (1888). See, also, ch. XXXIX, supra, § 663a.

1 See §§ 649, 663a.

² Coe v. East, etc., R. R., 52 Fed. Rep., 531 (1892).

SA foreclosure sale based on fraudulently issued bonds will be set aside as against purchasers with notice, and such purchasers held liable for the real value of the road. Drury v. Cross, 7 Wall., 299 (1868). Judgment creditors may bring an action to set aside a mortgage and to restrain a foreclosure, where the § 767. Who may complain of an issue of bonds at less than par—Stockholders—The corporation itself—Corporate creditors.—Even though the validity of an issue of bonds is questionable, yet it is not every person who can complain. A stockholder may enjoin the issue or cause it to be set aside where it is fraudulent or beyond the powers of the corporation. But all stockholders who have assented to the issue and all transferees of their stock are estopped from objecting to the bonds.

bonds secured thereby were issued to the stockholders for purposes foreign to the corporate purposes, in fraud of corporate creditors, the object being to close out the property and organize a new corporation for the purpose of going on with the business. Phenix Nat'l Bank v. Cleveland Co., 11 N. Y. Supp., 873 (1890). For an issue of bonds fraudulently by issuing them in pledge and then purchasing the bonds at a pledgee's sale, see James v. Railroad Co., 6 Wall., 752 (1867).

¹ See chs. XXXIX and XL, supra, A stockholder may object to the payment of bonds issued to other stockholders for construction work which was never performed. But bona fide holders of the bonds are protected. State v. Brown, 6 Atl. Rep., 172 (Md., 1885). Where bonds have been illegally or fraudulently issned and stockholders may object, the court will allow those which are in the hands of the guilty parties or persons taking with notice to be collected only for such amounts as were actually received therefrom by the corporation. Bona fide holders may collect the par value. Thomas v. Brownville, etc., R. R., 109 U.S., 522 (1883),

²See ch. XLIV, and § 735, supra. A subsequent purchaser of the stock cannot complain where the stock which he holds has ratified the transaction. Several of the cases cited above expressly state this to be the law, and there are many other decisions to the same effect. In the case of Matter of Syracuse, etc., R. R. Co., 91 N. Y., 1, the court said of the piaintiff stockholder who bad purchased his stock after the transaction:

"He was not a stockholder or an elector, and if it be claimed that he represents those from whom he acquired his certificate of stock, the answer is that they are the very parties who committed the wrong which the court was asked to redress," See, also, cases cited in \$\$ 40. 733. In the case of Stewart v. St. Louis. etc., R. R. Co., 41 Fed. Rep., 733, where a railroad road-bed worth \$2,000 was turned in to a corporation for \$200,000 of its notes and \$3,600,000 of its stock, the court held that the notes were good and could be collected. The court said: "It does not appear in this case that there was any deception or fraud practiced by the parties. The property was open to inspection, and the approximate cost of constructing it was easily obtainable. Its value to the company for the purpose desired was not difficult to ascertain. I find no evidence of any representations as to its value or cost or purchase price made by the parties selling: but there is record evidence that the board of directors, several months after the sale and with full knowledge of the transaction, formally approved and ratified it, and not only that, but subsequently, at a meeting of all the stockholders, the transaction was again rati-Now, who was defrauded or deceived? All parties - directors and stockholders -- assented to it; and, surely, subsequent purchasers of stock, or the corporation itself, cannot now object to it. It is true the vendors got a very large advance on the price they paid, but that is not alone the test by which the bona fides of the transaction is to be tried. To them as individuals

The attorney-general, in behalf of the state, certainly cannot enjoin the issue.¹

A judgment creditor may attack the legality of the bonds or of

the property was of little or no value. To the railroad company, it could be made worth the price paid for it; and the vendors bent every energy to make the property useful to the company and to make the enterprise successful, for their chances of making money or any other value for the property depended very largely on the result. As before remarked, parties taking stock afterwards in the company canuot complain of the purchase. The records of the company showed the transaction. was not kept a secret. There was no law compelling any person or municipality to take stock in the company unless they voluntarily chose to do so: and if they were deceived by misrepresentations of the officers, their cause of action rests on that deception and not on an attack on the original contract of purchase." A purchaser of stock that has voted for an issue of "watered" bonds and stock is estopped from complaining, even though the issue was prohibited by the constitution of the state -- Pennsylvania. Wood v. Corry, etc., Co., 44 Fed. Rep., 146 (1890). Although the bonds are sold at sixty-five to seventy cents on the dollar, and the purchaser holds a majority of the stock of the company and controls it, yet the bonds cannot be attacked by a stockholder who has acquiesced in their issue for eleven years. Alexander v. Searcy, 8 S. E. Rep., 630 (Ga., 1889).

¹Injunction is not the proper remedy for the state in objecting to ultra vires acts of corporations. Quo warranto is its remedy. See § 635. In the case of Columbus, etc., R'y Co. v. Burke, supra, the arbitrators said: "The theory that a corporation, even when exercising public franchises, holds its property upon any trust in favor of the public, was met and unqualifiedly denied by Chancellor Kent in his luminous and learned

opinion in the great case of Attornev-General v. Utica Insurance Co., 2 Johns. Ch., 471, where it was held that equity had no jurisdiction of a bill filed by the attorney-general to enjoin the defendant from carrying on the business of banking in violation of the statute. In adverting to the class of cases in which the English court of chancery had exercised control over corporations for breach of trust, Chancellor Kent pointed out that in every instance the jurisdiction had been confined to charitable institutions. He cited with evident anproval the case of The Mayor and Commonalty of Colchester v. Lotten, 1 Ves. & B., 226, which was a bill to set aside a mortgage of corporate property as unduly made by an officer of the corporation, under the corporate seal, for purposes not corporate, in which he said the lord chancellor had held that there was no instance of a trust attaching upon the ground of misapplication of funds by corporations, except in the case of corporations holding to charitable uses. 'The charge of a breach of trust,' continued Chancellor Kent, 'ought to come from, or on behalf of, the cestuis que trustent or stockholders of the company. If they are satisfied, no other person is entitled to complain. If they approve of the act of their trustees in instituting banking operations. there is no ground of any allegation of a breach of trust'" See, also, § 37. The state will not be allowed to intervene in a foreclosure suit for the purpose of preventing it on the ground that the bonds are illegal and void, and that on a reorganization a greater issue will be made. State v. Farmers', etc., Co., 17 S. W. Rep., 60 (Tex., 1891). Where \$100,000 of bonds and \$125,000 of stock are issued in payment for construction work of the value of \$121,000, the bonds are valid and may be enforced by bona

the foreclosure where the company has become insolvent and he has exhausted his remedy against it; but a subsequent mortgagee cannot, except as a judgment creditor. The corporation itself can-

fide purchasers. Wood v. Corry, etc., Co., 44 Fed. Rep., 146 (1890). In this case the court held also that only the state could object to watered stock and bonds issued upon the organization of the company in violation of the statutes.

1 Drury v. Cross, 7 Wall., 299 (1868).

Judgment creditors may bring an action to set aside a mortgage and to restrain a foreclosure, where the bonds secured thereby were issued to the stockholders for purposes foreign to the corporate purposes, in fraud of corporate creditors, the object being to close out the property and organize a new corporation for the purpose of going on with the business. Phenix Nat'l Bank v. Cleveland Co., 11 N. Y. Supp., 873 (1890). The deed of trust and bonds may be declared invalid in a suit instituted against the trustee and all known bondholders. Other bondholders cannot afterwards follow the property into other hands. Beals v. Ill., etc., R. R., 27 Fed. Rep., 721 (1886). A judgment creditor cannot attack consolidated bonds on the ground that the old bonds which have been taken up were informally and illegally issued. Coe v. East, etc., R. R., 52 Fed. Rep., 531 (1892). Although after foreclosure and purchase by the trustee and reorganization the foreclosure is declared fraudulent and void at the instance of judgment creditors, yet it is valid except as to those judgment creditors who attacked it, and hence a new foreclosure need not be had. Chicago, etc., R. R., 8 Biss., 514 (1879). In Drury v. Cross, supra, a person who was a general creditor at the time of the foreclosure sale, but became a judgment creditor after the sale, caused the sale to be set aside as fraudulent on the ground that most of the bonds were issued without consideration, and for the purpose of "wrecking" the company for the benefit of the directors, who were in-

dorsers of the company's paper. The case James v. Railroad, 6 Wall., 752 (1867). was to the same effect. The court, at the instance of judgment creditors, set aside the sale because of the \$2,000,000 of bonds on which the foreclosure was obtained only \$200,000 were bona fide and enforceable. But a decree invalidating the sale does so only as to complaining judgment creditors, and not as to other creditors or bondholders, or the company itself. Barnes v. Chicago, etc., R'y, 112 U. S., 1 (1887). A foreclosure and reorganization, the latter being agreed upon before the foreclosure, by the terms of which the bondholders and stockholders buy the property at the foreclosure suit, and then organize a new company to own it is fraudulent as against the unsecured creditors of the company, and they may cause the stockholders' interest to be applied to their debts. Railroad v. Howard, 7 Wall., 392 (1868). "If one creditor objects to the claim of another creditor, and succeeds in showing it to be invalid, such claim does not stand good as against other creditors who interpose no objection to it. The opposition of one inures to the benefit of all." Duncan v. Mobile, etc., R. R., 3 Woods, 567 (1877). Although a mortgage and a foreclosure thereof, and a purchase thereunder by the mortgagee, are declared void as a fraud on creditors of the company, except as to bona fide holders of the bonds, yet it is merely voidable, and a sale of the property to satisfy another debt bars the right of such mortgagee to recover for liens which it had paid. Such payment was a payment of liens on its own property. Barnes v. Chicago, etc., R'y, supra.

² Where a third mortgage is made expressly subject to a second mortgage, the third mortgagee in his suit to foreclose cannot attack the validity of the second-mortgage bonds. Bronson v. La

not, unless some of the stockholders object; 1 but it is held that a receiver may.2

Even if the bonds, and hence the mortgage, are held to be invalid, the court may retain jurisdiction of the property.3

§ 768. The bonds of a corporation payable to order or bearer are negotiable.— A bona fide purchaser of such bonds is protected not only against defenses set up by the corporation,4 but also against the claims of prior owners of the bonds. This class of bonds are negotiable like promissory notes. and this feature of negotiability

Crosse, etc., R. R., 2 Wall., 283 (1863). Where one telegraph corporation holds the bonds of another and exchanges the bonds for the stock of the latter corporation, a subsequent mortgagee of the first corporation cannot attack the validity of the bonds and mortgage on the property of the second corporation. Boston, etc., Co. v. Bankers', etc., Co., 36 Fed. Rep., 288 (1888). Although certain persons, being directors and owners and in control of a railroad company, cause it to make a construction contract with a company which they also control, yet if all stockholders assent, subsequent consolidated bondholders cannot object that a part of the old issue of bonds was issued below par aud was fraudulently and illegally issued. Coe v. East, etc., R. R., 52 Fed. Rep., 531 (1892).

¹ Columbus, etc., R. R. v. Burke, supra. In a suit between the corporation and bondholders to test the validity of the bonds, stockholders are not proper parties. Des Moines Gas Co. v. West, 50 Iowa, 16 (1878). Where a trustee sells at great sacrifice, and at the sale makes statements disparaging the title, and the purchaser is a former trustee of the mortgage, the court set the sale aside. Equitable Trust Co. v. Fisher, 106 Ill., 189 (1883). The legislature has no power to validate a foreclosure sale which is invalid by reason of fraud. White, etc., R. R. v. White, etc., R. R., 50 N. H., 50 (1870).

² A receiver may bring an action to determine the validity of bonds issued by the corporation of which he is re- lature having ratified "the proceed-

ceiver. Hubbell v. Syracuse, etc., Works. 42 Hun, 182 (1886). In the case Shaw v. Railroad, 100 U.S., 605 (1879), the court intimated that a bill of review was not the proper remedy, but the court dismissed the bill on the merits. the question being the legality of a reorganization agreement. If the bondholder charges fraud he cannot obtain relief on other grounds, the charge of fraud not being substantiated. Spies v. Chicago, etc., R. R., 40 Fed. Rep., 34 (1889). In a bondholders' and stockholders' bill to set aside an amicable foreclosure and reorganization the parties charged with participating therein must be made defendants. Ribon v. Railroad Cos., 16 Wall., 446 (1872).

3 Although the bonds are held to be invalid, yet the foreclosure suit being started aud receiver's certificates being out and all the property in the receiver's hands, the court will sell and administer the property, all parties consenting. The phrase all property "intended to be used," in the mortgage, covers material for construction, such as rails, etc. If the receiver has notes belonging to the company the court will administer them also. Farmers' L. & T. Co. v. San Diego, etc., St. Car Co., 49 Fed. Rep., 188 (1892).

4 See §§ 764-767: also § 38.

⁵ White v. Vermont & Mass. R. R. Co., 21 How., 575 (1858); Murray v. Lardner, 2 Wall., 110 (1864); Chapin v. Vermont & Mass. R. R. Co., 74 Mass., 575 (1857). In this case railway bonds payable "to --- " were held negotiable, the legisis by far the most important feature of corporation bonds. The bond of an individual is not negotiable like a note.¹

The negotiability of corporate "bonds" probably arose in the following manner: The seal may be looked upon in any one of three ways: (1) as merely the signature of the corporation, thus making the instrument one not under seal and hence a negotiable note; (2) or as corresponding to an individual's seal, making the instrument a regular bond; or (3) as being both the signature and also the seal similar to an individual seal. The first way of considering the corporate seal probably gave rise to the negotiability of corporate "bonds." In modern times, however, these instruments are called bonds and not notes.² However, the law is well

ings" whereby the mortgage was executed. Brainerd v. N. Y., etc., R. R., 25 N. Y., 496 (1862); Hackensack Water Co. v. De Kay, 36 N. J. Eq., 548 (1883); Morton v. N. O., etc., R'y, 79 Ala., 590 (1885); Grand R., etc., R. R. v. Sanders, 17 Hun, 552; Chesapeake, etc., Co. v. Blair, 45 Md., 102 (1876); Stanton v. Ala., etc., R. R., 2 Woods, 523 (1875); State v. Cobb. 64 Ala., 127 (1879): Langston v. South Car. R. R., 2 S. C., 248 In Massachusetts corporation bonds under seal are negotiable by statute. Union Cattle Co. v. International, etc., Co., 21 N. E. Rep., 962 (Mass., 1889). This statute declares negotiable all bonds or other obligations under seal for the payment of money to bearer or some person or bearer, or to order, and issued by a corporation or joint-stock Stat. 1852, ch. 76. company. calling for a bond in the future is negotiable. Goodwin v. Roberts, 1 App. Cas. 476; L. R., 10 Ex., 337 (1875), distinguishing Crouch v. Credit Foncier, L. R., 8 Q. B., 374. But trust certificates are not negotiable. Railroad v. Howard, 7 Wall., 392 (1868). Coupon bonds payable to bearer, issued by a corporation under proper authority, have all the qualities of commercial paper, and are negotiable instruments. Commonwealth v. Chesapeake, etc., Co., 32 Md., 501 (1870). Railroad bonds are negotiable. Society for Savings v. New London, 29 Conn., 174 (1860). The bonds of a manufacturing corporation are negotiable.

Lehman v. Tallassee Mfg. Co., 64 Ala., 567, 593 (1879). See, also, many cases in § 765. In England the negotiability of foreign bonds is recognized. Gorgier v. Milville, 3 B. & C., 45 (1824). The House of Lords, in London, etc., Bank v. Simmons, 66 L. T. Rep., 625 (1892), reversed 63 id., 789, and 62 id., 427, and held that bona fide holders of negotiable bonds of a corporation were protected.

¹Bonds issued by an individual, though negotiable in form, are specialties and are not negotiable. Bockes v. Hathorn, 20 Hnn, 503 (1880). The bonds of an individual when once paid cannot be re-issued. Id.

² Railway bonds "are called bonds, or railway bonds, but they are in fact, both the bonds and the coupons, mere bills or notes, and as strictly negotiable as bank notes." The court said also that they should not be under seal, but the court would disregard the seal anyway. Ide v. Conn., etc., R. R., 32 Vt., 297 (1859). The fact that an obligation for money issued by a corporation is uuder seal does not make it a bond. "It is under seal; but so, in the absence of special powers, must every instrument be which is executed by a corporation." A debenture similar to an American bond is held in England to be nothing but a promissory note. In re Imperial, etc., Co., L. R., 11 Eq., 478, 491 (1870). See, also, § 771, infra, where this same question arises in connection with the statute of limitations. The corporate

settled that the bonds of a corporation are negotiable, although the seal of the corporation is attached. The negotiability of a bond is not destroyed by the fact that the corporate seal is attached, or that the company retains the right to pay the bond before maturity, or that registration is provided for, or that it is convertible into stock, or that it is payable on or before a specified date, or that overdue coupons are attached to the bonds, or by the fact that the interest has been due and unpaid for a period sufficient to make the bonds due, if the interest had been demanded, no demands having been made. But the negotiability is destroyed by the fact that the bonds call for labor to be done, or that provision is made for extending the time of payment, or by the fact that the bonds are overdue, or by the place and method of payment being left in blank. If the purchaser took with no-

eeal upon a bond raises a presumption of a consideration. Campbell v. Cypress, etc., Cemetery 41 N. Y., 34 (1869).

¹ Conn., etc., Ins. Co. v. Cleveland, etc., R. R., 41 Barb., 9 (1863); In re General Estates Co., L. R., 3 Ch., 758 (1868). See, also, cases in preceding notes.

² Union Cattle Co. v. International Trust Co., 21 N. E. Rep., 962 (Mass., 1889).

³ Savannah, etc., R. v. Lancaster, 62 Ala., 555 (1878); Reid v. Bank of Mobile, 70 Ala., 199 (1881).

⁴ Welch v. Sage, 47 N. Y., 143 (1872); Hotchkiss v. Nat'l Bank, 21 Wall., 354 (1874).

⁵ Union, etc., Co. v. Southern, etc., Co., 51 Fed. Rep., 840 (1892).

⁶ A purchaser may be bona fide although he buys bonds two days before maturity and there are eight overdue semi-annual coupons thereon. But he is not a bona fide purchaser of such overdue coupons. Gilbrough v. Norfolk, etc., R. R., 1 Hughes, 410 (1877). Several past-due coupous on a municipal bond are sufficient to put upon inquiry a purchaser of the bond from a First Nat'l Bank v. County Com'rs, 14 Minn., 77 (1869). "The dishonor of the unpaid coupons for interest did not infect with dishonor the bond or other coupons, putting on inquiry those who in the usual course of trade, in good faith, and upon a valuable consideration, should require them." State v. Cobb, 64 Ala., 127, 158 (1879): Morton v. N. O., etc., R. R., 79 Ala., 590. The fact that an unpaid coupon is attached to a bond does not render the purchaser a non bona fide purchaser. Cromwell v. County of Sac. 96 U.S.. 51: Railway v. Sprague, 103 U.S., 756 (1880). Unpaid coupons on bonds do "not necessarily constitute notice of any invalidity in the bonds." Grand Rapids, etc., R. R. v. Sanders, 54 How. Pr., 214 (1877). "It cannot be said that the holder of the bond, with its undetached coupons, is put upon notice of a defense as to the delay because some of the coupons happen to be overdue." McElrath v. Pittsburgh, etc., R. R., 55 Pa. St., 189 (1867). It is legal for a company to issue its bonds with overdue coupons attached. Id.

⁷ Railway Co. v. Sprague, 103 U. S., 756 (1880). See, also, Morgan v. United States, 113 U. S., 476 (1885); Northampton Nat'l Bank v. Kidder, 106 N. Y., 221 (1887).

⁸ Knight v. Wilmington, etc., R. R., 1 Jones' L. (N. C.), 357 (1854).

⁹ McClelland v. Norfolk, etc., R. R., 110 N. Y., 469 (1888).

¹⁰ Vermilye v. Adams, etc., Co., 21 Wall., 138 (1874).

¹¹ Ledwick v. McKim, 53 N. Y., 307 (1873).

tice, and there were no bona fide purchasers in the line of his title, he takes subject to the equities.¹

In determining who is and who is not a bona fide purchaser the facts of each case by itself must be taken into consideration.²

Where a party purchases bonds from a bona fide holder, he

¹ Hervey v. Ill. Mid. R'y, 28 Fed. Rep., 169 (1884).

² The rule laid down in Welch v. Sage. 47 N. Y., 143 (1872), is as follows: "The law may be regarded as settled that a purchaser, for value advanced, of negotiable paper, including bonds, is not bound to exercise such care and caution as wary, prudent men would exercise. Negligence will not impair his title. It is a question simply of good faith in the purchaser. Unless the evidence makes out a case upon which a jury would be authorized to find fraud or bad faith in the purchaser, it is the duty of the court to direct a verdict." A purchaser of bonds at an auction sale, no interest having been paid for ten years, and the purchaser knowing that they had been the subject of litigation, is not a bona fide purchaser. Trask v. Jacksonville. etc., R. R., 124 U. S., 515 (1888). The amount paid for bonds as well as the value of the bonds themselves may be taken into consideration in determining whether the holder is a bona fide pur-Grand Rapids, etc., R. R. v. chaser. Sanders, 54 How, Pr., 214 (1877). Where the trustee named in the mortgage is himself the vendor of the bonds, and he sells \$4,000 of bonds for \$150, the purchaser is not a bona fide purchaser. Riggs v. Penn., etc., R. R., 16 Fed. Rep., 804 (1883). A purchaser of negotiable bonds or other commercial paper, in good faith, for valuable consideration, and before maturity, is entitled to protection, although he may have had suspicion of a defect of title or knowledge of circumstances sufficient to excite such suspicion in the mind of a prudent man, and even although he may have been guilty of gross negligence; and this protection equally extends to a mortgage or other security given for such com-

mercial paper or bond. The court said: "Two states - Ohio and Illinois - depart from the general ruling, which extends the immunity accorded to negotiable instruments to the mortgages given to secure their payment. Bailey v. Smith, 14 Ohio St., 396: Kleeman v. Frisbie, 63 Ill., 462. And in 2 Pom. Eq., \$ 708, n. 1, the reasoning of these cases is commended. Our ruling in Hawley v. Bibb, supra, is supported by the great weight of authority." Spence v. Mobile & Montgomery R'v Co., 79 Ala., 576, 587 (1885). Mere suspicion on the part of a purchaser of negotiable paper of a defect in the seller's title, or knowledge of facts which would excite suspicion in the mind of a prudent man, is not sufficient to vitiate or impair his title; there must be bad faith or something equivalent to it: and while gross negligence is not of itself bad faith, it may be evidence of it. The bonds in this case referring on their face to the deed of trust executed by the railroad company for their security, which deed expressly provided that the entire debt, principal and interest, should become due and payable within ninety days after refusal to pay the semi-annual interest due by the coupons, on demand made at the agency of the corporation in the city of New York, a purchaser having knowledge of such demand and refusal at the time he acquired the bonds cannot claim to be an innocent purchaser without notice; but when he has proved the payment of value, the onus of proving knowledge or notice of such extrinsic fact is on the party who seeks to impeach his title. Morton & Bliss v. N. O. & Selma R'y Co., 79 Ala., 590, 592 (1885). Concerning the subject of what constitutes a bona fide purchaser, see, also, § 772.

thereby becomes a bona fide holder himself, even though he had notice of defenses to the bonds.¹ A bona fide purchaser of a bond which has been stolen takes good title.²

Although there is a suit pending to restrain a mortgagor railroad company from negotiating its bonds, yet where the company does

¹ Grand Rapids, etc., R. R. v. Sanders, 54 How. Pr., 214 (1877); Northampton Bank v. Kidder, 106 N. Y., 221 (1887); Cromwell v. County of Sac, 96 U. S., 51 (1877). A holder of bonds is a bona fide holder if any prior holder thereof was a bona fide holder. Union, etc., Co. v. Southern, etc., Co., 51 Fed. Rep., 840 (1892).

² A bona fide purchaser of negotiable corporation bonds is protected even though the bonds were stolen by the Dutchess, etc., Ins. Co. vendor. Hachfield, 73 N. Y., 226 (1878). bona fide purchaser of stolen railroad Murray v. Lardbonds is protected. ner, 2 Wall., 110 (1864); Evertson v. Nat'l Bank, 66 N. Y., 14 (1876). The bona fide purchaser of stolen railroad bonds payable to bearer is protected. Carpenter v. Rommel, 5 Phil., 34 (1862). So, also, as to water-works bonds. Consolidated Assoc. v. Avegno, 28 La. Ann., 552 (1876). The bona fide purchaser of a stolen bond is protected. Gilbrough v. Norfolk, etc., R. R., 1 Hughes, 410 Buying a security bona fide twelve months after receiving notice that it had been stolen does not invalidate the purchaser's title. Raphael v. Governor, etc., 17 C. B., 161 (1855). A national bank buying government bonds which have been stolen may be bona fides although it had not paid any attention to a notice sent to it of the theft of the bonds. Seybell v. Nat'l Currency Bank, 54 N. Y., 288 (1873). Equity will compel payment of a lost bond where full indemnity is given. Force v. City of Elizabeth, 27 N. J. Eq., 408 (1876). So, also, of coupons where the bonds were destroyed by fire on a steamboat. Rogers v. Chicago, etc., R'y, 6 Abb. N. C., 253 (1878). Where bonds are lost or destroyed, the court will direct the company to issue new and suitable representations thereof to the owner upon full indemnity being given. peake, etc., Co. v. Blair, 45 Md., 102 (1876). A person losing negotiable bonds may compel the company to issue new ones to him upon giving ample indemnity, since a bona fide purchaser of the lost bonds may enforce them, and he may be a bona fide holder although he had suspicions and grounds of suspicion as to the title, and was guilty of gross negligence in not investigating, but vet acted in good faith. New Orleans, etc., R. R. v. Miss. Coll., 47 Miss., 560 (1873). See, also, Lawrence v. Lawrence, 42 N. H., 109. Where the bonds are stolen before the trustee's certificate is attached, such certificate being required by the terms of the bond, the bonds are void absolutely and there can be no bona fide purchaser of them. Maas v. Missouri, etc., R'y, 83 N.Y., 223 (1880). Lost bond will be paid if indemnity given. Variation from a reorganization agreement without foreclosure releases the signers. Miller v. Rutland, etc., R. R., 40 Vt., 399 (1867). The owner of a lost coupon may recover interest from the date when be made a demand and tendered proper indemnity. Fitchett v. North Penn. R. R., 5 Phil., 132 (1863). If stolen bonds are sold, the owner may follow the proceeds of the sale into the hands of one who takes with notice. Newton v. Porter, 69 N. Y., 133 (1877). Where negotiable bonds are stolen from the owner and they pass into bona fide hands, and then the thief obtains them by fraud from such bona fide hands and returns them to the first owner, the latter is entitled to keep them. London, etc., Co. v. London, etc., Bank, 61 L. T. Rep., 37 (1889).

negotiate them, even in violation of an injunction, the bona fide purchaser of the bonds is protected. The doctrine of lis pendens does not apply.\(^1\) A person selling bonds has no purchase-money lien on such bonds for the price thereof.\(^2\) The holder of bonds is presumed to be the bona fide holder of them,\(^3\) but this burden is easily shifted.\(^4\) The person suing on bonds payable to bearer need not show how he came by them,\(^5\) or how they were issued,\(^6\) or to whom they were first issued.\(^7\)

§ 769. Miscellaneous features of bonds — Issue in payment of the property of another corporation — Consolidations — Bondholders' suits — Bonds exchangeable into stock.— Where the bonds are secured by a mortgage on property which is taken over from an insolvent party, difficult questions arise as to the rights of creditors of that insolvent party as against the bondholders and stockholders.

¹ Farmers', etc., Co. v. Toledo, etc., Co., 54 Fed. Rep., 759 (1893).

² Farmers', etc., T. Co. v. Pine Bluff, etc. R'v. 21 S. W. Rep. 652 (Ark. 1893)

etc., R'y, 21 S. W. Rep., 652 (Ark., 1893). ³ County of Macon v. Shores, 97 U.S., 272 (1877); Murray v. Lardner, 2 Wall., 110 (1864). The holder of a municipal bond is presumed to be a bona fide holder. Kennicott v. Supervisors, etc., 6 Biss., 138 (1874). The possession of a negotiable bond is prima facie evidence of title, and ordinarily is presumptive evidence that the holder is bona fide. North Car. R. R. v. Drew, 3 Woods, 692 (1879). The burden of proof that the plaintiff is not a bona fide purchaser of bonds which he is suing on and which were stolen and the theft advertised is upon the company which is being sued. Gilbrough v. Norfolk, etc., R. R., 1 Hughes, 410 (1877). Bona fide ownership is presumed. Lehman v. Tallassee, etc., Co., 64 Ala., 567 (1879). The holder of bonds payable to "holder" is presumed to be the owner of them. Martin v. Somerville, etc., Co., 27 How. Pr., 161 (U. S. C. C., 1863). The holder of bonds payable to bearer is presumed to be the owner upon foreclosure proceedings until the contrary is shown. Chicago, etc., Land Co. v. Peck, 112 Ill., 408 (1885); Carr v. Le Fevre, 27 Pa. St., 413 (1856).

Smith v. Sac County, 11 Wall., 139

(1870); Stewart v. Lansing, 104 U. S., 505 (1881).

⁵ A holder of bonds payable to bearer need not prove how he came by them. He is presumed to be the rightful owner. Chicago, etc., R. R. v. Peck, 112 Ill., 408 (1885).

⁶ In enforcing bonds it need not be shown how much was paid for them or where they were issued. Savannah, etc., R. R. v. Lancaster, 62 Ala., 555 (1878).

⁷Where the bonds are payable to bearer, "no rule of law requires it to be shown by averment to whom such bonds, or any of them, were negotiated in the first instance." Savannah, etc., R. R. v. Lancaster, 62 Ala., 555 (1878). The bondholder need not show how much was paid for the bonds or where they were issued. Id.

8 As to this, see ch. XL, supra. Bondholders who took with notice that the property was received by the corporation from another corporation or firm in payment for stock and that the latter corporation or firm was in debt cannot hold as against such creditors. Blair v. St. Louis, etc., R'y, 22 Fed. Rep., 37 (1884). General creditors of a road that is consolidated with another have no equitable lien on the bonds issued by the consolidated company. Hervey v. Ill. Mid. R'y, 28 Fed. Rep., 169 (1884).

A railroad company is liable on its bonds although by consolidation with another company all its property has passed out of its possession.¹ The consolidated company may be made liable on the bonds.²

A contract to deliver the bonds of a company is not fulfilled by tendering the bonds of a company into which the former company has been merged by consolidation.³

Bonds are sometimes by their terms made convertible into stock. This subject is considered elsewhere.

The right of bondholders to complain of ultra vires or fraudulent acts of the corporation and directors, and in general to bring suits to protect the corporate property, is considered elsewhere.⁵

§ 770. The negotiability of the bonds extends also to the mortgage. The bonds of a corporation are negotiable, and the corporation is unable to set up many defenses against bona fide holders which it might have set up against the parties to whom the bonds were originally issued. But does this protection and negotiability extend also to the mortgage as well as the bonds? Can the corporation defend against the mortgage on grounds which it cannot set up against bona fide holders of the bonds? In the federal courts and in most of the states of the Union the corporation cannot. The mortgage follows and partakes of the negotiability of the bonds.

¹ Gale v. Troy, etc., R. R., 51 Hun, 470 (1889). As to the liability of the consolidated company under the New York statute, see Jones v. Fitchburg R'y, 50 Hun, 310 (1888); Polhemus v. Same, id., 397.

² See ch. LII, infra. The holder of a bond unsecured by mortgage cannot prevent a consolidation where such consolidation is authorized by an existing statute. The consolidated company is liable for the debts of the constituent companies, including this bonded debt; but the constituent company may place a mortgage on the property to secure other debts and still leave this bonded debt unsecured. Where a consolidated company agrees to "protect" unsecured bonds of the consolidating companies, an equitable lien is created on the consolidated company property. Tysen v. Wabash R'y, 11 Biss., 510 (1883). In suing a foreign consolidated company on bonds issued by one of the constituent companies, the statutes rendering

the former liable must be pleaded. Rothschild v. Rio Grande, etc., R'y, 59 Hun, 454 (1891).

New Jersey, etc., R'y v. Strait, 35
 N. J. L., 322 (1872).

4 See § 283. supra.

⁵ See § 735, supra, and § 830, infra.

⁶ A negotiable note secured by a mortgage enables a bona fide indorsee thereof to enforce the mortgage free from defenses that exist against the payee. Carpenter v. Longan, 16 Wall., 271 (1872). Such also is the rule where bonds are so secured and have passed into bona fide hands. Kenicott v. Supervisors, 16 Wall., 452 (1872); Chicago R'y, etc., Co. v. Merchants' Bank, 136 U.S., 268, 283 (1890); Swift v. Smith, 102 U. S., 442, 444; Collins v. Bradbury, 64 Me., 37; Towne v. Rice, 122 Mass., 67, 73; Heath v. Silverthorn, etc., Co., 39 Wis., 146 (1875). In the case Spence v. Mobile, etc., R'y, 79 Ala., 576, 587 (1885), the court said: "Two states - Ohio and Illinois - depart from the general ruling This rule of law would seem to be one of the first requirements of trade. The average corporate bond would be a very dangerous instrument if the mortgage were liable to be swept away by some defense which the bond purchaser knew nothing about. It is a wise rule of public policy which causes the mortgage to partake of the negotiability of the instrument which it secures. Nevertheless in Ohio and Illinois a contrary rule prevails.

§ 771. Suits at law on bonds — Demund of payment — Form of action — Statute of limitations.— A suit at law may be brought to obtain judgment on a bond of a corporation even though the bond

which extends the immunity accorded to negotiable instruments to the mortgages given to secure their payment." Converse v. Mich. Dairy Co., 45 Fed. Rep., 18 (1891); Swett v. Stark, 31 id., 858 (1887). "The same immunity from defenses in the hands of bona fide bolders applies to mortgages securing such bonds as to the bonds themselves." Hackensack Water Co. v. De Kay, 36 N. J. Eq., 548 (1883). The general rule is that where a negotiable note is secured by a mortgage the mortgage may be enforced by a bona fide purchaser of the note. But in some states the negotiability of the note does not extend to the mortgage. The former rule prevails in the federal courts. Myers v. Hazzard, 50 Fed. Rep., 155 (1881). The question of whether the mortgage partakes of the negotiability of the negotiable paper which it secures has not often arisen, because in most of the states the practice is to give a non-negotiable bond instead of a note for the principal debt. The early cases holding that the negotiability of the note extends to the mortgage are Reeves v. Sently, Walker's Ch. Rep., 248 (1843); Dutton v. Ives, 5 Mich., 515 (1858); Fisher v. Otis, 3 Chand. (Wis.), 83 (1850); Croft v. Bunster, 9 Wis., 503 (1859).

¹ The supreme court of Ohio, in the early case of Baily v. Smith, 14 Ohio St., 396 (1863), established the rule for that state that the mortgage did not partake of the negotiability of the note which it secured. Where bounds are delivered to a contractor to pay for work

which he never does, they are enforceable in the hands of bona fide purchasers, but the mortgage securing them is not, in Illinois. Chicago, etc., R'y v. Loewenthal, 93 Ill., 433 (1879). A bona fide purchaser of a note who takes with the note an assignment of chattels mortgaged to secure the note takes the latter subject to the equities. Commercial Nat. Bank v. Burch, 31 N. E. Rep., 420 (Ill., 1892). Railroad bonds are negotiable, and the mortgage securing them may be enforced in behalf of bona fide purchasers, even though the bonds were issued below par in violation of the statute. Peoria, etc., R. R. v. Thompson, 103 Ill., 187 (1882). If a statute prohibits the issue of bonds below par, a bona fide holder may enforce them, but the mortgage is void and he becomes an unsecured creditor. Union Trust Co. v. New York, etc., R. R. Co., 1 R'v & Corp. L. J., 50 (1887, Cleveland, Ohio, Court); Kleeman v. Frisbee, 63 Ill., 462. In Pom. Eq., § 708, note 1, the reasoning of these cases is commended. See, also, Belden v. Burke, N. Y. L. J., Oct. 13, 1892. Where by the charter all rights are to be forfeited unless the road is completed within a certain time, and it is not so completed, and the state forfeits all its rights and turns them over to another company, a mortgage of the old company falls also. Where no part of the money from the bonds was expended on the road, holders of bonds with notice get nothing. Silliman v. Fredericksburg, etc., R. R., 27 Gratt. (Va.), 119 (1876).

with many other bonds is secured by a mortgage. Nevertheless the bondholder after obtaining judgment cannot levy execution on the property covered by the mortgage. The law does not allow this as against the mortgagor nor as against the other bondholders. No demand of payment need be made.

The formalities connected with the issue of bonds depend upon the orders of the board of directors.4

The corporation cannot set up in defense to its bonds that it was irregularly incorporated.⁵

The bond may be sued upon as though it were a promissory note 6

The statute of limitations begins to run the same as on other agreements to pay money, but it is a matter of doubt whether

1 The holders of bonds which are due may sue upon them, notwithstanding they are secured by a mortgage. "The fact that a mortgage had been given as security for the debt with trusts and covenants, which a court of equity would control and enforce in a proper case, afforded not a shadow of defense. The bond was the principal debt, the mortgage the incidental security. Remedies peculiar to each exist, both in law and equity, but they do not clash and destroy each other—they co-exist." Phil. & Balt, etc., R. R. v. Johnson, 54 Pa. St., 127 (1967).

² See § 773, infra, as to coupons.

³Shaw v. Bill, 95 U.S., 10 (1877), where the corporation was insolvent. Demand of payment need not be made, alleged or proved in an action on the bond, even though the bond is payable at a certain place, but the defendant may set up that the money was there to pay the bond. Langston v. South Car. R. R., 2 S. C., 248 (1870). If the bonds are payable at the office of the company in a particular place and it has no office there, the demand may be made elsewhere. Alexander v. Atlantic, etc., R. R., 67 N. C., 198 (1872). See, also, § 773, infra, concerning demand of payment of coupons. Where the company has the right to pay off the bonds, it may do so and stop interest by depositing the

money at the place stated in the bond as the place of payment. But the offer to pay must not be conditioned on all the past-due coupons being also turned in. So held in regard to municipal bonds. Bailey v. County of Buchanan, 54 N. Y. Super. Ct., 237 (1887).

⁴ As to the right of a particular officer to sell them, see Chew v. Henrietta, etc., Co., 2 Fed. Rep., 5 (1880). If valid on their face, compliance with the charter is presumed. Nichols v. Msse, 94 N. Y., 160 (1883). See, also, ch. XLIII.

5 § 637, supra.

⁶ A corporation bond may be sued and declared upon as though it were a bill of exchange or promissory note. Ide v. Passumpsic, etc., R. R., 32 Vt., 297 A railway bond payable to bearer may be sued upon in assumpsit and set forth as a "bond." It may be joined with the common counts in indebitatus assumpsit. Ide v. Conn., etc., R. R., 32 Vt., 297 (1859). The holder of bonds payable to bearer is an original payee and not an assignee merely. Rutten v. Union P. R'y, 17 Fed. Rep., 480 (1883). For the form of complaint on a railroad bond, see Miller v. N. Y., etc., R. R., 8 Abb. Pr., 431 (1859). The holder of the bond may of course sue npon it in his own name. Carr v. La Fevre, 27 Pa. St., 413 (1856). See, also, § 761, supra.

the statute relative to sealed instruments or the statute applicable to promissory notes applies to the bonds of a corporation.¹

§ 772. Coupons and interest on bonds — Negotiability of coupons — Participation in foreclosure — Interest on overdue bonds and coupons — Purchase of coupons when presented for payment.— Nearly all bonds of corporations have attached to them coupons, representing the semi-annual or annual interest on the bonds themselves. These coupons are usually in the form of promissory notes payable to the bearer. They are generally signed by the engraved signature of the treasurer of the company. They may be detached from the bond and sold like promissory notes. They are negotiable, and a bona fide purchaser of them is protected.

¹In the case Best v. Davis Sewing Machine Co., 65 Hun, 72 (1892), it was held that the six-year statute of limitations applied to corporate bonds, the court saying: "The obligations being promissory notes and not sealed instruments, the six-year statute of limitations applies." The statute of limitations does not begin to run six months after default, merely because at that time the bondholders have an option to declare the whole sum due. Nebraska, etc., Bank v. Nebraska, etc., Co., 14 Fed. Rep., 763 (1883). See, also, § 773, infra, as to coupons; and § 846, infra.

²A lithographed signature on the coupons is good. McKee v. Vernon County, 3 Dill., 210 (1874). Coupons of bonds may be signed by a printed facsimile of a corporate officer's autograph adopted by the corporation for that purpose, though not expressly authorized by statute. Pennington v. Baehr, 48 Cal., 565 (1874).

3 Commonwealth of Va. v. Chesapeake, etc., Co., 32 Md., 501, 547 (1870); Spooner v. Holmes, 102 Mass., 503 (1869), where the coupons had been stolen; Evertson v. National Bank, 66 N. Y., 14 (1876); Connecticut etc., Ins., Co. v. Cleveland, etc., R. R. Co., 41 Barb., 9 (1863), where a guaranty of the coupon was enforced; Haven v. Grand Junction R. R. & D. Co., 109 Mass., 88 (1871), the coupons being payable to bearer;

Miller v. Rutland & Washington R. R. Co., 40 Vt., 399 (1867). To same effect and holding that detached coupons create a distinct obligation, National Exchange Bank v. Hartford, Prov. & F. R. R. Co., 8 R. I., 375 (1866): Carr v. Le Fevre, 27 Pa. St., 413, 418 (1856); Bunting's Adv. v. Camden & Atl. R. R. Co., 81 Pa. St., 254 (1876); Brainerd v. New York & H. R. R. Co., 25 N. Y., 496 (1862); Hubbard v. New York & H. R. R. R. Co., 36 Barb., 286 (1862); Commonwealth v. Chesapeake & O. R. R. Co., 32 Md, 501, 547 (1870); Langston v. South Carolina R. R. Co., 2 S. C., 248 (1870); New Albany, L. & C. P. R. Co. v. Smith, 23 Ind., 353 (1864); Junction R. R. Co. v. Cleneay, 13 Ind., 161 (1859); American File Co. v. Garrett, 110 U.S., 288 (1884); Wicks v. Adirondack Co., 2 Hun, 112 (1874); Evertson v. Nat'l Bank, 66 N. Y., 14 (1876); Galveston R. R. Co. v. Cowdrey, 11 Wall., 459 (1870). See, also, Arentz v. Commonwealth, Gratt., 754 (1868); Clark v. Iowa City, 20 Wall., 583 (1874); Walnut v. Wade, 103 U. S., 683 (1880); Thompson v. Lee County, 3 Wall., 327 (1865); Aurora City v. West, 7 Wall., 82, 105 (1868); Morris Canal & Bank, Co. v. Fisher, 9 N. J. Eq. 699 (1855), where coupons payable to bearer were held to be negotiable and the subject of pledge; Morris Canal & Bank. Co. v. Lewis, 12 N. J. Eq., 323 (1858). That coupons are negotiable,

The holder need not prove his title. But if the bonds are not negotiable the coupons are not, even though the latter are negotiable in form. If the coupon does not run to any person or order or bearer it is not negotiable. A purchaser of the coupon after

see, also, Chesapeake, etc., Canal Co. v. Blair, 45 Md., 102 (1876), where bonds were lost and representations thereof were issued by the company to the owner. Town of Cicero v. Clifford, 53 Ind., 191 (1876), a municipal bond coupon case; Gilbrough v. Norfolk, etc., R. R., 1 Hughes, 410 (1877), holding that a bona fide purchaser of stolen bonds might enforce conpons not yet due but not the overdue coupons. See, also, Dillon on Municipal Corporations for many cases relative to conpons on municipal bonds. Haven v. Grand, etc., R. R., 109 Mass., 88 (1871), where the coupon was a promise to pay to bearer. The purchaser from a bona fide purchaser is protected even though the former was not a bona fide purchaser himself. Grand Rapids, etc., R. R. v. Sanders, 54 How. Pr., 214 (1877); Miller v. Town of Berlin, 13 Blatch., 245 (1876); Northampton Nat'l Bank v. Kidder, 106 N. Y., 221 (1887). In Myers v. York, etc., R. R., 43 Me., 232 (1857), and Jackson v. York, etc., R. R., 48 Me., 147 (1858), the court held that a coupon worded the company "will pay thirty dollars on this coupon" is not negotiable, it not being to bearer or order. But a similar coupon attached to a municipal bond was held to be negotiable in Smith v. County of Clark, 54 Mo., 58 (1873), and in McCoy v. Washington County, 3 Wall. Jr., 381 (1862), a municipal bond case, where the court said that the coupon took its negotiability from the bond. Overdue coupons are not negotiable. Arents v. Commonwealth, 18 Gratt. (Va.), 750 (1868). Coupons are negotiable without indorsement, and title passes by delivery. Johnson v. County of Stark, 24 Ill., 75 (1860). As regards theft the coupons on bonds are the same as negotiable instruments, bank bills and money. The bona fide holder is protected. Spooner v.

Holmes, 102 Mass., 503 (1869). Where overdue connons from bonds stolen before maturity are sued upon, the holder must prove that he, or a bona fide purchaser prior to him, purchased the coupons before maturity. Hinckley v. Merchants' Nat'l Bank, 131 Mass., 147 (1881). Payment of interest coupons on bonds cannot be refused on the ground that. certain forged bonds are in circulation. Wood v. Consolidated, etc., Co., 36 Fed. Rep., 538 (1888). "Coupons, where payable to bearer, are promissory notes negotiable by the law merchant, and possess all the attributes of promissory notes." Cooper v. Town of Thompson, 13 Blatch., 434 (1876). In Wright v. Ohio, etc., R. R., 1 Dis. (Ohio), 465 (1857), the court held that coupons worded as "warrants for thirty-five dollars payable in New York on the first day of," etc., were not negotiable.

¹The holder of coupons suing thereon need not prove the origin of his title. He sues as holder and not as assignee. McCoy v. Washington County, 3 Wall. Jr., 381 (1862). A possession of uncanceled coupons, detached from negotiable bonds, is prima facie evidence of title, with all the rights of a purchaser. Duncan v. Mobile, etc., R. R., 3 Woods, 567 (1877).

² McClelland v. Norfolk, etc., R. R., 110 N. Y., 469 (1888), holding that under a mortgage power the majority of the bondholders might extend the time of payment of the coupons. But see Manning v. Norfolk, etc., R. R., 29 Fed. Rep., 838 (1887).

³ Jackson v. York, etc., R. R. Co., 48 Me., 147 (1858). Coupons are not negotiable if they are not payable to bearer nor to any one's order. Evertson v. National Bank, 66 N. Y., 14 (1876); Myers v. York & Cumberland R. R. Co., 43 Me., 232 (1857). In this case a coupon not it becomes due is not a bona fide purchaser.¹ Coupons stand upon the same footing as the bond in regard to the terms of the bond.² A provision in the bond that it and the coupons shall be redeemable within a certain time follows the coupons, although the latter are detached.³

The coupon, although detached from the bond, is secured by the mortgage.⁴ The coupons participate ratably in any mortgage which secures the bonds, but they are not entitled to any priority in payment over the bonds when a foreclosure takes place on all together.⁵

When coupons are presented for payment and are cashed they are held to be canceled so far as the bonds and other coupons are concerned. Even though a third person was buying them instead of the company paying them, the bondholders may insist on their mortgage lien free from these purchased coupons. The reason is that it takes two parties to make a sale, and moreover the coupon holders might have preferred to foreclose rather than to sell.⁶

payable to order or bearer was held not negotiable though taken from a negotiable bond. See, also, Clark v. City of Janesville, 1 Biss., 98 (1856), holding that a municipal bond coupon is not negotiable.

¹ Arents v. Commonwealth, 18 Gratt. (Va.), 750 (1868), holding also that a guaranty of the coupon passes to any holder. Where railroad bond coupons are stolen and are purchased after they become due, the bona fide purchaser is not protected. Wylie v. Speyer, 62 How. Pr., 107 (1881).

² Guilford v. Minn., etc., R'y, 51 N. W. Rep., 658 (Minn., 1891).

³ And a tender stops the interest on the coupons. Bailey v. County of Buchanan, 115 N. Y., 297 (1889). Detached coupons in the hands of the holders of the bonds are mere incidents of the latter and may be redeemed if the bonds may be. Id.

⁴ Miller v. Rutland, etc., R. R. Co., 40 Vt., 399 (1867); Sewall v. Brainerd, 38 Vt., 364 (1865); Stevens v. N. Y., etc., R. R. Co., 13 Blatch., 412 (1876), giving a priority in payment to the coupons. Although the coupons are detached from the bond, yet they are protected by the mortgage and secured by it. Union

Trust Co. v. Monticello, etc., R. R., 63: N. Y., 311 (1875).

⁵ Miller v. Rutland, etc., R. R., 40 Vt., 399 (1867); In re Sewall, 38 id., 364 (1865). The coupons are not entitled to. any priority of payment over the bonds on a distribution of the funds after a foreclosure. Duncan v. Mobile, etc... R. R., 3 Woods, 567 (1877). Cf. Stevens: v. N. Y., etc., R. R., supra. The acceptance of funded interest bonds for overdue coupons does not waive the mortgage security. It is a change and extension of the debt, but not of the security. Gibert v. Washington, etc., R. R., 33 Gratt. (Va.), 586 (1880). The court may with the consent of the interested parties authorize the receiver to issue certificates extending the unpaid coupons without invalidating the lien of the coupons. Skiddy v. Atlantic, etc., R. R., 3 Hughes, 320, 341 (1877). No preference is given to the coupons. Dunham v. Cincinnati, etc., R'y, 1 Wall., 254 (1863).

⁶ Iu the case Cameron v. Tome, 64 Md., 507 (1885), the court stated the law as follows: "That as against bondholders who presented their coupons for payment and not for sale, and who had the right to assume that they were paid and

A person who sells bonds with a representation that past-due coupons have been paid may be compelled to deliver up such

extinguished, a person who advances the money to take them up, under an undisclosed agreement with the company that the coupons should be delivered to him uncanceled as security for his advances, is not entitled to an equal priority in the lien, or the proceeds of the mortgage by which the coupons are secured." Although the president and manager of the corporation claims that when he paid coupons he did so from his personal funds and for the purpose of holding the coupons as unpaid and as a lien, vet where the parties presenting the coupons supposed that they were paid and the directors knew nothing to the contrary, the coupons cannot be enforced by the president. Lloyd v. Wagner, 21 S. W. Rep., 334 (Ky., 1893). In Commonwealth v. Chesapeake, etc., Co., 32 Md., 501 (1870), the court held that persons "taking up and holding" coupons as they came due under agreement with the directors, whose authority was only to obtain a loan and pay the coupons, cannot claim that the coupons are still unpaid. In the case Duncan v. Mobile, etc., R. R., 3 Woods, 567 (1877), the court allowed the purchaser of coupons to participate in the assets, although purchased when they came due and were presented for payment, where the owners presenting them knew that they were purchased instead of being paid and did not object, the court saying that the rule was that "there was no purchase unless there was an intent on the part of the original holder to sell;" but in this case there was such intent. Where coupons are presented at the place of payment and money is paid for them, such coupons cannot participate in the security as against boudbolders who supposed the coupons were so paid and canceled. This is the rule even though instead of being paid the coupons were purchased by an outside party when

they were received at the place of payment. Union Trust Co. v. Monticello. etc., R. R., 63 N. Y., 311 (1875). Coupons cashed by the mortgagor are paid as against the bondholders, although actually purchased by an outside party instead of being paid. Bockes v. Hathorn, 20 Hun, 503 (1880). A purchaser of coupons by a syndicate is not payment and cancellation of them by the company. Claffin v. South Carolina R. R., 8 Fed. Rep., 118 (1880). A person who advances money to the corporation to pay coupons cannot claim that the coupons are a lien under the mortgage unless the bondholders consented. Fidelity, etc., Co. v. West Pa. R. R., 21 Atl. Rep., 21 (Pa., 1891). Where bondholders are entitled to participate in a reorganization on a certain basis, a person purchasing coupons under an agreement with the company when they become due may be shut out of the reorganization. Child v. N. Y., etc., R. R., 129 Mass., 170 (1880). In the case Hand v. Savannah, etc., R. R., 17 S. C., 219 (1881), the court held that uncanceled coupons having been taken up by parties who advanced the money to an embarrassed corporation for that purposealthough marked paid in the company's books - these parties have an equity to claim for their coupons the benefit of the lien which originally secured them. The court also said that the recognition of this equity may be required at the hands of persons seeking the equitable powers of the court to enable them to contest the liability of the company to pay these coupons. When the parties practically know that the company is not paying out its money for the coupons, the sale is sustained and the coupons are enforceable. Ketcham v. Duncan, 96 U.S., 659 (1877). But where the parties presenting them know nothing about this, they may exclude these from participating in the assets until they are

coupons.¹ The pledgee of bonds may collect the coupons thereon as they become due.² Money deposited to pay coupons cannot be attached as belonging to the company.³ It is well settled that bonds bear interest after they become due.⁴

So also the coupons bear interest from the time when they be-

first paid. South Cov., etc., R'y v. Gest, 34 Fed. Rep., 628 (1888). Railroad coupons which are paid and so understood cannot afterwards be enforced as having been merely signed. Hollister v. Stewart, 111 N. Y., 644 (1889). It is a question of fact whether a taking up of overdue coupons was intended as a cancellation of them or only a transfer of interest. Wood v. Guarantee, etc., Co., 128 U. S., 416 (1888). Where a person pays corporate bond coupons as they become due, and takes a note of the corporation in payment, the coupons no longer exist as a corporate liability. The person cannot claim that he is secured by the mortgage which secured the coupons. South Cov., etc., R'y v. Gest, 34 Fed. Rep., 628 (1888). But where, in order to maintain the credit of a company, a director, upon presentation of its coupons for payment, pays out his own money and takes the coupons, he may enforce them, there being sufficient assets to pay all other creditors first. Haven v. Grand, etc., Co., 109 Mass., 88 (1871).

¹ And his wife may also be compelled so to do. Chicago, etc., R'y v. Turner, 44 N. W. Rep., 174 (Mich., 1889).

²The pledgees of bonds have a right to collect the coupons, although the debt which is secured by the bonds is not yet due. Such a pledgee may also start foreclosure proceedings the same as the full owner. "He only differed from an absolute owner in this: that he was bound to account for any surplus received from the bonds and coupons, over and above what was necessary to the payment of his debt." Warner v. Rising Fawn, etc., Co., 3 Woods, 514 (1878).

³ Rogers Locomotive, etc., Works v.

Kelley, 88 N. Y., 234 (1882); affirming 19 Hun. 399.

4 Interest at the legal rate as fixed by statute runs on bonds after their maturity, and commences to run on bonds and coupons from the time they fall due, even though no demand of payment is made, but of course the company may show that the money was there to pay with. Langston v. South Car. R. R., 2 S. C., 248 (1870). When the principal becomes due it continues to bear interest, unless the company is ready to pay. Price v. Great Western, etc., R'v, 4 R'v & Canal Cas., 707 (1846). Simple interest at the legal rate is recoverable on the principal of the bonds after they become due, "not upon and by virtue of the original contract, but as damages for the detention of money due." Ashuelot R. R. v. Elliot, 57 N. H., 397, 437 (1874); Laugston v. South Car., etc., Co., 2 S. C., 248 (1870); Com., etc., v. Chesapeake, etc., Co., 32 Md., 501, 551 (1870). Interest allowed on the bouds after they are declared due. Welsh v. First Div., etc., R. R., 25 Minn., 314 (1878). If bonds are redeemable and are called by the company, which, however, is unable to pay them, they continue to bear interest. Gordillo v. Weguelin, L. R., 5 Ch. D., 287 (1877). Bonds do not bear interest after they become due, and no demand is made, where the company proves that it was ready, able and willing to pay them, even though it did not set aside a specific sum for that purpose. the money being in its general account. Emlen v. Lehigh, etc., Co., 47 Pa. St., 76 (1864). Municipal bonds after maturity bear interest at the rate which they bore before maturity, even though it is in excess of the legal rate. Pruyn v. City of Milwaukee, 18 Wis., 367 (1864). come due, and no presentation or demand of payment is necessary to set this interest running, but the company is not obliged to pay interest on the coupons if it can show that it was ready and willing to pay the coupons if they had been presented for payment. There is some doubt as to whether coupons have three days of grace.

Principal bears interest unless company is ready to pay and gives notice. Price v. Great Western, etc., R'v. 16 M. & W., 244 (1847), on the ground that the debentures were practically a mortgage. See, also, Ohio v. Frank, 103 U.S., 697 (1880); Brewster v. Wakefield, 22 How., 118 (1859). The interest on the bonds after maturity is the same as that before Beckwith v. Trustees, etc., maturity. 29 Conn., 268 (1860): Cromwell v. County of Sac, 96 U.S., 51 (1877). Interest continues on the bonds from the time of foreclosure at the rate specified in the bond, although different from the statutory rate. Jackson, etc., Co. v. Burlington, etc., R. R., 29 Fed. Rep., 474 (1887). Interest is allowed up to the date of distribution. Re The London, etc., Co., 66 L. T. Rep., 19 (1892).

¹Phil., etc., R. R. v. Smitb, 105 Pa. St., 195 (1884); North Pa., etc., R. R. v. Adams, 54 Pa. St., 94 (1867), holding also that demand of payment at maturity is excused if the corporation was unable to pay; Langston v. South Car., etc., Co., 2 S. C., 248 (1870); Mills v. Town of Jefferson, 20 Wis., 50 (1865); Arents v. Commonwealth, 18 Gratt. (Va.), 750 (1868); Conn., etc., Ins. Co. v. Cleveland, etc., R. R., 41 Barb., 9 (1862), allowing same as damages for delay of payment: Welsh v. First Div., etc., R. R., 25 Minn., 314 (1878): Burroughs v. Commissioners, 65 N. C., 234 (1871); County of Beaver v. Armstrong, 44 Pa. St., 63 (1862); Commonwealth v. Chesapeake, etc., Co., 32 Md., 501, 547 (1870); Gelpcke v. Dubuque, 1 Wall., 175 (1863): Hollingsworth v.

City of Detroit, 3 McLean, 472 (1844): Walnut v. Wade, 103 U.S., 683 (1880). In Alexander v. Commissioners, 67 N. C., 330 (1872), the court said that demand was necessary before action on a nunicipal coupon, inasmuch as the changing officials necessitated such a rule, although a different rule prevailed as to individuals. But interest runs from the time of non-payment, McLendon v. . Commissioners, 71 N. C., 38 (1874); Commonwealth v. Chesapeake, etc., Co., 32 Md., 501 (1870). Coupons bear interest after their maturity. Beattys v. Solon, 64 Hun, 120 (1892); Langston v. South C. R. R. Co., 2 S. C., 248 (1870); Cromwell v. County of Sac, 96 U.S., 51 (1877): Aurora City v. West, 7 Wall., 82 (1868) the last seven cases being municipal bond cases. Cf. Rose v. City of Bridgeport, 17 Conn., 243 (1845); Jackson v. York, etc., R. R. Co., 48 Me., 147 (1858); Crosby v. New London, etc., R. R. Co., 26 Conn., 121 (1857); Johnson v. County of Stark, 24 Ill., 75 (1860). Bond coupons detached from the bond bear interest from maturity. Phil., etc., Co. v. Knight, 16 Atl. Rep., 492 (Pa., 1889). In Rhode Island the coupons bear interest from the time of demand of payment. Whitaker v. Hartford, etc., R. R. Co., 8 R. I., 47 (1864); National Ex. Bank v. Hartford, etc., R. R. Co., id., 375 (1866). Coupons bear interest from the time that the company is in default in paying them. Gibert v. Washington, etc., R. R., 33 Gratt. (Va.), 586 (1880). There are many municipal corporation cases also on this subject; and to the same effect,

order to pay money. Arents v. Commonwealth, 18 Gratt. (Va.), 750 (1868). In New York they are entitled to days of grace. Evertson v. Nat'l Bank, 66 N. Y., 14 (1876).

²Wood v. Consolidated, etc., Co., 36 Fed. Rep., 538 (1888). The coupon is deemed due on the day fixed for the payment of interest. It is not a bill of exchange although in the form of an

§ 773. Suit to collect coupons — Execution cannot be levied upon the mortgaged property — Demand of payment.— A bondholder may sue at law on an overdue coupon. But it is well-settled law that neither a mortgage bondholder nor the holder of a coupon can levy an execution upon the mortgaged property in order to enforce a judgment obtained upon the bond or coupon. There are two reasons for this rule: First, that a mortgagee at common law cannot so enforce his security; second, other bondholders and coupon holders are entitled to participate equally in the security.

City of San Antonio v. Lane. 32 Tex., 405 (1869); Town of Genoa v. Woodruff, 92 U.S., 502 (1875); City of Jeffersonville v. Patterson, 26 Ind., 15 (1866); Mc-Lendon v. Commissioners, 71 N. C., 38 (1874): Davis v. County of Yuba, 75 Cal., 452 (1888), a municipal bond case, where the interest was allowed from the time when payment was demanded. In Whitaker v. Hartford, etc., R. R., 8 R. L, 47 (1864), the court allowed interest only from the date of demand and refusal of payment. So also in City of Pekin v. Reynolds, 31 III., 529 (1863). In Corcoran v. Chesapeake, etc., Co., 1 Mac Arthur (D. C.), 358 (1874); aff'd, 94 U.S., 741, the court held that interest began to run on coupons only after demand and refusal of payment. A waiver by the state of its lien so as to make it second to other bonds and coupons is not a waiver for interest on those coupons. Corcoran v. Chesapeake, etc., Co., 1 MacArthur (D. C.), 358 (1874); aff'd, 94 U.S., 741. In Connecticut the coupon does not bear interest after maturity. Rose v. Bridgeport, 17 Conn., 243 (1845). The company may decline to pay a coupon unless it is presented and delivered up. Warner v. Rising Town, etc., Co., 3 Woods, 514 (1878). But the owner of a lost coupon may recover interest from the date when he made a demand and tendered proper indemnity. Fitchett v. North Penn. R. R., 5 Phil, 132 (1863). If the bonds are payable in England with interest at five per cent., the interest collectible after default is the legal rate in England and not the legal rate of the state wherein the railroad company is. Cogblan v. South Car. R. R., 142 U. S., 101 (1891). The trustee is not the party to demand payment of the coupons. Taber v. Chicago, etc., R'y, 15 Ind., 459 (1860).

¹ Montgomery, etc., Soc. v. Francis, 103 Pa. St., 378 (1883). A holder of coupons from railroad bonds may sue on them, and his right to do so is not taken away by the fact that they are secured by a mortgage. Manning v. Norfolk, etc., R. R., 29 Fed. Rep., 838 (1887). The holder of a coupon may obtain judgment thereon although the mortgage provides that he shall not levy execution on the road. Widener v. Railroad, 1 Weekly Notes of Cas., 472 (Pa., 1875). Suit on one interest coupon is no bar to a subsequent suit on another, though the latter was due at the time of the first suit. Butterfield v. Town of Ontario, 44 Fed. Rep., 171 (1890). The holder of coupons may sue on them even though the mortgage is being foreclosed and the principal sum mentioned in the bonds has become due. inasmuch as in the trustee's foreclosure suit no judgment for a deficiency can be granted, the trustees not suing on the bonds. Welsh v. First Div., etc., R. R., 25 Minn., 314 (1879).

²The bondholders cannot recover judgment at law and then sell out the mortgaged premises. Pugh v. Fairmount, etc., Co., 112 U. S., 238 (1884). A bondholder who has obtained judgment on his bonds cannot, by an execution levied on the property mortgaged to secure the bonds, obtain an advantage over other bondholders. Bowen v. Brecon R'y, L. R., 3 Eq., 541 (1867). In West

Other bondholders may enjoin the execution or attachment.¹ The holder of coupons need not demand payment before commencing suit thereon.²

The question whether a demand of payment is necessary before commencing foreclosure proceedings turns upon the provisions of the mortgage.³

Branch Bank v. Chester, 11 Pa. St., 282 (1849), it seems that a sale of the equity of redemption based on a judgment obtained by a bondholder for interest was upheld. The holder of coupons may obtain judgment and levy on such property as is not covered by the mortgage securing his coupons. Commonwealth v. Susquehanna, etc., R. R., 122 Pa. St., 306 (1888); Du Pont v. Bushong, 1 Weekly Notes of Cas., 378 (1875); Pennock v. Coe, 23 How., 117 (1859). A bondholder cannot obtain judgment at law on unpaid coupons or the bond, and by levy of execution sell the mortgaged railway and franchises and buy it in and turn it over to a reorganized company to operate. The state will oust such a corporation from possession. The only execution which the bondholder can levy in such a case is on property not subject to the mortgage. Commonwealth v. Susquehanna, etc., R. R., 122 Pa. St., 306, 321 (1888). Where bonds are secured by a chattel mortgage, one bondliolder cannot obtain payment from such chattels in preference to other bondholders by levying an execution on them, even though the chattel mortgage has not been recorded as required by the statutes. Fish v. N. Y., etc., Paper Co., 29 N. J. Eq., 16 (1878). One of the parties secured by a mortgage cannot levy an attachment on the mortgaged property "without alleging that the residue of the debts secured had been paid, and bringing the trustees or legal title-holders before the court." Martin v. Merriwether, 7 Bush (Ky.), 116 (1870). Where a bondholder sues on his bonds and gets judgment, and sells the company's rights by a levy of execution, the mortgage securing that bond and others still exists. Common-

wealth v. Susquehanna, etc., R. R., 15 Atl. Rep., 448 (Pa., 1888).

¹A boudholder may enjoin another bondholder from levying an execution on the property mortgaged. They are to be treated as partners, and one is not allowed to obtain an advantage over others. Moreover, they have all agreed that the property shall be sold as a whole. And again, the reorganization provision in the mortgage is a covenant that is binding. Phil., etc., R. R. v. Woelpper, 64 Pa. St., 366 (1870). A bondholder may enjoin an execution sale. Butler v. Rahm, 46 Md., 541 (1877).

² Walnut v. Wade, 103 U. S., 683 (1880); Warner v. Rising, etc., Co., 3 Woods, 514: Smith v. Tallapoosa County. 2 Woods, 574 (1874). Demand of payment need not be alleged in a suit on coupons. It is a matter of defense to the company. Phil., etc., R. R. v. Johnson, 54 Pa. St., 127 (1867). Coupons are like other commercial paper in that, although payable at a particular place, suit may be brought or foreclosure commenced on them without demand of payment at that place. So held where payment was to be "at the financial office of said company in the city of New York." Warner v. Rising Fawn, etc., Co., 3 Woods, 514 (1878).

³ No demand of payment of bonds need be made before foreclosure proceedings if an allegation is made that the company is insolvent and such demand would have been useless. Shaw v. Bill, 95 U. S., 10 (1877). No demand of payment of interest is necessary before the commencement of foreclosure proceedings. The defendant must prove payment or readiness to pay. Marlor v. Texas, etc., R'y, 21 Fed. Rep., 383 (1884). Presentation and demand of pay-

The holder of coupons, upon which he is suing, need not produce the bonds to which they were attached, nor need he be interested in them.¹ The form of action on coupons is the same as that upon promissory notes.²

The statute of limitations applicable to coupons is the same as that applicable to the bonds. This is generally twenty years.³ The statute commences to run from the time when the coupons be-

ment of coupons need not be shown in order to prove that the company had failed for more than six months to pay the interest. Savannah, etc., R. R. v. Lancaster, 62 Ala., 555 (1878). A demand of payment of coupons is necessary in order to set running a provision of the mortgage that the principal shall become due and a remedy become available six months after default. Potomac Mfg, Co. v. Evans, 6 S. E. Rep., 2 (Va., 1888). Also § 800, infra. Non-payment of coupons is no cause for foreclosure where no demand of payment is shown. Davies v. N. Y. Concert Co., 41 Hun, 492 (1886). See, also, Union, etc., Ins. Co. v. Union, etc., Co., 37 Fed. Rep., 282 (1889).

¹Thomson v. Lee County, 3 Wall., 327 (1865), "Suits on the coupons are sustained entirely independently of the bonds to which they were originally annexed. It is therefore of very little consequence whether they are promissory notes, bills, drafts or checks, for they have the same quality of negotiability as either of those instruments, and the holder sues upon them and recovers in his own name." County of Beaver v. Armstrong, 44 Pa. St., 63 (1862). It is not necessary to produce the bond, and the surrender and cancellation of the bond after the coupon was transferred does not affect the coupon. Miller v. Town of Berlin, 13 Blatch., 245 (1876). In suing on the coupons the bonds to which they were attached need not be set out. Ring v. County of Johnson, 6 Iowa, 266 (1858). The holder of a coupon may sue on it although he does not own the bond. National Ex. Bank v. Hartford, etc., R. R. Co., 8 R. L., 375 (1866); North Penn. R. R. Co. v. Adams,

54 Pa. St., 94 (1867); Commissioners v. Aspinwall, 21 How., 539 (1858); Cromwell v. County of Sac, 94 U. S., 351, 362 (1876); City v. Lamson, 9 Wall., 477 (1869). The holder of coupons who snes thereon need not produce or prove an interest in the bond itself. He should set forth the number of the bond, however, the date sum and time of payment. Kennard v. Cass County, 3 Dill., 147 (1874); City v. Lamson, 9 Wall., 477 (1869). Coupons may be sued on without producing the bonds. Commonwealth v. Chesapeake, etc., Co., 32 Md., 501 (1870); New London, etc., Bank v. Ware, etc., R. R., 41 Conn., 542 (1874). The payment of a coupon payable to bearer must be to the holder of it and not to the holder of the bond. In re-Sewall, 38 Vt., 364 (1865).

² A general count in debt is sufficient to recover on a coupon. Nat'l Ex. Bank v. Hartford, etc., R. R., 8 R. I., 375 (1866). May be proved under the common counts. Johnson v. County of Stark, 24 Ill., 75 (1860). An action in tort for the conversion of coupons lies against a purchaser 'of the same from a thief. Spooner v. Holmes, 102 Mass., 503 (1869). A single count may include several coupons. New London, etc., Bank v. Ware, etc., Co., 41 Conn., 542 (1874). In suing upon coupons they should be put in evidence. De Graaf v. Wychoff, 13 Daly, 366 (1885). For the pleading, etc., on an interest warrant, see Crosby v. New London, etc., R. R., 26 Conn., 120 (1857).

²City v. Lamson, 9 Wall., 477 (1869). "A suit upon a coupon is not barred by the statute of limitations unless the lapse of time is sufficient to bar also a come due.¹ The right of the company to pay coupons in land scrip does not prevent the holders from suing for money if the scrip is not issued.²

§ 773a. Income bonds.—A corporation may issue an "income bond," the interest on which is not payable annually, but is payable only in case there is income sufficient to pay the regular charges and interest due from the corporation and to leave a surplus which is applicable to the income bonds. An income bond differs from preferred stock in that it cannot vote; it generally is secured by mortgage; and its right to interest is more clear than that of stock to dividends. The power to issue irredeemable bonds, interest on which is to be paid after certain dividends have been declared on the stock, is a question still in dispute.

The rights of income bondholders are given, governed and determined entirely by the terms of the bonds themselves and the mortgage securing them, if such a mortgage exists.⁵

suit upon the bond." City of Lexington v. Butler, 14 Wall., 282 (1871). See, also, Huey v. Macon Couuty, 35 Fed. Rep., 481 (1888); § 771.

¹ Clark v. Iowa City, 20 Wall, 583 (1874). So held whether the coupons are detached from the bonds or not. Koshkonong v. Burton, 104 U. S., 668 (1881); Amy v. Dubuque, 98 U. S., 470 (1878); Huey v. Macon County, 35 Fed. Rep., 481 (1888). Contra where the coupon is not detached. City v. Lamson, 9 Wall., 477 (1869); City v. Butler, 14 Wall., 282 (1871). Statute of limitations on the coupons of municipal bonds begins to run from the date when the coupons became due. Huey v. Macon County, 35 Fed. Rep., 481 (1888). The statute of limitations of ten years applies to detachable interest coupons. Griffin v. Macon County, 36 Fed. Rep., 885 (1888).

² Marlor v. Texas, etc., R'y, 19 Fed. Rep., 867 (1884); Id., 21 id., 383; Barry v. Missouri, etc., R'y, 27 id., 1 (1886). Land scrip issued in payment of coupons, the coupons, however, being kept alive as collateral, should be retired and the coupons paid in money, whenever the finances of the company fully warrant it. Little Rock, etc., R'y v. Huntington, 120 U. S., 160 (1887).

³ Garrett v. May, 19 Md., 177 (1862),

upholding the giving of a mortgage which took precedence over prior income bonds.

⁴ The supreme court of Pennsylvania. by a divided court, about 1882, held that a railroad company without express authority might issue irredeemable interest-bearing bonds at a large discount, the interest to be paid only after a certain dividend had been declared on the common stock. The bonds were called "deferred income bonds." Phil, etc., R. R. Co. v. Stichter, 21 Am. L. Reg., 713. A contrary conclusion was reached in Taylor v. Phil., etc., R. R. Co., 7 Fed. Rep., 386 (1881). An "income bond" under the New York statute is secured by a lien in regard to its principal only. Its interest is unsecured. The income bondholder cannot control the discretion of the directors in paying such interest or using the funds for other purposes. Day v. Ogdensburgh, etc., R. R. Co., 107 N. Y., 129 (1887).

⁵The case of Barry v. Missouri, etc., R'y, 27 Fed. Rep., 1 (1886), considered the rights of income bondholders under the particular mortgage in that case. The income bond provided for the payment of the interest, "provided such net or surplus earnings shall be sufficient therefor." The court held that

Frequently there is difficulty in determining whether any "income" actually exists which should be applied to the payment of interest on income bonds. The same difficulty that is experienced in ascertaining whether there are net profits for a dividend is experienced in ascertaining whether there is a surplus properly applicable to income bonds. In general, the courts decide each case on the terms and conditions of the income bonds themselves. The various rights, remedies and incidents peculiar to different kinds of income bonds are set forth in the notes below.

"unless within some one of the six months' periods between the date and the maturity of the bonds net income is realized, the company is not in default, and is under no present obligation to pay interest," but nevertheless the words of the bond may give the holder the right to claim this interest at a later date, "whenever there is net income applicable thereto." It must be paid before any dividends are declared. "According to the scheme of the mortgage, as denoted by the several provisions referred to, the surplus earnings of each interest period belong to the holders of coupons for that period. If the earnings are insufficient to pay the interest in full, the holders are entitled to scrip certificates for the residue; if the net earnings more than suffice to pay the interest for the six months, the surplus falls into a general fund for the payment of holders of scrip certificates ratably: if there are no net earnings until an exercise of the power of sale under the eighth article, the unearned interest becomes principal, and is to be paid as principal out of the proceeds of the sale. The coupon-holders have the first lien upon the surplus earnings from any other for the period represented by their coupons, but as to earnings from any other period they have only the rights of certificate-holders; and whether they surrender their coupons or not, if the earnings are insufficient to pay the interest in full they stand as certificateholders for their interest unearned." The coupon-holders and the certificateholders were held to stand upon substantially the same ground. It was the duty of the company to keep its accounts so as to show the net income for each six months. The trustee was bound to see that this was done. An accounting was ordered.

¹ Passing upon the rights of income bondholders in a suit brought by them to have their interest paid, the court said: "The expenses defraved or incurred in producing the earnings for a given interest period are the only charges which can enter into the income account for that period. . . . It is preposterous to assert that the company could properly charge against income for any period during the life of the mortgage a payment or a liability incurred on account of old indebtedness existing before the mortgage was created, or arising from a loss incurred by the sale of bonds issued to pay off old indebtedness. It might with equal propriety seek to offset its whole funded debt against its income." Barry v. Missouri, etc., R'y, 27 Fed. Rep., 1 (1886). An income bondholder may obtain an accounting by the mortgagor railroad in order to determine whether there is any income applicable to his bonds. Improper items of the account will be stricken out. But where most of the income bonds have been turned in for a lower security, the complainant is eutitled to an income based only on all the income bonds as originally issued. Barry v. Missouri, etc., R'y, 34 Fed, Rep., 829 (1888). An income bondholder may file a bill for an accounting where the funds upon which he has a lien have been

§ 774. Accommodation paper cannot legally be signed by a corporation—A consideration must exist—Bona fide holders.—It is a well-established rule that a corporation cannot be bound by its signature to or indorsement or guaranty of the note or paper of

mingled with other funds and no separate account has been kept. If the directors have made no determination in the matter, it is immaterial that the mortgage provided for a final determination by them. Suit lies. Losses incurred by reason of new lines, leased lines, etc., are not to be paid before funds are set apart to pay the interest on income bonds, the income mortgage being a lien on the income of the main line. Ordinarily an income mortgage on present and future property as a security for interest is " but little more than the pledge of the good faith of the company in managing its lines." The company ordinarily under such a mortgage may improve, alter or extend its lines and may lease others without violating its obligation to the income bondholders. If the directors have neglected to ascertain whether net income exists. the court will undertake to do so. Spies v. Chicago, etc., R. R., 40 Fed. Rep., 34 (1889). Although an income bondholder is entitled to an accounting as to the income applicable to the interest on his bonds, yet, if he charges fraud against the directors, he must prove fraud or his bill will be dismissed. even though fraud need not have been alleged. Id.

In Day v. Ogdenburg, etc., R. R., 107 N. Y., 129 (1887), income bondholders were held not entitled to any surplus in one year to make up for a deficiency in the payment of interest in a prior year. The court held also that the company might take a lease of another railroad and use its income to pay the rental, and the income bondholders could not object. Where an income bondholder applies for an injunction against a misappropriation of the income of the railroad, giving figures, the injunction will be granted though in large part

the allegations are made on information and belief, if the defendant does not specifically explain the figures and merely denies the misapplication. Barry v. Missouri, etc., R'v. 36 Fed. Rep., 228 (1888). An income bondholder may enjoin an application of the company's funds to other corporate purposes, thereby affecting the payment of interest due to him. Id. The holder of coupon bonds secured by a mortgage on the income from certain lands owned by a railroad may by bill in equity subject that income to the payment of the coupons, even though the railroad has been consolidated with another and the consolidated railroad owns the lands. Rutten v. Union Pac. R'y, 17 Fed. Rep., 480 (1883). For an instance of bonds and a mortgage on the income of the property of a canal company, see Stewart v. Chesapeake & Ohio Canal Co., 5 Fed. Rep., 149 (1881). In this case a bondholder asked to have a receiver appointed for the purpose of operating the canal and applying the profits to the interest on the bonds. Mismanagement was charged. The court refused to appoint the receiver, the proof not being sufficient, but retained the suit for the purpose of compelling the company to render accounts from time to time. The court stated that the only remedy of the bondholders was a receiver, foreclosure not being possible of such a mortgage. Concerning the construction of the rights of an income bondholder, see, also, Lehigh, etc., Co. v. Central R. R., 34 N. J. Eq., 88 (1881); Thomas v. New York & Greenwood, etc., R'y, N. Y. L. J., March 28, 1891; Id., Sept. 1, 1892, where an income bondholder failed in an attack upon the honesty of the management of the company. bonds do not unnecessarily restrict the owner to payment in land scrip, where another person for the accommodation of the latter. The directors are authorized by the stockholders to do business for corporate purposes, but are not authorized to use the corporation to perform acts of friendship or accommodation to others. The accommodation indorsement, signature or guaranty of the corporation is illegal and cannot be enforced.

the company may so pay interest thereon, in any year when the income is sufficient. Unless the company declares its election to pay in scrip, the owner may sue for the money as soon as the income is sufficient. Failure of the bondholder to demand payment of the interest is no bar, he having been notified that the company could not pay it. Texas, etc., R'v v. Marlor, 123 U. S., 687 (1887). Where an income bond has its coupons payable in money or land scrip at the option of the company, and the company does not exercise its option when the coupons become due, the holder may insist on payment in money and sue therefor. It is immaterial that the mortgage is a lien on land only and not on the railroad. Marlor v. Texas. etc., R'y, 21 Fed, Rep., 383 (1884); S. C., 19 id., 867. Where the income mortgage contains no provision for the trustee taking possession, the only remedy may be "that no dividend can be declared until the interest on it is regularly paid." Union T. Co. v. Missouri, etc., R'y, 26 Fed. Rep., 485 (1880). In New York, by statute, income bonds with voting privileges may be issued. Laches on the part of the dissenting stockholder will bar his remedy. Taylor v. South, etc., R. R. Co., 13 Fed. Rep., 152 (1882). An income bondholder bringing suit to compel the corporation to account and pay his interest coupons must allege a request to the trustee in the deed of trust to bring the suit and a refusal by him. The trustee must also be joined as a party defendant. Morgan v. Kansas, etc., R'y, 15 Fed. Rep., 55 (1882).

¹Bank of Genesee v. Patchin Bank, 13 N. Y., 309 (1855); National Bank v. Wells, 79 N. Y., 498 (1880), reversing

S. C., 15 Hun, 51; Central Bank v. Empire Stone D. Co., 26 Barb., 23 (1857): Morford v. Farmers' Bank, etc., 26 Barb., 568 (1857): Bridgeport City Bank v. Empire Stone D. Co., 30 Barb., 421 (1859); Ex parte Estabrook, 2 Lowell, 547 (1877): Lafayette Savings Bank v. St. Louis Stoneware Co., 2 Mo. App., 299 (1876): West St. Louis Bank v. Shawuee Co. Bank, 95 U.S., 557 (1877), holding that a cashier is not presumed to have power to bind his bank as indorser of his personal note. The payee of such a note. in order to hold the bank, must prove that he had such power: Ætna National Bank v. Charter Oak L. I. Co., 50 Conn., 167 (1882), holding that a president has no implied power to bind his corporation as accommodation indorser: Culver v. Reno Real Estate Co., 91 Pa. St., 367 (1879); Beecher v. Dacey, 45 Mich., 92 (1881); Smead v. Indianapolis, P. & C. R. R. Co., 11 Ind., 104 (1858). A warehouse corporation has no power to indorse paper as an accommodation even for a consideration paid. A person discounting the same for the maker thereby has notice of the illegal judorsement. Park Nat'l Bank v. German, etc., Co., 116 N. Y., 281 (1889). A corporation organized for freight transfer business is not bound, and is not liable on its bond of surety for the debt of another. Even a co-surety cannot enforce contribution. Lucas v. White Line Transfer Co., 70 Iowa, 541 (1886). Corporation cannot be surety on a note which has nothing to do with its business - pure accommodation. Payee cannot collect. Hall v. Auburn T. Co., 27 Cal., 255 (1865). national bank cannot become an accommodation indorser. Nat'l Bank, etc., v. Atkinson, 55 Fed. Rep., 465 (Kan., 1893), The indorsement, however, though not enforceable by parties taking it with notice that it was for accommodation, may be enforced by bona fide holders.¹

There is, however, no rule of public policy which prohibits an accommodation indorsement of commercial paper by a corporation. Consequently, if such an indorsement is made with the knowledge and assent of all the directors and stockholders, the indorsement is valid and enforceable.²

A corporation engaged in selling manufactured goods may indorse a manufacturer's note to enable him to furnish goods.³

§ 775. Guaranty by one corporation of the bonds or dividends of another corporation — Guaranty by an individual.— One of the most important and yet difficult branches of railroad and corporation law is the question whether one railroad corporation may guaranty the bonds or dividends of another railroad corporation. After a great deal of litigation the rule has become established that such a guaranty is valid, provided it is based on a valuable consideration, and the consideration is such as the guarantor has power to receive or invest in.4

¹ Bank of Genesee v. Patchin Bank, 19 N. Y., 312 (1859), holding also that a third party is not put upon his inquiry if the paper purports on its face to be regularly indorsed in the course of business; Ex parte Estabrook, 2 Lowell, 547 (1877). A bona fide purchaser of a bill of exchange accepted for accommodation by a corporation may enforce it. Farmers' National Bank v. Sultan, etc., Co., 52 Fed. Rep., 191 (1892). To the same effect, Mechanics' Banking Ass'n v. New York & S. White Lead Co., 35 N. Y., 505 (1866), and cases cited; Central Bank v. Empire Stone D. Co., 26 Barb., 23 (1857), holding that a note made by the president and indorsed by the corporation is binding upon the corporation in the hands of one who had been induced by its agent to accept it as a transaction of the corporation and within the scope of its business. Morford v. Farmers' Bank, etc., 26 Barb., 568 (1857); Bridgeport City Bank v. Empire Stone D. Co., 30 Barb., 421 (1859); Farmers' & Mechanics' Bank v. Empire Stone D. Co., 5 Bosw., 275 (1859);

Works, 101 Mass., 57 (1869); Lafayette Savings Bank v. St. Louis Stoneware Co., 2 Mo. App., 299 (1876), holding also that in a suit on the note the burden of showing that it was taken by a third party with notice of the inability of the corporation to indorse lies upon the defendant. If the notes are signed by the president without authority, even a bona fide holder cannot enforce them. Mc-Clellan v. Detroit, etc., Works, 56 Mich., 579 (1885). A corporation cannot be an accommodation indorser. Yet a bona fide holder of the paper may hold the corporation liable. National Bank v. Young, 7 Atl. Rep., 488 (N. Y., 1886); Credit Co. v. Howe, etc., Co., 8 Atl. Rep., 472 (Conn., 1886).

² Martin v. Niagara, etc., Co., 122 N. Y., 165 (1890).

³ Holmes, etc., v. Willard, 125 N. Y., 75 (1890).

ford v. Farmers' Bank, etc., 26 Barb., 568 (1857); Bridgeport City Bank v. Empire Stone D. Co., 30 Barb., 421 (1859); holder's suit to enjoin the fullfillment of Farmers' & Mechanics' Bank v. Empire Stone D. Co., 5 Bosw., 275 (1859); in accordance with a statute authorizing Monument National Bank v. Globe ing it, failed because of the laches of

A guaranty by one railroad of the liabilities of another railroad,

the stockholder; Harrison v. Union Pac. R'v Co., 13 Fed. Rep., 522 (1882). where the guarantor was merely a stockholder in the corporation whose bonds were guarantied. The guaranty was enforced; Macon, etc., R. R. Co. v. Georgia R. R. Co., 63 Ga., 103 (1879), upholding a mortgage given by the guarantied corporation to the guarantor corporation: Madison, etc., R. R. Co. v. Norwich Sav. Ass'n, 24 Ind., 457 (1865), where the guaranty of bonds in the hands of a bona fide purchaser was sustained, the bonds having been issued to and in the name of the guarantor, although the latter acted only for accommodation: Conn., etc., Ins. Co. v. Cleveland, etc., R. R. Co., 41 Barb., 9 (1863). where an Ohio guaranty was upheld, though the required assent of the stockholder had not been obtained. Though the bonds were void, the guaranty was enforced; Arnot v. Erie R'y Co., 67 N. Y., 315 (1876); aff'g 5 Hun, 610, upholding a guaranty which the defendant had made on bonds sold by it: Railroad Co. v. Howard, 7 Wall., 392 (1868), where the guaranty by a railroad of bonds given to it by a city was upheld; Green Bay & M. R. R. Co. v. Union Steamboat Co., 107 U.S., 98 (1882), holding that nuder the charter a contract of a railroad with a steamboat company running in connection with its line by which it guarantied that the gross earnings of each of its boats should amount to a certain sum for two years was valid; Sheffield Nickel Co. v. Unwin, L. R., 2 Q. B. D., 214 (1877), where a release by a corporation of a guaranty of certain profits made to it by a person who had sold property to it was upheld. However, in Madison, etc., Co. v. Watertown, etc., Co., 7 Wis., 59 (1858), where a plank-road company guarantied and paid the debts of another plankroad company which built and owned a road over that part of the former's route which the former had not con-

structed, the guarantor was defeated in a suit for repayment from the guarantied corporation. In Simpson v. Denison, 10 Hare, 51 (1852), the stockholder of a railroad company enjoined the company from guarantving a certain dividend on all the stock of another railroad in consideration of the right to carry on the business of the latter rail-But in De Graff v. American. etc., Co., 21 N. Y., 123 (1860), a corporation was held liable on its guaranty that the patronage of the employees of the corporation should continue to a store which the corporation sold with such guaranty. A railroad corporation may guaranty and sell the bonds of another railroad company which have been given by the latter to the former company in payment of a debt. Rogers, etc., Works v. Southern R. R., 34 Fed, Rep., 278 (1888). Guarantors of bonds sold to a corporation are liable, though the corporation had no power to purchase. State of Indiana v. Woram, 6 Hill, 33 (1843). A corporation's guaranty of another corporation's bonds is an original undertaking, and may be enforced without resorting to the latter company. Phil., etc., Co. v. Knight, 16 Atl. Rep., 492 (Pa., 1889). A bank may guaranty the interest on the debentures of a company. Ex parte Booker, L. R., 14 Ch. D., 317 (1880). A lessee railroad which on the face of the bonds of the lessor agrees to pay the coupons cannot as against bona fide holders set up that its agreement was ultra vires or informally Singer v. St. Louis, etc., authorized. R. R., 6 Mo. App., 427 (1879). In the case Penn. R. R. v. Allegheny, etc., R. R., 42 Fed. Rep., 82 (1890), one railroad company agreed to purchase the coupous and bonds of another railroad company if not paid by the latter. Where one company agrees on the face of the bonds of another company to purchase the coupons and bonds as they become due, the former company cannot forewhere there is no direct consideration therefor, is not enforceable.1

close until it has fully completed the contract of purchase. Penn. R. R. v. Allegheny, etc., R. R., 48 Fed. Rep., 139 (1891).

In the case of the County of Leavenworth v. Chicago, etc., R. R., 25 Fed. Rep., 219 (1885), it appeared that the Rock Island railroad guarantied the interest on the bonds of another railroad. Where the guarantor becomes insolvent. the maker of the bonds being solvent and continuing to pay the coupons, the distribution of the assets of the guarantor will not be delayed or restricted by the possibility of future liability on the guaranty. Gav Mfg. Co. v. Gittings, 53 Fed. Rep., 45 (1892). A construction company's contract to pay certain interest on bonds, which it received in payment in advance, does not obligate it to pay interest on bonds received by it in regular payment. Foster v. Mansfield, etc., R. R., 36 Fed, Rep., 627 (1888). A guaranty that certain construction work will be done free from any lien ahead of a specified mortgage does not render the guarantor liable to parties who have furnished materials to the Holly Mfg. Co. v. New contractor. Chester Water Co., 48 Fed. Rep., 879 (1891). In March v. Eastern R. R. Co., 43 N. H., 515 (1862), where one railroad leased its entire property and franchises to another, it was held that, under the provisions of the lease, there was neither a union of interest and capital between the two roads nor any warrant of an equality of dividends between the stockholders of the two corporations. A brewing company has power to guaranty a lease of premises occupied by one of its customers, and containing fixtures mortgaged to the company. Fuld v. Burr Brewing Co., 18 N. Y. Supp., 456 (1892). A corporation organized to deal in the stock of a stockyard corporation, and hold personal and real estate, may buy competing stockyards: also may buy the stock of a conteniplated competing company: also buy, guaranty and sell the bonds of such competing company; also pay money to settle suits against the first-named stockvard company, and to bind stockvard men not to erect competing yards for a specified term of years within a certain territory; and may sell any or all of the above property and right to the first-named company. Ellerman v. Chicago, etc., S. Y. Co., 23 Atl. Rep., 287 (N. J., 1891). Where a company is in financial distress, and its creditors agree to an extension of time provided the company assumes certain private debts of the directors, the company has power to do so, but the question of good faith may invalidate the transaction. Stark Bank v. United States Pottery Co., 34

486 (1876); Rahm v. Same, 16 id., 277 (1876); Stark Bank v. U. S. Pottery Co., 34 Vt., 144 (1861), where the debt assumed was one upon which the directors were liable. A transfer company cannot guaranty credit of another person. Lucas v. White, etc., Co., 30 N. W. Rep., 771 (Iowa, 1886). A railroad has no power to guaranty dividends on the stock of an elevator company, even though the latter subscribes for railroad stock. Memphis, etc., Co. v. Memphis, etc., R. R., 5 S. W. Rep., 52 (Tenn., 1887).

¹ Penn. R. R. Co. v. St. Louis, etc., R. R. Co., 118 U. S., 290 (1885), where a distant railroad guarantied the rental of a lessor railroad to another railroad. Coleman v. Eastern Counties R'y Co., 10 Beav., 1 (1846), where a stockholder enjoined the railroad from establishing and guarantying profits to a packet line. Payee of note given by one corporation in payment of a debt due from another corporation, there being no connection or consideration between the two corporations, cannot enforce the note. Ehrgott v. Bridge Manufactory, 16 Kan.,

A corporation cannot give away its funds or guaranty certain receipts to another corporation in a different business.¹

Vt., 144 (1861). The bona fide purchaser of a note indorsed by a corporation may enforce it against the company. Central Bank v. Empire, etc., Co., 26 Barb., 23 (1857): Bridgeport, etc., Bank v. Empire, etc., Co., 30 Barb., 421 (1859). But a purchaser of a bill of exchange before it is accepted by the company is not such a bona fide purchaser. Farmers', etc., Bank v. Empire, etc., Co., 5 Bosw., 275 (1859). Where one railroad company contracts with another company to pay the interest on the bonds of the latter company, and then caused or consented to the latter company's issuing bonds with a statement in such bonds that the interest was guarantied by the former company, the former company is liable for such interest even though it was not a party to the bonds themselves. Opdyke v. Pacific R. R., 3 Dill., 55 (1874). Conpon-holders may assume that the stockholders have authorized a guaranty as required by statute. Conn., etc., Ins. Co. v. Cleveland, etc., R. R., 41 Barb., 9 (1863).

Where the guarantor of bonds is secured by a mortgage, the holder of the bonds is entitled to the benefit of the mortgage. Young v. Montgomery, etc., R. R., 2 Woods, 606 (1875). Where, under its power to lease, a railroad buys all the stock of another railroad, it may as a consideration for such stock, guaranty the bonds of the lessor railroad. Atchison, etc., R. R. v. Fletcher, 35 Kan., 236 (1886). Where a lease of one railroad to another is valid, the consideration of the lease may be the guaranty by the lessee of the bonds of the lessor. Low v. Central Pac. R. R., 52 Cal., 53 (1877). It is sufficient consideration for a guaranty that the gnarantor is the lessee of the principal debtor and the proceeds are to be used in equipping the leased road. Codman v. Vermont, etc., R. R., 16 Blatch., 165 (1879). It is a sufficient consideration for the guaranty that it was

to enable a connecting line to adopt the same gauge as the guarantving line, and thereby increase the business of the latter. Conn., etc., Ins. Co. v. Cleveland, etc., R. R., 41 Barb., 9 (1863). A railroad may gnaranty the payment of municipal bonds which are issued to aid the railroad. Railroad v. Howard, 7 Wall., 392 (1868). A gas company may be authorized by its charter to guaranty municipal bonds which are issued in its behalf. New Orleans v. Clark. 95 U.S., 644 (1877). An additional obligation in the bond. making it payable in gold, and added after the gnaranty was made, binds the company but not the guarantor. lace v. Loomis, 97 U.S., 146 (1877). The consideration of a guaranty may be the changing of the gauge of the railway whose bonds are guarantied. Zabriskie v. Cleveland, etc., R. R., 23 How., 381 (1859). A stockholder in a railway company cannot set aside the company's indorsement of another company's bonds in consideration of certain contracts between them, the indersing company having paid the interest for five years. Cozart v. Georgia, etc., R. R., 54 Ga., 380 (1875). Where the payment of the coupon is guarantied, demand of payment at the place where the coupon is payable should be made within a reasonable time after it becomes due. Arents v. Commonwealth, 18 Gratt. (Va.), 750 (1868). The guaranter of the prompt payment of the principal and interest of bonds is liable for interest on the coupons which are not paid when they become due. Phil., etc., R. R. v. Knight, 124 Pa. St., 58 (1889).

¹ Davis v. Old Colony R. R. Co., 131 Mass., 258 (1881), where the guaranty by a corporation of the expenses of a musical festival was held ultra vires. A railroad subscription to a state fair was enforced in State Board of Agriculture v. Citizens' Street R'y Co., 47 Ind., 407 (1874). Stockholder may enjoin a

A stockholder who assents to a guaranty cannot afterwards attack it on the ground that the corporation had no power to enter into it.¹

It is a question of considerable doubt as to whether the guaranty on bonds is negotiable the same as the bonds themselves.²

railway from donating its funds to an exhibition, even though it is claimed that thereby the corporate receipts will be increased. Tomkinson v. South, etc., R'y Co., 56 L. T. Rep., 812 (1887). A stockholder who offsets to his statutory liability the corporate guaranty of bonds' must prove the consideration. Briggs v. Cornwall, 9 Daly, 436 (N. Y., 1881). A railroad cannot guaranty the dividends of an elevator corporation in consideration of the latter company subscribing for the stock of the former company. Memphis, etc., Co. v. Memphis, etc., Co., 5 S. W. Rep., 52 (Tenn., 1887). A freight and transfer corporation has no power to guaranty the credit of a third person. Lucas v. White Line, etc., Co., 30 N. W. Rep., 771; Atchison, etc., R. R. Co. v. Fletcher, 10 Pac. Rep., 596 (Kan., 1886), under a statute.

¹ If all parties assent to a guaranty by the company of bonds and stock in another company owned by directors of the first company, such guaranty being in consideration of a lease will not be set aside. Barr v. N. Y., etc., R. R., 125 N. Y., 263 (1891). Where an agricultural society guaranties the bonds of a street railway, a participating stockholder in such society cannot afterwards object. Thompson v. Lambert, 44 Iowa, 239 (1876). See, also, Martin v. Niagara, etc., 122 N. Y., 165 (1890).

² Not only the bonds, but the state's indorsement or guaranty on them, are negotiable, and a bona fide purchaser of them from a contractor to whom they were fraudulently issued may enforce them. Gilman, etc., Co. v. New Orleans, etc., R. R., 72 Ala., 566 (1882). The state's indorsement or guaranty of bonds is negotiable. State v. Cobb, 64 Ala., 127 (1879). "Where the statute confers express authority upon the company to

guaranty the bonds of another company, a mere failure on the part of the guarantying company to pursue the mode specified in the statute will not invalidate such guaranty in the hands of the bona fide holder." Atchison, etc., R. R. v. Fletcher, 35 Kan., 236, 248 (1886). For a full statement of the law relative to the negotiability of a guaranty of a note, see Daniels on Negotiable Instruments (4th ed.), §§ 1774-1784. A guaranty indorsed on a negotiable note is generally not negotiable. 1 Amer. Lead. Cas. (ed. 1871), 410. Quære. whether this is the same as to guaranties of railroad bonds. Arents v. Commonwealth, 18 Gratt, (Va.), 750, 776 (1868). In the case Codman v. Vermont, etc., R. R., 16 Blatch., 165 (1879), where two companies joined in making notes, and then one of these companies indorsed the same and also guarantied payment, the court, per Wheeler, J., said: "This guaranty is not, in terms, negotiable. By it the defendant guaranties the payment of the note, principal and interest, 'according to its tenor.' The note being negotiable, perhaps these words draw that quality into the guaranty. If they do, the guaranty would seem to be negotiable. Story on Prom. Notes, § 484. If not, in Partridge v. Davis, 20 Vt., 499, Davis, J., seems to have thought such a guaranty would, in effect, be negotiable; while in Sandford v. Norton, 14 Vt., 228, and in Sylvester v. Downer, 20 Vt., 355, the late Chief Justice Redfield was clearly of the opinion that, like ordinary simple contracts, such guaranties would not be negotiable." If a railroad may lease another road, it may guaranty interest on the latter's bonds, such interest being the rent. Though the bonds are negotiable the guaranty is not. If bonds are issued

Where, however, bonds are issued to a railroad company or its assigns, and are indorsed by the company and sold, the bona fide purchaser may enforce the indorser's liability. It is the liability of an indorser, and not of a guarantor.¹

A guaranty of the bonds or dividends on the stock of a corporation should be made, indorsed and signed by the guarantying party on the bonds or certificates of stock. If the guaranty rests merely on a contract between the two corporations, it may be modified by the corporations; ² and it may be beyond the power of the bondholder to enforce the guaranty, ³ or the guarantied company may have difficulty in enforcing the contract. ⁴

for construction work which is not done, a bona fide purchaser of the bonds cannot enforce a guaranty thereof by auother corporation. Eastern, etc., Bank v. St. Johnsbury, etc., R. R., 40 Fed. Rep., 423 (1889).

¹So, also, where the company buys bonds of another company and guaranties and sells them. Arnot v. Erie R'y, 67 N. Y., 315 (1876). Where a municipal bond is payable to a railroad company or its assigns, and the company sells it with the indorsement, "The New Orleans, Jackson & Great Northern Railroad Company, for value received, hereby transfers the within bond to the New Orleans Savings Institution, or assigns," the company is liable as an indorser of the bond when it becomes due. Bonner v. City of New Orleans, 2 Woods, 135 (1875). A railroad company may accept the bills of exchange of another railroad company, the consideration being the altering the gauge of the latter company so as to enable the cars of the former to run over the tracks. Smead v. Indianapolis, etc., R. R., 11 Ind., 104 (1858). Where the bonds are payable to the order of another railroad company or its assigns, and are indorsed by the latter and sold, the latter are liable as an indorser to a bona fide holder, even though the indorsement was ultra vires. Madison, etc., R. R. v. Norwich, etc., Soc., 24 Ind., 457 (1865).

² If the guaranty is to the corporation, and not to the stockholders severally, the board of directors may reduce the

amount of the guaranty. Beveridge v. N. Y., etc., R. R., 112 N. Y., 1 (1889).

³ The agreement of a railroad company to pay the bonds of another railroad company is not enforceable by the bondholders. The court said: "A mere valid promise or undertaking, taken by the company to give it support financially by enabling it to escape default for the non-payment of interest, evidently is not the property which the mortgagee took by force of this indenture, although it was obtained by the mortgagor for its financial relief and support, and its performance would have had the effect to enable it to operate its road." A different case is presented where the contract is executed. as where a lease has been made. Thereis no privity of contract between the contracting company and the bondholders in such a case as this. The contract is between the two companies alone. The outside company owed no debt and held no fund in trust for the other company nor for the latter's bondholders. Metropolitan Trust Co. v. N. Y., etc., R. R., 45 Hun, 84 (1887).

⁴Where one railroad by contract with another guaranties the interest on the bonds of the latter, but fails to fulfill its contract, the latter railroad itself cannot enforce the guaranty. The liability to repay attaches at once. In any case the remedy is not in equity. Bradford, etc., R. R. v. N. Y., etc., R. R., 123 N. Y., 316 (1890). A guaranty by one company of dividends on the stock of another com-

A few forms of guaranties of bonds and dividends on stock are given in the notes below.¹

If the guarantor takes up the securities he may enforce their payment as against the company liable thereon, but his rights are second to those of any of the guarantied bonds not yet taken up.²

pany is a collateral undertaking. Miller v. Ratterman, 24 N. E. Rep., 496 (Ohio, 1890).

¹ Form of guaranty on West Shore Railroad bonds:

GHARANTY

For value received the New York Central and Hudson River Railroad Company hereby guaranty the punctual payment of the principal and interest of the within bond at the time and in the manner therein specified, and covenants in default of payment of any part thereof by the obligor to pay the said principal and interest of the within bond as the same shall become due, upon the demand of the holder thereof.

In witness whereof the said company has caused its corporate seal to be hereto affixed and attested by its secretary and this instrument to be signed by its president or one of its vice-presidents.

The proposed guaranty by the United States government of the Nicaragua Canal Company bonds is as follows:

The United States of America guaranties to the lawful holder of this hond the payment by the Maritime Canal Company of Nicaragua of the principal of said bonds and the interest accruing thereon, and as it accrues.

Form of guaranty of dividends ou Rome, Watertown, etc., Railroad stock:

The New York Central and Hudson River Railroad Company hereby guaranties to the holder, for the time being, of this certificate the payment of 1½ per cent. on the par value of the stock represented thereby, on the 15th days of May, August, November and February in each year, during the continuance of a certain lease, dated the 14th day of March, 1891, by the Rome, Watertown and Ogdensburg Railroad Company to the said New York Central and Hudson River Railroad Company.

In witness whereof the corporate seal of the said New York Central and Hudson River Railroad Company has been hereto affixed, attested by an officer thereof, the —— day of ——, A. D. 18—.

New York Central and Hudson River Railroad Company.

By ----, Treasurer.

² See notes page 1245, supra. Where. the bonds being in default the trustee foreclosed by taking and retaining possession, and conveyed the property to a new corporation, the bondholders taking stock for their bonds, a guarantor of the bonds who paid some of the old coupons as they became due gets nothing, inasmuch as the whole property was used to pay the guarantied bonds. Child v. N. Y. & N. E. R. R., 129 Mass., 170 (1880). guaranty was as follows: "In consideration of the provisions of a contract of even date for the use of the Boston. Hartford & Erie Railroad by the Erie Railway Company, the Erie Railway Company hereby agrees with the holder of this bond that the several interest warrants hereto attached shall be paid as they respectively mature. Witness the seal of the Erie Railway Company and the signature of its secretary, at the city of New York, the 8th day of October, A. D. 1867." The contract by which the guaranty was agreed upon contained the following clause: "And it is further agreed that any interest warrants which the said party of the second part shall be obliged to take up under the provisions of this contract or the indorsement which may be put on any of said bonds shall be and remain a valid lien on all the franchises and property named in or secured by said mortgage." A guarantor of bonds which have become due cannot participate in the assets along with the bondholders on coupons which have been paid by the guarantor. The bondholders are to be paid first, since the guarantor is liable to pay them. But where the principal is not due, the guarantor's coupons are to be paid after other outstanding coupons are paid.

Where a state guaranties bonds the guaranty is construed and enforced the same as where the guaranty is by a corporation.¹

A guaranty by one individual of certain dividends on stock held by another individual is legal and enforceable.²

§ 776. Debentures in England.—In England the securities which are issued by corporations are generally called "debentures." An English debenture is a term which in its widest application includes any instrument issued by a corporation which creates a debt or acknowledges it. But generally it means a bond 2 secured by a

Commonwealth v. Chesapeake, etc., Co., 32 Md., 501, 540 (1870). Where the guarantor has paid a part of the securities which were guarantied, the remaining part is to be paid first, and thus the guarantor is to be repaid and then other creditors come in. Commonwealth v. Chesapeake, etc., Co., 32 Md., 501 (1870). The lessees of the guarantor, having taken up coupons which were guarantied, are "entitled to the same remedies for the collection thereof to which the creditors themselves would have been entitled," and may apply for a receiver under the New Jersey statute. Penn. R. R. v. Pemberton, etc., R. R., 28 N. J. Eq., 338 (1877). As to the guaranter company's right to institute suit to protect its interests, see, also, State of Florida v. Anderson, 91 U. S., 667 (1875). The guarantor may enforce a mortgage given to protect it. Macon, etc., R. R. v. Georgia, etc., R. R., 63 Ga., 103 (1879). Where railroad bonds are secured by a mortgage on the railroad and also a mortgage on the property of another corporation, the latter may be foreclosed before the former where the former would net nothing. Chicago, etc., Land Co. v. Peck, 112 Ill., 408 (1885).

Commonwealth v. Chesapeake, etc.,
 Co., 32 Md., 501 (1870); Morton v.
 N. O., etc., R. R., 72 Ala., 599; Gilman v. Same, id., 566; State v. Cobb, 64
 Ala., 127; State of Florida v. Anderson, supra.

² In a celebrated litigation in New York state it was adjudicated:

First. That such a guaranty is valid

and enforceable. Lorillard v. Clyde, 86 N. Y., 384.

Second. That the defendants were liable upon it, during the time the corporation subsisted de facto, although there existed cause for its dissolution. Same v. Same, 16 J. & S., 409; affirmed, 99 N. Y., 196.

Third. That separate actions may be brought on the contract as the instalments fall due, and separate recoveries had in each. Same v. Same, 122 N. Y., 41 (1890).

Fourth. That the plaintiff was in no legal sense a party to an action by the people of the state, and not concluded by the findings therein. Same v. Same, 16 J. & S., 409; 99 N. Y., 196.

Fifth. That the dissolution of the corporation did not affect the rights of the party guarantied. Same v. Same, 15 N. Y. Supp., 809 (1891); N. Y. L. J., April 4, 1891.

Where an insolvent insurance company buys out a solvent company and certain individuals guaranty that the obligations of the latter company will be fulfilled, and the latter company is "wrecked," the guarantors are liable. Mason v. Cronk, 125 N. Y., 496 (1891).

Levy v. Abercorris, etc., Co., 58 L.
T. Rep., 218 (1888). See, also, British, etc..
Co. v. Comm'rs, L. R., 7 Q. B. D., 165 (1881); Edmonds v. Blaina, etc., Co., L.
R., 36 Ch. D., 215 (1887). Cf. Topham v.
Greenside, etc., Co., 58 L. T. Rep., 274 (1882); 2 R'y & Corp. L. J., 529.

 2 It is applied to evidences of indebtedness such as a deed under seal. Ex mortgage 1 or by a clause equivalent to a mortgage inserted in the bond itself.2

narte Bradshaw, L. R., 15 Ch. Div., 465 (1879), where the form was that of a bond binding the company "and their successors and their real and personal estate," which was held to be a charge upon the real and personal estate of the company as it existed at the date of winding-up proceedings, but not including unpaid capital; Re City Bank, L. R., 3 Ch. Div. 758 (1868), where, however, a deed under seal, payable to order, but purporting to be a debenture, was treated as a mere promissory note. Ex parte Grissell, L. R., 3 Cb. Div., 411 (1875). Also to a simple promise to pay. with a clause subjecting certain property as security. Re Marin Mansions Co., L. R., 4 Eq., 601 (1867). See, also, note infra. A Lloyd bond is a due-bill or acknowledgment of indebtedness issued under seal by a corporation to the constructors, supply men, etc. palie's Dictionary. And see In re Cork, etc., R'y, L. R., 4 Ch. App., 748 (1869). Cavanagh on Money Securities (2d ed., p. 355) defines a debenture as "an instrument in writing, generally under seal, creating a definite charge on a definite or indefinite fund or subject of property in favor of a given person, or of a given person and his order or bearer, and constituting a member in a series of instruments, each entitling the original holder thereof to similar rights. Hence a debenture is distinguished (1) from a mortgage, which is an actual transfer of property; (2) from a bond, which does not directly affect property; and (3) from a mere charge on property, which is individualized and does not form part in a series of similar charges. cases.] Debentures may be issued by a single person, by a partnership or by a corporation." Debenture stock differs from a pure debenture in that the title of each original holder appears in a registry instead of being represented by an instrument complete in itself, and the

stock is capable of being transferred in any amounts, unless limited by corporate regulations. See Attree v. Hawe, L. R., 9 Ch. D., 337 (1878).

¹ In re Hamilton's Windsor Waterworks, L. R., 12 Ch. Div., 707 (1879); Wildey v. Mid-Hants R'y Co., 16 W. R., 409 (1868).

² Re Marin Mansions Co., L. R., 4 Eq., 601 (1867); Re Panama, etc., R'y Co., L. R., 5 Ch., 318 (1870); Re New Clydach S. & B. I. Co., L. R., 6 Eq., 514 (1868). A debenture not making a charge upon property has been held to be a promissorv note. Ex parte Colborne, L. R., 11 Eq., 478 (1870). But security upon property is not a necessary feature. Edmonds v. Blaina Furnaces Co., L. R., 36 Ch. Div., 215 (1887), holding, also, that it is not necessary that they be issued and numbered seriatim: a single debenture may be issued to one man. "In the ordinary acceptation of the term a debenture means any document, binding on an incorporated company, by which it acknowledges a debt to be due and undertakes to pay it." Romer, Q. C., in Edmonds v. Blaina Furnaces Co., supra; where, also, Chitty, J., said: "I find that generally, if not always, the instrument imports an obligation or covenant to pay." The same learned judge, in Levy v. Abercorris, etc., Co., supra, said that "debenture" is not a term of art. but means a document which acknowledges or creates a debt. In the former case the instrument was a memorandum of agreement acknowledging loans in various amounts set opposite the names of nine persons, covenanting with each of them to pay the same, with interest, at a fixed date, and to pay them ratably in case the whole was not then paid, and pledging as security the "undertaking, property and effects of every kind," subject to prior charges, and with liberty to the company to sell or pledge the things manufactured by the comThe power to issue debentures is generally conferred by the charter. Where it is not so conferred it is implied from a general power to borrow money and create debts.¹

In England statutory provisions regulating the issue of debentures must be carefully observed.² Debentures in England, covering all the property, etc., of the corporation, are specifically excepted from the bill of sales or chattel mortgage act, requiring registration of bills of sale.³ A debenture is to be construed according to the language used in it. There are no arbitrary rules of construction peculiar to it alone.⁴

pany in the ordinary course of business until default made.

¹ Inns of Court Hotel Co, L. R., 6 Eq., 82 (1868); Bank of South Australia v. Abrahams, L. R., 6 P. C., 265 (1875), holding that a power to issue debentures after all calls have been fully paid does not warrant making them upon future calls.

² Where the required assent of stockholders is not obtained, the debentures are void. Fountaine v. Carmarthen R'y Co., L. R., 5 Eq., 316 (1868). Where the issue is made before the whole capital is subscribed, and the statute forbids such issue, the debenture is void. Chambers v. Manchester, etc., R'y Co., 5 B. & S., 588 (1864). Where the issue is made when the corporate debts are greater than the statute allows, then the debentures are void, and the holders come in as unsecured creditors. Re Pooley Hall, etc., Co., 18 W. R., 201 (1869).

³ The bills of sale act in England relieves corporations from the necessity of recording debentures. Read v. Joannon, 63 L. T. Rep., 387 (1890). Debentures have precedence over a fi. fa. Re Opera, Limited, 65 L. T. Rep., 371 (1891). The debentures of none of the incorporated companies in England need be recorded as a chattel mortgage. Re The Standard, etc., Co., 64 L. T. Rep., 487 (1891); Edmonds v. Blaina, etc., Co., 57 L. T. Rep., 139 (1887). A debenture is a document which creates or acknowledges a debt. It need not be recorded in the register's office under the bill of

sales act. Levy v. Abercorris, etc., Co., 58 L. T. Rep., 218 (1887). Cf. Id., 274. For a review of the long litigation in England whether a debenture had to be recorded as a bill of sale, i. e., in America as a chattel mortgage, see 8 R'v & Corp. L. J., 222. This question was finally settled in England by act of parliament declaring that debentures of corporations need not be recorded under the bill of sales act. A debenture on the whole property, with a clause that no prior mortgage or charge should be made, is not good as against an assignment by the company of money due from an insurance company, where such assignee gave notice to the insurance company before the insurance company had notice of the debenture. The English, etc., Trust v. Bruuton, 66 L. T. Rep., 767 (1892).

⁴ Edmonds v. Blaina Furnace Co., supra; Ex parte Cox, 13 L. R., Ir., 174 (1884), and Re Panama, etc., R'v Co., L. R., 5 Ch. Div., 318 (1870), holding that debentures secured by the "undertaking and all sums arising therefrom" are a charge upon all the property of the corporation, past and future, and are entitled to be paid before the general creditors. The former case gives the form of the indenture. Re Marin Mansions Co., L. R., 4 Eq., 601 (1867), to same effect, but not a charge on the capital stock; also, In re Colonial, etc., Corporation, L. R., 15 Ch. D., 465 (1879); Re New Clydach S. & B. I. Co., L. R., 6 Eq., 514 (1868), where debeutures purporting to be an assignment of the undertaking

Many of the rules of law applicable to other evidences of corporate indebtedness apply also to this class of obligations. The power

and charging all the real and personal property were held valid upon all personal property existing at the date of the debentures, but not upon property subsequently acquired: Bloomer v. Union Coal & I. Co., L. R., 16 Eq., 383 (1873), holding that book debts were not charged; Ex parte Grissell, L. R., 3 Ch. D., 411 (1875), where a charge upon all the funds, property and effects which the company held or possessed or should hold or be possessed of, held valid; Hodson v. Tea Co., L. R., 14 Ch. D., 859 (1880), where debentures containing an assignment of chattels with provision that the corporation shall retain possession until twenty-one days after default were held a lien, though winding-up proceeding had been begun before they became due; Re Herne Bay Water-works Co., L. R., 10 Ch. Div., 42 (1878), holding that debenture holders, not being in the position of ordinary mortgagees, may have a receiver appointed, but cannot institute winding-up proceedings; Wildey v. Mid-Hants R'y Co., 16 W. R., 409 (1868), holding that the holder of a debenture secured by mortgage has a title prior to that of a subsequent judgment creditor, and may file a bill to protect his security though his claim is not due; Ex parte Pitman, L. R., 12 Ch. D., 707 (1879), holding that the debenture does not prevent the company from selling property and dealing with it without regard to the debenture. To same effect, Wheatley v. Silkstone, etc., Co., L. R., 29 Ch. D., 715 (1885), where a mortgage given subsequent to the indentures took precedence over them; In re Florence, etc., Co., L. R., 10 Ch., 530 (1878); Moor v. Anglo-Italian Bank, id., 681 (1879); In re Hamilton's, etc., Iron Works, L. R., 12 Ch. D., 707 (1879). But as soon as winding-up proceedings are commenced then the lien of the debenture holders attaches, and the unsecured holders are paid after the debenture

holders. In re Panama, etc., Mail Co., L. R., 5 Ch., 318 (1870). To same effect. In re Horne, L. R., 20 Cb. D., 736 (1885); Hodson v. Tea Co., L. R., 14 Ch. D., 859 (1880). A purchaser of laud from the company may, before taking title, require proof of no default as to the debentures. Re Home & Holland, 53 L. T. Rep., 562 (1885). A floating debenture does not prevent the company from paying a debt to a director just before a winding up is commenced. Willmott v. London, etc., Co., 55 L. T. Rep., 696 (1887). A pledge or mortgage of a specific piece of corporate property takes precedence of a general debenture lien. although the debenture was prior in time. Ex parte Harrison, 58 L. T. Rep., 174 (1887). A debenture is not a lien on the proceeds from superfluous land sold by the company. Re Hall, etc., R'v, 59 L. T. Rep., 302 (1888). In England anv loan by a corporation in excess of the amount expressly authorized by its charter is void, but the company may be held liable for such part of the money as they properly used to pay other debts. Wenlock v. River, etc., Co., 59 L. T. Rep., 485 (1888).

¹ Webb v. Herne Bay Commissioners. L. R., 5 Q. B., 642 (1870), holding that a defense of illegal issue cannot be made by a corporation against the suit of an innocent holder of assignable debentures; Fountaine v. Carmarthen R'v Co., L. R., 5 Eq., 316 (1868), holding that when issued for an insufficient consideration they are still good to the extent of the value of the consideration; In re Northern Assam Tea Co., L. R., 10 Eq., 458 (1870), to the effect that when held by a member of a corporation subject to a lien for money due to it the lien is released by a transfer to which the company has consented; Agar v. Athenæum Life, etc., Co., L. R., 3 C. B. (N. S.), 725 (1858), holding that the fact that due formality was not observed in borrowof the corporation to pledge or mortgage unissued debentures as

ing the money for which debentures are issued is no defense to a suit upon them: Crouch v. Credit Foncier, etc., L. R., 8 Q. B., 374 (1873), holding that debentures under seal, though payable to bearer, are not negotiable: Re Brunton's Claim, L. R., 19 Eq., 302 (1874). holding that a company cannot set up equities against a debenture bond after accepting notice of its assignment: Potteries, etc., R'y Co. v. Minor, L. R., 6 Ch., 621 (1871), holding that obtaining judgment upon debentures does not change the status of the holder; he is still bound by the acts of a majority of his fellow-holders under the Railway Company Act of 1867; Price v. Great Western R'y Co., 16 M. & W., 244 (1847), holding that if the principal of debentures remains unpaid after maturity it bears interest though all coupons have been promptly paid. A debenture holder may apply for a receiver whenever the company ceases to be a going concern. Hubbuck v. Helms, 56 L. T. Rep., 232 (1887). See 60 id., 776 (1889). A debenture holder cannot have a receiver of all the railway property appointed merely because there is a default. He must first get judgment and execution at law. He differs from a mortgagee. Imperial, etc., Assoc. v. Newry, etc., R'y, 2 Ir. Rep. Eq., 524 (1868). debenture which in effect is a mortgage on the tolls and income of a pier company cannot enjoin a general creditor from selling out the land by levy of exe--cution. Perkins v. Deptford, etc., Co., 13 Sim., 277 (1843). The court will appoint a receiver at the instance of debenture holders if the corporation is insolvent, even though neither the principal nor interest is due. McMahon v. The North, etc., Works, 64 L. T. Rep., 317 (1891).

Debentures in excess of the amount authorized by statute are void. Fountaine v. Carmarthen R'y, L. R., 5 Eq., 316 (1868). Where some debentures have

been paid, new ones may be issued to that amount and not be in excess of the statutory limit. Fountaine v. Carmarthen R'y, L. R., 5 Eq., 316 (1868). After a receiver has taken possession, a debenture holder cannot obtain priority over other holders by getting a judgment at law and issuing execution thereon. Bowen v. Brecon R'v. L. R., 3 Eq., 541 (1867). Nor can a general creditor interfere by execution on property in the receiver's possession. Russell v. East Anglian R'v. 3 Mac. & G., 104 (1850). A debenture is more of a bond than a mortgage. Subsequent mortgagees may obtain a priority on lands in Italy, where the law of notice of prior liens does not prevail. Norton v. Florence, etc., Co., 26 Week, Rep., 123 (1877). "All that debenture holders cau claim is the actual fruit resulting from the carrying on of the business of the company - namely, the tolls, rates and duties which may be earned by the company through their availing themselves of their privilege of becoming carriers, and the rent which may be paid by other companies for the use of their lines." Id.; also Gardner v. London, etc., R'v, L. R., 2 Ch., 201. A mortgage on the undertaking does not cover the property belonging to the company as common carriers of passengers or goods for hire, nor the soil of the railway itself. "The railway acts have been prepared on the model of the canal acts, in which the principal object of the company was the proprietorship of the canal, and the profits derived from the use of it by the public in general." Hart v. Eastern, etc., R'y, 7 Ex., 246 (1852). A debenture covering the undertaking "is a lieu similar to an income mortgage." Gardner v. London. etc., R'y, L. R., 2 Ch. App., 201 (1867). In the case of Re Panama, etc., Co., L. R., 5 Ch., 318 (1870), the court held that the debenture in that case was a mortgage security and came in ahead of general creditors. Word "undertaking"

collateral security for money advanced has been conceded. It has been held legal to issue them at a discount.2

The English debentures are negotiable or non-negotiable according to the language used in them.³

§ 777. Debentures in America.— In the United States the "debenture" is new and has no clearly defined place among the securities of corporations. A so-called debenture, however, is rapidly coming into use in this country. Its character and issue are as follows: Certain corporate assets, generally railroad bonds or stock, or real-estate mortgages or municipal bonds, or water-works

does not cover and include land so as to sustain ejectment. Doe v. St. Helens, etc., R'v. 2 Q. B., 364 (1841). Concerning a receiver under debentures, see Gardner v. London, etc., R'v. L. R., 2 Ch. App., 201 (1867). Debenture holders may be given power to appoint a receiver to take possession of everything whenever certain things happen. Re Henry, etc., Limited, 62 L. T. Rep., 137 (1889). A mortgage on the "undertaking" covers after-acquired personalty. Panama, etc., Co., L. R., 5 Ch. App., 318 (1870). See, also, in general, Jones on Corporate Bonds, etc., §§ 381-425. An English mortgage covers only the tolls and income. Bowen v. Brecon, etc., R'y, L. R., 3 Eq., 541 (1867).

¹ Re Regents' Canal, etc., Co., L. R., 3 Ch. D., 43 (1875).

² See ch. III, supra; Campbell's Case, L. R., 4 Eq., 470 (1876).

3 For iustances of negotiable debentures, see In re Imperial Land Co., L. R., 11 Eq., 476 (1870); In re Blakely, etc., Co., L. R., 3 Ch., 154 (1867; Higgs v. / Northern, etc., Co., L. R., 4 Ex., 387 (1869); In re General Estates Co., L. R., 3 Ch., 758 (1868). For instances of nonnegotiability, see In re Natal, etc., Co., L. R., 3 Ch., 355 (1868); Athenæum, etc., Soc. v. Pooley, 3 De G. & J., 294 (1858); Crouch v. Credit Foncier, etc., L. R., 8 Q. B., 374 (1873). Debentures may be negotiable as to the company, but not as against other debenture holders. So held where debentures were issued after a winding up was commenced. Mowatt v. Castle, etc., Co., 55 L. T. Rep., 645 (1887). If the debentures are not negotiable the company may of course set up defenses against any holder. Athenæum, etc., Soc. v. Pooley, 3 De G. & J., 294 (1858). Debentures in England. corresponding in form to bonds here, are not negotiable instruments. Crouch v. Credit Foncier, etc., L. R., 8 Q. B., 374 (1873); In re Imperial, etc., Co., 11 Eq., 478; In re Natal, etc., Co., L. R., 3 Ch., 355 (1868); In re Rhos, etc., Co., 17 W. R., 343 (1868). Where debentures run to a person or his assigns, and he assigns them with the concurrence of the company, the company cannot then set off against them a debt owed by him to it. Higgs v. Northern, etc., Tea Co., L. R., 4 Ex., 387 (1869). Debentures payable. to bearer are negotiable, and in the winding up may be enforced by the holders free from equities between the company and the original purchasers. Purchasers after the winding up commenced, but in ignorance of it, are also protected. In re Imperial Land Co., L. R., 11 Eq., 478 (1870). But they may be made negotiable by being payable "to the order of." etc. In re General Estates, etc., Co., L. R., 3 Ch., 758 (1868). Although debenture bonds payable to certain persons or bearer, or to bearer alone, are not negotiable and cannot be sued upon at law by bearer, yet he may enforce them in equity on the winding up. In re Blakely, etc., Co., L. R., 3 Ch., 154 (1867). Debentures under seal have been held in England to be merely notes. In re General Estates, etc., Co., L. R., 3 Ch., 758 (1868).

bonds, are deposited with trustees to secure the debenture holders. The debenture itself is a bond or note of the corporation, reciting on its face that it, with other similar debentures, is secured by the property so deposited in the hands of the trustees. Such a debenture as this is practically a note of the corporation secured by the securities as collateral; in other words, it is a note secured by a pledge of securities. This form of security has been quite extensively issued by railroads, where the parent company owns the stock or bonds of many branch or leased lines and wishes to raise money on them on long time. Such debentures are legal. They are substantially a borrowing of money and delivering bonds or stock as collateral security.1

1 The character of such a transaction is well shown in the case of Ward v. Johnson et al., 95 Ill., 215 (1880). Here the M. F. & M. Sav. Bank was incorporated in Illinois and doing business in the city of Chicago. In the course of its business, and out of moneys received from depositors, it loaned large sums of money, taking promissory notes from the borrowers secured by first mortgages upon improved and productive real estate situated in Chicago, of about three times the value of the face of the respective notes thereby secured. pursuance of a resolution of the board of directors of the bank creating an "investment department" of the business, these notes and collateral mortgages were assigned to one Chandler in trust for the purpose of conducting the business of said "investment department." Said trustee was authorized to countersign and issue certificates in sums of \$100 or over to all applicants applying therefor, but in an amount not exceeding the face value of the notes held by him as trustee. Said certificates bore interest at the rate of seven and threetenths per cent., payable quarterly, and were redeemable by said trustee upon the application of the bearer, either in notes secured by mortgage of equal face value with such certificates, or in cash, at the option of the trustee. The certificates recited that they were secured

in trust, secured upon real estate valued at about \$300 for every \$100 of certifi-The money received by the trustee from the sale of the certificate was by him turned over to the officers of the bank, and by them used to pay depositors and for all the other purposes for which the bank used money. Held, that the trust fund in hands of the receiver should be applied to the payment of the investment certificates; and that the bank, after receiving large sums of ! money on the faith of the security offered under the trust deed and "investment certificates," which money went into its general business, and after having had the full benefit of the contract with the certificate holders, will not be allowed to interpose the defense of ultra vires to defeat the execution of the trust. A subscription for debenture bonds to be paid for in assessments as the company might require cannot be enforced for the benefit of corporate creditors. the bonds not having been delivered. Pettiboue v. Toledo, etc., R. R. Co., 19 N. E. Rep., 337 (Mass., 1889). Bonds issued on shares of stock were involved in Clarke v. Central R. R., etc., 50 Fed. Rep., 338 (1892). This decision was reversed in June, 1893, and the validity of the transaction was sustained. A third mortgage may be secured by such prior bonds as are delivered up by the parties in exchange for the third-mortgage by bond and mortgage collaterals held bonds, under an agreement that such

The simon-pure English debenture, however,—the debenture which is in itself both bond and mortgage combined, without any registry under the mortgage acts, and without any delivery of the property,—has not been adopted in America. Under the statutes

prior bonds are not to be considered paid. Poland v. Louisville, etc., R. R., 52 Vt., 144 (1879).

An example of the new form of debentures secured by a trust deed is that of Chicago Great Western R'v Co. There the company secures payment of "interest" on the debenture stock, and a fair accounting for the preferred, by executing a deed of trust to some trust company. This trust deed provides (a) that in case of liquidation the net assets shall be applicable to the new stocks or securities in their order: (b) that holders shall from their own number select a finance committee which shall have general supervision and control of the company's finances: (c) that further issues of debenture or A stocks shall be made only by a majority vote, or, in the case of an issue of bonds, by a twothirds vote, subject also to approval of the finance committee: (d) that in case of a default in debenture interest, the trustee under the deed of trust shall. when required by the finance committee, appoint a receiver to apply the income and mauage the property subject to the control of the debenture and A holders, the stockholders having no voice; (e) that in case the company makes good its default, possession shall revert to the company. Any surplus above debenture interest shall go absolutely to holders of A stock; any failure to distribute all such earnings shall also be an infraction of the trust deed and bring the same penalties.

Another form of debenture is what is known as a "collateral trust indenture." The form adopted by the Northern Pacific R. R. Co. was briefly as follows:

This indenture, dated May 1, 1893, between the Northern Pacific Railroad and the Farmers' Loan and Trust Company is to pay off a floating debt of about \$11,000,000 and for other requirements; the railroad company sells its 5-year 6 per cent. gold notes to an aggregate amount of \$15,000,000. The following collateral is deposited with the trust company:

\$10,000,000 par value Northern Pacific consol. 5 per cent. honds.

3,000,000 par value Chicago and Northern Pacific 5 per cent. bonds.

6,000,000 par value Chicago and Calumet 5 per cent. honds.

7,000,000 par value St. Paul and Northern Pacific capital stock.

15,010,000 par value Chicago and Northern Pacific stock heneficial certificates.

343,000 par value Northern Pacific Express Company stock.

Article I. Notes shall be \$1,000 each, payable in gold, and may be registered.

Article II. The railroad company hinds itself to make up deficiency, if any, after sale of collateral.

Article III. The railroad company may deliver the collateral from time to time and receive from trust company a proportion of the notes.

Article IV. The railroad company will not, without first obtaining the consent of the Committee, or until all the notes are paid, construct new lines or purchase or lease any, or guaranty bonds of other companies, or issue its own bonds against such.

Article V. A committee is formed consisting of Messrs. R. G. Rolston, John A. Stewart, James Stillman, J. D. Prohst, and F. T. Gates. Committee shall organize and appoint a secretary. Members may vote in person or by letter or telegram, and shall receive twenty dollars for attendance at each meeting. Majority shall be a quorum.

Article VI. Committee may sell the bonds deposited as collateral from time to time, but without consent of the railroad company cannot dispose of Northern Pacific 5s at less than 95, or Chicago and Northern Pacific 5s at less than 95, or Calumet 5s at less than 85. The Committee has power to sell all other collateral at times and prices such as the railroad company shall direct and the Committee approve. With the money received from such sales, the trust company shall purchase the notes in the open market. After May, 1896, the notes can be called for payment hy lot. If railroad company shall default in the interest for ninety days the Committee

of some of the states such a mortgage lien would be good against general creditors, even though it was not recorded and even though possession was not taken. But in most states it would, under the statutes, be held to be illegal and void as against the rights of other corporate creditors.²

§ 778. Mode of drafting, signing, scaling and acknowledging corporate obligations to pay money — Liability of the corporation and the corporate officers on irregularly executed instruments — Charter provisions as to authorizing the instruments.— These subjects are considered elsewhere.³

shall sell part of the collateral to realize such interest, or at its option shall have power to declare the principal due, whereupon the trust company shall dispose of underlying securities as determined by the Committee. In such case Committee may fix a minimum price.

Article VII. Upon any purchase or sale of any coupons belonging to these notes, or upon loans made after date of maturity of said coupons, such coupons shall not be within this indenture.

Article VIII. All the notes may be called and paid by the railroad company at any time after May 1, 1896, at par and accrued interest.

Article IX. The Committee shall vote all the stock among the collateral. Interest on the bonds shall belong to the railroad company.

Article X. The Calumet Terminal Railway Company, without consent of the Committee, shall not issue any more bonds, but upon payment to the trust company of \$4,500,000 the railroad company shall have the right of withdrawing these Calumet bonds, money to be used to purchase notes in open market.

Article XI. Railroad company and trust company shall have access to papers and accounts of Committee, and Committee shall have like access to books, papers and accounts of railroad company.

Article XII. Provides for continuance of a trustee.

Article XIII. When notes are paid they shall be canceled and delivered to the railroad company.

Article XIV. The railroad company will do all necessary acts to carry the intent of the parties into effect.

Article XV. Marginal notes in the indenture not to affect the text.

A supplementary agreement provides that the railroad company shall not sell any of the Northern Pacific 5s which it may have in its treasury at less than 90, or pledge the same except under existing contracts without the consent of the Committee.

¹Such a security was enforced in White Water, etc., Co. v. Vallette, 21 How., 414 (1858).

²The danger and insufficiency of the English debenture as regards corporate property located in America appears in Re Empire, etc., Co., 62 L. T. Rep., 493 (1890), where the precedence of attachments over the debentures was admitted.

³See §§ 721-725. As to requirements that the stockholders shall authorize the issue of bonds, see, also, § 808, *infra*.

CHAPTER XLVII.

MORTGAGES -- POWER TO ISSUE AND FORM THEREOF.

- A. POWER TO MAKE MORTGAGES.
- § 779. Mortgages may be executed and given by corporations — Mortgages by insolvent corporations — Statutes requiring consent of stockholders.
 - 780. A railroad corporation has no implied power to mortgage its railroad.
 - 781. Mortgage on the superfluous land, etc., of a railroad corporation.
 - 782. Express authority to mortgage and ratification of unauthorized mortgages.
 - 783. Construction of various provisions authorizing mortgages.
 - 784. Purchase-money mortgages need not be expressly authorized.
 - 785. Power to again mortgage after a mortgage has been given.786. Power to mortgage the whole
 - 786. Power to mortgage the whole gives power to mortgage a part.
 - 787. Mortgage to secure future advances, contracts, dividends, etc.—After-acquired property.
 - 788. Who may attack the validity of a mortgage.
 - 789. Purchase-money mortgage issued to an insolvent vendor.
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 - 791. Mortgages to directors.
 - 792. Forfeiture of the charter Effect upon a mortgage.
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- B. FORM AND PROVISIONS OF THE MORT-GAGE DEED OF TRUST.
- § 794. The mortgage may be a deed of trust — Mortgages to a state — Equitable mortgages.

- § 795. Character of the various provisions in a corporate mortgage deed of trust — The granting clause.
 - 796. Provision that the mortgagor may retain possession until default.
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 - 798. Provision giving power to the corporation to sell old material and parts of the property free from the mortgage.
 - 799. Provision relative to taxes, insurance, liens and maintenance.
 - 800. Provision for declaring the principal sum due upon a default in interest.
 - 801. Provision for a waiver of default.
 - 802. Provision for the remedy of entry by the trustee or a receivership upon default.
 - 803. Provision giving power of sale to the trustee upon default. This is a cumulative remedy and does not prevent foreclosure instead.
 - 804. Provisions unreasonably limiting the right to foreclose.
 - 805. Provision exempting the trustee from liability.
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- C. AUTHORIZING, EXECUTING AND RE-CORDING MORTGAGES.
- § 808. The board of directors authorize the execution of mortgages — A stockholders' meeting is not necessary.
 - 809. The resolutions authorizing the mortgage.
 - 810. Signing, sealing and acknowledging the mortgage.
 - 811. Recording of a mortgage.

A. POWER TO MAKE MORTGAGES.

§ 779. Mortgages may be executed and given by corporations—Mortgages by insolvent corporations—Statutes requiring consent of stockholders.—A corporation, other than a railroad corporation, may mortgage its real estate and personal property for the purpose of securing its bonds or other evidences of indebtedness, unless there is some provision in its charter expressly prohibiting or regulating this right. The right to mortgage is a natural result of the right to incur an indebtedness.¹

¹ Barry v. Merchants' Exchange Co., 1 Sandf. Ch., 280 (1844), where mortgages designed to secure future advances expected to be made upon bonds. such advances being intended for use in the erection of an exchange building at a cost of twice the amount of the capital stock of the company, were held to be valid: Thompson v. Lambert, 44 Iowa, 239 (1876), where it was said that corporate powers in this respect are as extensive as those of an individual; Curtis v. Leavitt, 15 N. Y., 9 (1857); White Water, etc., v. Vallette, 21 How., 424 (1858), a canal company; Aurora, etc., v. Paddock, 80 Ill., 263 (1875); Union Water Co. v. Murphy's P. F. Co., 22 Cal., 620 (1863), holding that if not upon its face beyond the corporate authority, a contract will be presumed to be valid. Dimpfel v. Ohio & M. R'y Co., 9 Biss., 127 (1879), holding that the laches of stockholders may render valid a mortgage executed by a corporation without due authority when the bonds secured by it are in the hands of bona fide purchasers; Third Ave. Savings Bank v. Dimock, 24 N. J. Eq., 26 (1873), in which the court said that a defense to a bill of foreclosure that a corporation in making the loan was acting ultra vires was "unconscionable." Darst v. Gale, 83 Ill., 136 (1876); Commissioners v. Atlantic & N. C. R. R. Co., 77 N. C., 289 (1877); Pierce v. Emery, 32 N. H., 484 (1856); Shaw v. Norfolk R. R. Co., 5 Gray, 162 (1855), a religious corporation; Burt v. Rattle, 31 Ohio St., 116 (1876), a manufacturing company;

Pennock v. Coe. 23 How., 117 (1859): Richards v. Merrimack & C. R. R., 44 N. H., 127 (1862): Miller v. Chance, 3 Edw. Ch., 399 (1840), holding also that a mortgage executed by a majority of a board of trustees excluding the members ex officio is valid; Farmers' Loan & T. Co. v. Hendrickson, 25 Barb., 484 (1857); King v. Merchants' Exch. Co., 5 N. Y., 547 (1851); Leavitt v. Blatchford. 17 N. Y., 521 (1858); Parish v. Wheeler, 22 N. Y., 494 (1860), where a mortgage including property purchased in excess of the powers of the corporation was held binding upon such property. A mortgage on real estate may be given by a corporation to raise money to carry on the business. Martin v. Niagara, etc., Mfg. Co., 44 Hun, 130 (1887); Central, etc., Min. Co. v. Platt, 3 Daly, 263; Carpenter v. Black Hawk, etc., Co., 65 N. Y., 43 (1875); Ex parte Birmingham. L. R., 6 Ch., 83 (1870), an insurance company; In re General, etc., Assur. Co., L. R., 14 Eq., 507 (1872); In re General South., etc., Co., L. R., 2 Ch. D., 337 (1876); Wood v. Whelen, 93 Ill., 153 (1879), where a gas company was, however, given express authority; Lehman v. Tallassee, etc., Co., 64 Ala., 567 (1879), where express authority was given: West v. Madison, etc., Co., 82 Ill., 205 (1876), a county fair company: Hackensack Water Co. v. De Kay, 36 N. J. Eq., 548 (1883), a water company; Clark v. Titcomb, 42 Barb., 122 (1864), an insurance company; Nelson v. Eaton, 26 N. Y., 410 (1863), a case of a pledge by an insurance company; Australian, etc.,

The power of the ordinary business corporation to give a mortgage is a most necessary power. A denial of this power would restrict the operations of corporations to such an extent as to discourage the transaction of business by or through corporatious.

Co. v. Mounsey, 4 K. & J., 733 (1858), a navigation company; Thomas v. Citizens' R'v Co., 104 Ill., 462 (1882), holding that where a corporation has power to borrow money (after complying with certain conditions) and secure the same by mortgage upon its property, such corporation, after having received the loan on security of its mortgage, will not be allowed to avoid liability by questioning its own power to make the mortgage, or by showing an irregular or defective execution of the power. Nor will a subsequent indement creditor or a purchaser at execution sale on a judgment subsequent to the mortgage stand in any other or better position than the company. Susquehanna, etc., v. General Ins. Co., 3 Md., 305 (1852): Bardstown & L. R. R. v. Metcalfe, 4 Metc. (Kv.), 199 (1862); Coe v. Johnson, 18 Ind., 218 (1862); Jones v. Guaranty & Indemnity Co., 101 U.S., 622 (1579), holding that power to mortgage to carry on business implies power to mortgage to secure money to be advanced; Detroit v. Mutual Gaslight Co., 43 Mich., 594 (1880), a gas company; Memphis & L. R. R. Co. v. Dow, 19 Fed. Rep., 388 (1884), holding that lawful power to purchase a franchise implies the power to mortgage it to secure the purchase money; Hopson v. Ætna Axle, etc., Co., 50 Conn., 597 (1883), where a mortgage given to directors to secure them for their guaranty of corporation paper was held valid; Australian, etc., Co. v. Mounsey, 4 K. & J., 733 (1858); Re Patent File Co., L. R., 6 Ch., 83 (1870); Scott v. Colburn, 26 Beav., 276 (1858), holding that power to borrow on mortgage includes power to mortgage to secure a bill given for an existing debt; Tallidega Ins. Co. v. Peacock, 67 Ala., 253 (1880); Commonwealth v. Smith, 10 Allen, 448 (1865). In this case a statute

was held to have taken away the power to mortgage. To same effect, Richardson v. Sibley, 11 Allen, 65 (1865). Contra, Steiner's Appeal, 27 Pa. St., 313 (1856), holding that special authority from the legislature is necessary.

The mortgage may be given in order to secure the carrying out of a contract. Mason v. York, etc., R. R., 52 Me., 82. A mortgage is valid as against the corporation giving it. although the officers give to the mortgagee their individual notes as additional security and cause the corporation to issue stock to themselves without payment, which they deposit also as collateral with the mortgagee. The giving of the mortgage is not an increase of indebtedness such as is prohibited by the Pennsylvania constitution. Powell's Appeal, 19 Atl. Rep., 559 (Pa., 1890). Bonds secured by a mortgage on land of a turnpike company are valid and the mortgage can be foreclosed. The defense that the mortgage was unauthorized by statute is not good. The delay is fatal. Browning v. Mullins. 13 S. W. Rep., 426 (Ky., 1890). A water-works corporation has power to mortgage its property. Hackensack Water Co. v. De Kay. 36 N. J. Eq., 548. A trading corporation has implied power to borrow money and give a mortgage therefor. Wood v. Meyer, 7 S. Rep., 359 (Miss., 1590). "Corporations, unless restrained by their charters, have the power to mortgage their property to secure borrowed money or their debts." Carpenter v. Black Hawk Min. Co., 65 N. Y., 43, 49. "By the common law the power to alien and mortgage lands in the course of its business inhered in corporations capable of acquiring and holding them, as in natural persons, as an incident of ownership." Rochester Sav. Bank v. Averell, 96 N. Y., 467, 472; In re Nash Brick, etc., Mfg. Co., 3 N. S. D.

It is a power, dangerous but necessary. It often leads to insolvency and often it saves an enterprise from insolvency. It is a power that exists by implication of law, and it is also held to arise from the right to purchase and sell land. A corporation may also mortgage or pledge personal property for the payment of loans.2

The power of an insolvent corporation to give a mortgage to some of its creditors and thereby prefer them to others is denied in some of the states, but at common law this power undoubtedly exists.3

254 (Can., 1873). Where all the directors and all the stock except one share assent to borrowing money and giving a mortgage, the money being used in the business, the loan and mortgage may be enforced. Witter v. Grand Rapids, etc., Co., 47 N. W. Rep., 729 (Wis., 1891). Concerning questions relative to mortgages made to secure the payment of preferred dividends, see ch, XVI, supra. The directors of a trading company have implied power to borrow money and give mortgages upon the property of the company in furtherance of its objects. General Auction. etc., Co. v. Smith. 65 L. T. Rep., 188 (1891).

¹ Jackson v. Brown, 5 Wend, 590 (1830); Gordon v. Preston, 1 Watts, 385 (1833); Watts' Appeal, 78 Pa. St., 370 (1875); Taber v. Cincinnati, L. & C. R. R., 15 Ind., 459 (1860); McAllister v. Plant. 54 Miss., 106 (1876); West v. Madison Co. Agric., etc., 82 Ill., 205 (1876). It is not for a borrower of money from the corporation to say that a mortgage given by the corporation is ultra vires. Darst v. Gale, 83 Ill., 136 (1876).

² Curtis v. Leavitt, 15 N. Y., 9 (1857); Garrett v. May, 19 Md., 177 (1862), where the income of a railroad was pledged to secure bonds; Clark v. Titcomb, 42 Barb., 122 (1864): Shears v. Jacobs, L. R., 1 C. P., 513 (1866); Leo v. Union Pac. R'y Co., 17 Fed. Rep., 273 (1883), holding that power to pledge securities is included in the power to sell them: Combination Trust Co. v. Weed, 2 Fed. Rep., 24 (1880), where a pledge of unislawful. See, also, \$ 465; Duncomb v. New York, H. & N. R. R. Co., 84 N. Y., 190 (1881), holding lawful a pledge of the bonds of the corporation to secure a corporate debt; Castle v. Lewis, 78 N. Y., 131 (1879), in which property was assigned to secure a loan previously advanced to the corporation. A railway mortgage on all real and personal property is valid though not in conformity with the general chattel mortgage act in respect to acknowledgment. Cooper v. Corbin, 105 Ill., 224 (1883). A gas company may borrow money and give a mortgage. Havs v. Galion, etc., Co., 29 Ohio St., 330 (1876); Detroit v. Mutual Gas Light Co., supra.

³ See §§ 661, and ch. XLI, supra, as to assignments by a corporation for the benefit of creditors with preferences. "A private corporation in a failing condition has the same common-law right that a natural person has to prefer, by way of payment or by giving security on its property, one or more of its bona fide creditors to the exclusion of others," Allis v. Jones, 45 Fed. Rep., 148 (1891). An insolvent corporation may mortgage its property to any one of its creditors. Such a mortgage is not for the benefit of all creditors, even though it is given to secure several. The mortgage may be given to a director or stockholder. Bank of Montreal v. Potts, etc., Co., 51 N. W. Rep., 512 (Mich., 1892). A mortgage given by an insolvent corporation to obtain an extension of a debt is valid. Damarin v. Huron, etc., Co., 26 N. E. Rep., 37 (Ohio, 1890). In an Ohio case, sued stock to secure a loan was held. following the Ohio decisions, the court If the mortgage is prohibited it is void.¹ Sometimes mortgages by corporations are prohibited by statute, except in cases where a part or all the stockholders assent to the giving of the mortgage.²

held that mortgages given by an insolvent corporation to prefer creditors are void and will be set aside. Smith P. Co. v. McGroarty, 132 U. S., 237 (1890). Preferences by au insolvent Michigan corporation, by way of mortgage, were held void in Kendall v. Bishop, 43 N. W. Rep., 645 (Mich., 1889). A general creditor who has not vet obtained judgment cannot maintain a suit in equity to restrain the company from making a mortgage and to have a receiver appointed, even though he shows that the company is insolvent and even though the statutes of one of the states authorize such a suit. Atlanta, etc., R. R. v. Western R'y, 50 Fed. Rep., 790 (1892). In Ohio an insolvent corporation cannot create preferences by giving mortgages to a part of its creditors. Sayler v. Simpson, 24 N. E. Rep., 596 (Ohio, 1890). An insolvent corporation in Ohio cannot secure antecedent debts by mortgage, thereby giving a preference. Rouse v. Merchants' Nat'l Bank, 22 N. E. Rep., 293 (Ohio, 1889). An insolvent corporation may make a mortgage unless the statutes forbid. Bergen v. Porpoise, etc., Co., 42 N. J. Eq., 397 (1886). A creditor of a corporation cannot prevent its giving a mortgage, the mortgage being duly authorized. Reed v. Bradley, 17 Ill., 321 (1856). Where an insolvent corporation gives a mortgage deed of trust to secure notes, this amounts to a preference which is illegal in Washington. Tompson v. Huron Lumber Co., 30 Pac. Rep., 741 (Wash., 1892). A general creditor of a corporation may sue to set aside an illegal mortgage by it by way of preference to another creditor, although the first-mentioned creditor has not obtained judgment. Consolidated, etc., Co. v. Kansas, etc., Co., 45 Fed. Rep., 7 (1891). In Graham v. Railroad Co., 102 U. S., 148 (1880), it was held that where a corporation solventat the time,

and without intent to defraud creditors, disposed of its property for an inadequate consideration by a voluntary conveyance, its creditors cannot subsequently question the transaction.

1 Where by statute mortgages on land in more than one county are void, a railroad mortgage is void, and the bondholders are merely unsecured creditors. Farmers' L. & T. Co. v. Oregon, etc., R'y, 24 Fed. Rep., 407 (1885); Union Trust Co. v. New York, etc., R. R., 1 R'y & Corp. L. J., 50 (Ohio Com. Pl., 1887). A benevolent corporation has no power to mortgage its property except by consent of the courts under the statutes of New York. A mortgage without that consent is void. The bond cannot be enforced in such an equitable action. Dudley v. Congregation, etc., 65 Hun, 21 (1892).

² Such a provision is regarded as intended for the protection and security of the stockholders: and in the absence of fraud and objection upon their part, defects in the proceedings by which the assent is given cannot be made to invalidate the mortgage unless they are of such a substantial character that the giving of the assent cannot be inferred. Thomas v. Citizens', etc., R'y Co., 104 Ill., 462 (1882); Greenpoint Sugar Co. v. Whitin, 69 N. Y., 328 (1877); Beecher v. Marquette & Pac. R. M. Co., 45 Mich., 103 (1881). The assent may be given subsequently so as to validate a mortgage if there are no intervening rights. Rochester Savings Bank v. Averell, 96 N. Y., 467 (1884). And a person purchasing from the corporation with actual notice is bound by the irregular mortgage, Id., 26 Hun, 643 (1882). The corporation cannot raise the objection. Id. Stock owned by the corporation is not to be voted. Vail v. Hamilton, 85 N. Y., 453 (1881). Other corporate creditors cannot raise this objection to the

Although the statutes limit the amount of debt to secure which a mortgage may be given, yet a mortgage is valid although it exceeds the amount specified in the statute.¹

mortgage. Hervey v. Illinois, etc., R'y Co., 28 Fed. Rep., 169 (1884). Cf. in general, Astor v. Westchester, etc., Co., 33 Hun, 333 (1884). A foreign corporation may give a mortgage on real estate without the consent of stockholders as required of domestic corporations. Saltmarsh v. Spaulding, 17 N. E. Rep., 316 (Mass., 1888). Concerning the New York act requiring the assent of stockholders, see, also, Martin v. Niagara, etc., Co., 122 N. Y., 165 (1890); Welch v. Importers', etc., Bank, 122 N. Y., 177 (1890). A creditor who is also a stockholder may vote his stock in favor of a mortgage to himself. Rittenhouse v. Winch. 11 N. Y. Supp., 122 (1890). A stockholder's vote need not be proved where the company acquiesced in the mortgage. Augusta, etc., R. R. v. Kittel, 52 Fed. Rep., 63 (1892). An actual meeting of the stockholders is not necessary if all consent, even though the statutes require a meeting. A subsequent creditor cannot complain. Coe v. East, etc., R. R., 52 Fed. Rep., 531 (1892). Although the statutes require two-thirds of the stockholders' assent to a mortgage, yet corporate creditors cannot raise that objection where the corporation does not. Hervey v. Illinois Mid. R'y, 28 Fed. Rep., 169 (1884). Where the charter of a turnpike company requires the assent of two-thirds of the stockholders to any mortgage, a mortgage without that assent is not ratified by the payment of subscriptions for the purpose of paying the debt secured by the mortgage. Forbes v. San Rafael, etc., Co., 50 Cal., 340 (1875). A contract to make a mortgage and issue bonds may be enforced where the company has received the consideration therefor, even though the statute requires the assent of two-thirds of the stockholders. Texas, etc., R'y v. Gentry, 69 Texas, 625 (1888). Although the statutes of Montana require that a

mortgage may be given only after a stockholders' meeting, convened by puhlication of notice, etc., has voted it, vet all the stockholders by voting therefor waive the required notice and no one can complain. The mortgage is valid._ Campbell v. Argenta, etc., Co., 51 Fed. Rep., 1 (1892). Concerning such a waiver. see, also, ch. XXXVI, supra. A mortgage may be executed by authority of the directors of a company, and even though the statutes of New York require the consent of stockholders, vet this objection cannot be raised by the company itself upon a foreclosure, the mortgaged land being located in West Virginia. Only a stockholder can raise the objection. Boyce v. Montauk, etc., Co., 16 S. E. Rep., 501 (W. Va., 1892). As to the New York statute, see, also, Star P. Co. v. Andrews, 9 N. Y. Supp., 731 (1890); McComb v. Barcelona, etc., Ass'n, 10 N. Y. Supp., 546 (1890). Although the statute requires the assent of two-thirds of the stockholders at a meeting duly called, etc., before a mortgage is given, yet if all the stockholders except one are directors, and he assents to the mortgage, and the directors at a directors' meeting authorize it. the mortgage is good. The provision is for the protection of stockholders, and not of the public. Thomas v. Citizens' Horse R'y, 104 III., 462 (1882). The statute in Massachusetts that a corporation shall not convey or mortgage its real estate, or give a lease thereof for more than a year, "unless authorized by a vote of the stockholders at a meeting called for that purpose," does not apply to foreign corporations even though the mortgage is authorized in and is on property in Massachusetts. Saltmarsh v. Spaulding, 147 Mass., 224 (1888).

¹ See § 760, supra.

§ 780. A railroad corporation has no implied power to mortgage its railroad.—Unless the charter or the statutes of the state expressly give this power, such a mortgage is void.¹

This is the rule laid down in a few cases and in the *obiter dicta* of many cases, and it is the law. Nevertheless there are many decisions which question it and some which declare that it is not the law?

1"A railroad corporation-cannot mortgage its frauchise and railroad without the authority of the legislature, as shown by previous leave or subsequent satisfaction." Daniels v. Hart, 118 Mass., 543 (1875). The statutes of Massachusetts expressly prohibit mortgages by street railways unless specially allowed by their charters. Richardson v. Sibley, 93 Mass., 65 (1865). Substantially the same question arises and the same reasoning applies in the sale, lease or consolidation of railroads, concerning which see ch. LIII, infra. A statute prescribing that no mortgage shall be executed unless it secures existing debts does not give power to mortgage. If the bonds are invalid the mortgage falls with them. Commonwealth v. Smith, 92 Mass., 448 (1865). See, also, dictum in Platt v. Union Pac. R'v. 99 U. S., 48. 57 (1878); Daniels v. Hart, 118 Mass., 543 (1875): Black v. Delaware & R. Canal Co., 22 N. J. Eq., 121, 399 (1871), and English cases cited; Susquehanna, etc., Co. v. Bonham, 9 W. & S., 27 (1845); Steiner's Appeal, 27 Pa. St., 313 (1856); Wood v. Bedford & B. R. R. Co., 8 Phila., 94 (1871); Winchester & L. T. Co. v. Vimont, 5 B. Mon., 1 (1844); State v. Morgan, 28 La. Ann., 482 (1876). See, also, ch. LIII, to the effect that a railroad company has no implied power to sell its railroad.

² See Memphis, etc., R. R. v. Dow, 19 Fed. Rep., 388, 391 (1884). In New Hampshire, in 1857, the circuit court of the United States, after stating that in England a railway, and the right to own and operate a railway, could not be sold or mortgaged unless the party owning and operating it was expressly author-

ized to sell or mortgage it, proceeded to say: "The franchises to build, own and manage a railroad, and to take tolls thereon, are not necessarily corporate rights; they are capable of existing in and being enjoyed by natural persons; and there is nothing in their nature inconsistent with their being assignable." The court said there was great doubt about the inherent power to mortgage or sell, but in this case the mortgage had been recognized by the legislature, and hence was valid. Hall v. Sullivan R. R., 11 Month, Law Rep. (N. S.), 138 (1857). The franchise to be a corporation cannot be mortgaged. But the "franchises to build, own and manage a railroad and to take tolls thereon are not necessarily corporate rights" and may be mortgaged. New Orleans, etc., R. R. Co. v. Delamore, 114 U.S., 501 (1885), a street railway case. A railroad corporation has implied power to mortgage its property and franchises to secure bonds given in payment for rails. Miller v. Rutland, etc., R. R., 36 Vt., 452, 488 (1863). A railroad corporation has implied power to mortgage its property and franchises, excepting the franchise to be a corporation. Bardstown, etc., R. R. v. Metcalfe, 4 Met. (Ky.), 199 (1862); Savannah, etc., R. R. v. Lancaster, 62 Ala., 555 (1878); Kelly v. Trustees, etc., R. R., 58 id., 489 (1877). See, also, Pollard v. Maddox, 28 Ala., 321 (1856); McAllister v. Plant, 54 Miss., 106 (1876). In Alabama it has been held that "corporations created for the construction of railroads, in the absence of limitation or restraint by statute, have power to borrow money and to make bonds, bills or promissory notes for its repayment; and

An injunction will be granted at the instance of a stockholder to prevent the corporation from giving a mcrtgage which would be ultra vires.¹

§ 781. Mortgage on the superfluous land, etc., of a railroad corporation.— A railroad corporation may, without express authority so to do, mortgage such of its land and property as is not necessary to the operation of the road.² Hence the mortgage may be

also power to mortgage its property, real or personal, as a security for such evidence of debt." and that it has these powers incidentally and without express enactment. Kelly v. Trustees, etc., 58 Ala., 489 (1877). See, also, Bickford v. Grand Junction, etc., R'v. 1 Can. Sup. Ct. Rep., 696, 729 (rev'g court below), a dictum. In Arthur v. Commercial, etc., R. R. Bank, 17 Miss., 394 (1848), an assignment of a railroad for the benefit of creditors was held to be valid. "It cannot be successfully contended, in the face of many decisions to the contrary, both in England and America, of courts of the highest authority, that a statutory corporation is incapable of mortgaging its property, unless its incapacity to do so is either expressly declared or is to be gathered by implication from the terms of the act of incorporation. In other words, no enabling power is requisite to confer the authority to mortgage, but prima facie every corporation must be taken to possess it."

In the case of Shepley v. Atlantic, etc., R. R., 55 Me., 395, 407 (1867), the court said in regard to this doctrine as follows:

"The whole argument seems to have no greater force than this, that it is dangerous to the public interests to have the powers and privileges conferred by a railroad franchise transferred from the original corporators to a new body. But when we consider how little importance is attached to the persons of the original corporators, how soon death must and other circumstances may remove them from all participation in the affairs of the road, how constantly those who have the active management

of it are in fact being changed, we shall see how little practical merit this argument has. At the beginning the corporators undoubtedly have a controlling influence, but afterwards the directors are elected by the stockholders and are often changed. Is there any reason to suppose that if a mortgage should, by foreclosure, transfer the franchise to new hands, that as capable men would not be appointed to manage the road as before? Would not the bondholders be as interested and as capable of appointing suitable managers as the stockholders? Does any one fear that the public interest would not be as safe with the former as the latter? Why then is it dangerous to the public interests to allow such a transfer?

"We confess that, after giving the matter much thought, the doctrine that all railroad mortgages made without the consent of the legislature are illegal and void because they may operate as a permanent transfer of the corporate powers from the original corporators to another body seems to us to have little to commend it and much to condemn it."

And in Maine it is held that the general policy of the state in allowing mortgages by railroads is sufficient. Kennebec, etc., R. R. v. Portland, etc., R. R., 59 Me., 9 (1871). See, also, Morrill v. Noyes, 56 Me., 458.

¹ McCalmont v. Phil., etc., R. R. Co., 7 Fed. Rep., 386 (1881).

² Platt v. Union Pac. R. R., 99 U. S., 48, 57 (1878). A railroad company may, without express authority, mortgage lands which "were not acquired to enable the corporation to carry on the valid as to the property which the corporation is authorized to mortgage and invalid as to the rest.¹

§ 782. Express authority to mortgage and ratification of unauthorized mortgages.— Generally the charters of the corporations or the statutes of the state authorize railroad corporations to mortgage their railroads, property and franchises.² Where a railroad company has given a mortgage without authority so to do, the legislature may subsequently ratify and validate the mortgage.³

business which it was chartered to do for the benefit of the public, nor needed or used for that purpose. Their alienation in no wise impaired or affected the usefulness of the company as a railroad, or its ability to exercise any of its corporate franchises." A railroad company having power to acquire land for depots and warehouses and to sell or lease them to other companies may mortgage them. Hendee v. Pinkerton, 96 Mass., 381 (1867). A mortgage may be made on lands not used for permanent way, station houses and station grounds, without express authority. Bickford v. Grand Junction, etc., R'y, 1 Can. Sup. Ct. Rep., 696, 735 (1877); citing 22 Wall., 572; 2 Otto, 49. The company may without express authority mortgage ordinary real estate not used in the business, but received in payment for subscriptions to stock. Taber v. Cincinnati, etc., R'y, 15 Ind., 459 (1860). A railroad may mortgage its personal property not affixed to the road, though used in the operation of it. Pierce v. Emerv. 32 N. H., 484 (1856). Express power to mortgage the lots and such property as a dock company acquires under a statute does not prevent the company's giving a mortgage on other property owned by the company. McCormick v. Parry, 7 Ex., 355 (1852).

¹If the mortgage is authorized and valid on any part of the property which it purports to cover, it is not wholly void, but is void only as to the remaining property. Bickford v. Grand Junction, etc., R'y, 1 Can. Sup. Ct. Rep., 696, 734 (1877), reversing the court below. See, also, Carpenter v. Black Hawk, etc.,

Min. Co., 65 N. Y., 43 (1875). If the mortgage covers property which the company is authorized to mortgage and also property which it is not authorized to mortgage, it is good as to the former. Hendee v. Pinkerton, 96 Mass., 381 (1867).

² See Part V, *infra*, for the statutes of the various states. A lessor railroad may give a mortgage on the cash rental to which it is entitled, and may take the bonds secured by such mortgage. Hazard v. Vermont, etc., R. R., 17 Fed. Rep., 753 (1883).

³ A mortgage which is prohibited by statute may subsequently be validated by statute. Grass v. U. S., etc., Co., 108 U. S., 477 (1883); White Water, etc., Co. v. Vallette, 21 How., 414 (1858); Howe v. Freeman, 14 Gray, 566. The power to mortgage may be given after the mortgage is executed, and such mortgage may be validated. Galveston R. R. v. Cowdrey, 11 Wall., 459 (1870); Hall v. Sullivan R. R., 11 Month. L. R. (N. S.), 138 (U. S. C. C., 1857); Kennebec, etc., R. R. v. Portland, etc., R. R., 59 Me., 9 (1871); Shepley v. Atlantic, etc., R. R., 55 id., 395 (1867); Shaw v. Norfolk, etc., R. R., 71 Mass., 162 (1855); Richards v. Merrimack, etc., R. R., 44 N. H., 127 (1862), where the ratification was by authorizing the trustees in the mortgage to sell the road. The ratification cannot cure the defect that the vendor of the property to the corporation objects to the deed, the vendor being a corporation, and there being dissenting stockholders. Mayor, etc., v. Knoxville, etc., R. R., 22 Fed. Rep., 758 (1884).

§ 783. Construction of various provisions authorizing mortgages.—If the charter authorizes the corporation to sell this is sufficient authority to mortgage. Power to sell implies the power to mortgage,¹ and power to "pledge" the property gives power to mortgage.² But power to mortgage the real estate does not give power to mortgage the franchises.³ Power to give "such securties in amount and kind" as the company sees fit gives power to mortgage.⁴

The general power of a corporation to mortgage its property is not abridged or destroyed by a special authority to make a mortgage for a particular purpose.⁵

Power to mortgage in order to carry out the purposes of the incorporation authorizes a mortgage to buy rolling stock and build branch lines.⁶

Although the statutes authorize a mortgage for certain purposes only, yet if the bonds are used for other purposes, bona fide pur-

¹Express power given to sell gives also power to mortgage. Willamette, etc., Co. v. Bank, etc., 119 U. S., 191 (1886); McAllister v. Plant, 54 Miss., 106 (1876). Power to "transfer" the property gives power to mortgage it. Dunham v. Isett, 15 Iowa, 284 (1863). Power to sell gives power to mortgage. Bickford v. Grand Junction, etc., R'y, 1 Can. Sup. Ct. Rep., 696, 736 (1877). Power to "transfer all its property, rights, privileges and franchises" gives power to mortgage. East Boston, etc., R. R. v. Eastern R. R., 95 Mass., 422 (1866). Power to sell gives power to mortgage. Branch v. Atlantic, etc., R. R., 3 Woods, 481 (1879). Power to mortgage gives power to sell at foreclosure sale the right of way, franchises, etc. New Orleans, etc., R. R. v. Delamore, 114 U.S., 501 (1885). ² Mobile, etc., R. R. v. Talman, 15 Ala.,

²Mobile, etc., R. R. v. Talman, 15 Ala., 472 (1849). "The power to pledge the franchises and rights of the corporation implies as incident thereto the power to pledge everything that may be necessary to the enjoyment of the franchise and upon which its real value depends." Phillips v. Winslow, 18 B. Mon., 431 (1857).

³ Randolph v. Wilmington, etc., R. R., 11 Phil., 502 (U. S. C. C., 1876).

⁴ Pierce v. Milwaukee, etc., R. R., 24 Wis., 551 (1869). See Phillips v. Winslow, 18 B. Mon., 1 (1857), holding that power to mortgage the franchise implies the power to pledge everything that may be necessary to the enjoyment of it.

⁵ Allen v. Montgomery R. R. Co., 11 Ala. (N. S.), 437, 454 (1847); Mobile & Cedar Point R. R. Co. v. Talman, 15 Ala. (N. S.), 472 (1849). Cf. 21 Pac. Rep., 373. Bickford v. Grand Junction, etc., R'y, 1 Can. Sup. Ct. Rep., 696 (1877), reversing the court below (Grand Junction, etc., R'y v. Bickford); Uncas National Bank v. Rith, 23 Wis., 339 (1868), holding that power to mortgage the franchise does not exclude other forms of security. Where statutory power is given to a railroad corporation to issue bonds to aid in the construction and equipment of the road, and to secure the same by mortgage, the corporation is not limited in the amount of its mortgage, but only as to the purposes thereof. A second mortgage may also be made. A reorganized company may succeed to these same powers. Du Pont v. Northern P. R. R., 18 Fed. Rep., 467 (1883).

⁶ Gloninger v. Pittsburg, etc., R. R.,
 21 Atl. Rep., 211 (Pa., 1891).

chasers are protected. The general rule is that the negotiability of the bonds gives negotiability to the mortgage securing the bonds?

§ 784. Purchase-money mortgages need not be expressly authorized.— A railroad corporation having power to purchase a railroad has implied power to give a purchase-money mortgage in the transaction.³ A purchase-money mortgage may be created by the provisions of the deed of conveyance.⁴

§ 785. Power to again mortgage after a mortgage has been given. Where power is given to make a mortgage to complete a railroad and such mortgage is not given and the railroad is completed, the power is exhausted.⁵ But where a corporation has power to give mortgages, a consolidated company made up of the former and of other companies succeeds to that power.⁶

§ 786. Power to mortgage the whole gives power to mortgage a part.—If a railroad company has power to mortgage its whole road, this gives it power to mortgage a part of the road.

¹ See §§ 762, 768, supra.

² See § 770 for many decisions pro and con on this subject.

³ Memphis, etc., R. R. v. Dow, 19 Fed. Rep., 388 (1884), a case arising in the New York circuit. In the same case from the Arkansas circuit, 120 U.S., 287 (1887), the supreme court sustained the same doctrine by sustaining the mortgage as given, not under the statutory authority to secure "money borrowed," hut as a common-law mortgage. See p. 300. Where one road has been leased to another, the two roads may subsequently be consolidated, and consolidated mortgage bonds issued, of which a part shall go to the former lessor company in extinguishment of its claim to rent under the old lease. If the transaction is a fair one towards the stockholders of the lessor the court will not disturb it. Hazard v. Vermont, etc., R. R., 17 Fed. Rep., 753 (1883). The priority of purchase-money mortgages over other liens is considered in chapter L.

⁴ A purchase-money mortgage may be contained in the deed, by which the vendor is to be paid a certain sum or shares of stock in lieu thereof. Pinch v. Anthony, 90 Mass., 536 (1864). A purchase-money mortgage may be con-

tained in the deed, by which mortgage the vendee and mortgagor must complete the road and issue certain stock to the vendor. Tenn., etc., R. v. East Ala., etc., R'y, 73 Ala., 426 (1882). A purchase-money mortgage based on an old contract may be given even though the corporation is insolvent when the mortgage is given. Stokes a Detrick, 23 Atl. Rep., 846 (Md., 1892). Where a purchase-money mortgage is given as security for bonds, but the vendor rejects the bonds and they are used for other purposes, the vendor loses his lien. Rice's Appeal, 79 Pa. St., 168 (1875).

East Tenn., etc., R'y v. Frazier, 139
 U. S., 288 (1891).

⁶ Mead v. New York, etc., R. R., 45 Conn., 199 (1877); Du Pont v. N. P. R. R., supra.

⁷ Pullman v. Cincinnati, etc., R. R., 4 Biss., 35 (1865); Bickford v. Grand Junction, etc., R'y, 1 Can. Sup. Ct. Rep., 696, reversing the court below. But see quære in East Boston, etc., R. R. v. Eastern R. R., 95 Mass., 422 (1866), and a dictum to the contrary in East Boston, etc., R. R. v. Hubbard, 92 Mass., 439, note (1865). See, also, ch. LIII, concerning the sale of part of a railroad under a power to sell the whole. "If § 787. Mortgage to secure future advances, contracts, dividends, etc.—After-acquired property.—A mortgage may be given to secure future sums to be paid by the mortgage to the corporation.¹ The mortgage need not necessarily be to secure the payment of money. It may be to secure the performance of a contract,² or the payment of preferred dividends,³ or ordinary dividends on a sale of the corporate property.⁴

A mortgage may be given by a corporation to secure directors who at the time of the giving of the mortgage guaranty certain

debts of the company.5

The power of a corporation to give a mortgage to secure bonds issued by another corporation would seem to exist where the power exists to guaranty the payment of such bonds.

A mortgage may cover property subsequently acquired by the

company.7

§ 788. Who may attack the validity of a mortgage.— Although a corporate mortgage is illegal, yet it is not everyone who may attack it. A subsequent mortgage may attack unless his mortgage is expressly made subject to the mortgage in controversy.

they could mortgage the whole they could mortgage a part." Chartiers R'y v. Hodgens, 85 Pa. St., 501, 506 (1877). See, also, Jones on Corporate Bonds, etc., § 13. Where a railroad company mortgages such part of its road as is completed, and the mortgage is foreclosed, the purchasers are not bound to go on and complete the road. Failure on their part to complete it is no defense to an action on a subscription. Chartiers R'y v. Hodgens, 85 Pa. St., 501 (1877).

¹ Jones v. Guaranty, etc., Co., 101 U. S., 622 (1879). Where the mortgagee has the option to make future advances or not, each advance is as upon a new mortgage; but where the mortgagee is bound to make the advances, the lien therefor relates back to the date of the mortgage and is superior to liens or conveyances subsequent to that mortgage. Tompkins v. Little Rock, etc., R'y, 15 Fed. Rep., 6 (1882).

²The mortgage may be to secure not only the bonds, but also the performance by the corporation of a construction contract which it has let. But the terms of the mortgage may make the

bonds a prior lien to the contract, so that the mortgage secures first the bonds and then the contract. Mason v. York, etc., R. R., 52 Me., 82 (1861). A mortgage may be given by a corporation to become due when the corporation ceases to carry on the purpose for which it was incorporated. Trustees, etc., v. McKechnie, 90 N. Y., 618 (1882).

³ See § 270, supra.

- ⁴ Where under special charter power the company constructs a new road, and by a trust deed sets aside a certain proportion of the entire gross receipts of the company for dividends on the stock issued on the new line, a receiver of the company will be compelled to pay the amount called for by such a trust deed. Re The Eastern, etc., R'y Co., 63 L. T. Rep., 181 (1890); aff'd, id., 604, and aff'd 64 id., 669.
- ⁵ Re Pyle Works, 63 L. T. Rep., 628 (1890).
- ⁶ Concerning the power to guaranty, see § 775, supra.
 - 7 See ch. L, infra.
- ⁸ A second mortgagee may attack the validity of the first mortgage unless the second mortgage is expressly subject to

A general creditor may attack it where the corporation is insolvent,¹ or a receiver of the corporation;² the mortgagor company itself may,³ and a stockholder may attack it;⁴ but a purchaser of the property at foreclosure sale cannot.⁵

Where a corporation or insolvent firm sells its property to a corporation and takes its pay in the bonds of the latter, a creditor of the vendor may attack the mortgage securing the bonds. The mortgage may be held to be void on foreclosure proceedings. The invalidity of a part of the bonds which are secured by the mortgage

the first. Commonwealth v. Smith, 92 Mass., 448 (1865). The trustee of the second mortgage cannot attack the first mortgage where the second mortgage expressly provides that part of the bonds issued under it shall be used to pay off the first mortgage. Whitney v. Union Trust Co., 65 N. Y., 576 (1875). See, also, in general, Jerome v. McCarter, 94 U. S., 734 (1876); Minn. Co. v. St. Paul Co., 6 Wall., 742 (1867); Bronson v. La Crosse R. R., 2 Wall., 283 (1863).

¹ A corporate mortgage may be attacked by a general creditor of the insolvent corporation. Mellen v. Moline. etc., Works, 131 U. S., 352 (1889). Where several suits by judgment creditors are pending to set aside corporate mortgages, the court will enjoin all except the one by the receiver. Brower v. Baucus, 14 N. Y. Supp., 462 (1891). foreclosure sale based on fraudulentlyissued bonds will be set aside as against purchasers with notice and such purchasers held liable for the real value of the road. Drury v. Cross, 7 Wall., 299 (1868). A general creditor has an equitable lien upon the property of a corporation and therefore has a right to contest the question of priority of other asserted liens. He may contest the validity of an issue of bonds. Farmers' L. & T. Co. v. San Diego, etc., St. R'y Co., 45 Fed. Rep., 518 (1891).

² Brower v. Baucus, supra. A receiver of a corporation may institute suit to set aside a mortgage executed by it without the assent of stockholders as required by statute. Vail v. Hamilton, 85 N. Y., 453

(1881). A receiver may attack the validity of mortgages given by the corporation. Astor v. Westchester, etc., Co., 33 Hun. 333 (1884). A receiver may bring an action to determine the validity of bonds issued by the corporation of which he is receiver. All the parties having the bonds which were issued under the mortgage are necessary parties. A creditor's action to enforce the bonds will be stayed. A foreclosure had been commenced prior to this time. Hubbell v. Syracuse, etc., Works, 42 Hun, 182 (1886).

³ Beals v. Ill., etc., R. R., 27 Fed. Rep., 721 (1886),—the mortgager in this case having given a mortgage to secure the bonds of another company. The case of Arthur v. Commercial, etc., R. R. Bank, 17 Miss., 394 (1848), holds that only the state can object to an ultra vires mortgage, but this is clearly not the law.

⁴ McCalmont v. Phil., etc., R. R., 7 Fed. Rep., 386 (1881). See chs. XXXIX and XL, supra, where the right of a stockholder to attack fraudulent or ultra vires contracts of the company is fully explained.

⁵ A purchaser of real estate at a judicial sale, who is neither a stockholder nor creditor, cannot question a corporate mortgage on the property where he had notice thereof and there was no fraud. Darst v. Gale, 83 Ill., 136 (1876).

⁶See ch. XL, supra.

⁷Farmers' L. & T. Co. v. Oregon, etc., R'y, 24 Fed. Rep., 407 (1885); Union Trust Co. v. N. Y., etc., R. R., 1 R'y & Corp. L. J., 50 (Ohio Com. Pl., 1887). does not invalidate the mortgage as a security for the remaining bonds.1

§ 789. Purchase-money mortgage issued to an insolvent vendor.— Where a corporation sells all its property to another corporation without authority so to do, or where an insolvent copartnership sells all its property to a corporation, and in either case the vendor takes its pay in the stock and bonds of the vendee, the tendency of the law is to set aside the transaction, except where the rights of bona fide parties have intervened.²

A consolidated road may make a mortgage which will take precedence over the unsecured debts of one of the consolidating companies.³

§ 790. The franchise to be a corporation cannot be mortgaged, but the right to operate the road and collect toll is covered by an authorized mortgage.— The usual power to mortgage the property and franchises does not include the franchise to be a corporation. It refers to the franchise and right to operate the road and collect fares.⁴

¹ Graham v. Boston, etc., R. R., 118 U. S., 161 (1886).

² See ch. XL on this subject.

³ Wabash, etc., R'y v. Ham, 114 U. S., 587 (1885). This is no more than any one of the old companies might have done. Tysen v. Wabash R'y, 11 Biss., 510 (1883); 15 Fed. Rep., 763. But where the unsecured debts consist of bonds which the consolidated company agrees to "protect," these constitute an equitable lien on the property of the old com-Id. The case of Compton v. Railway, 45 Ohio St., 592 (1888), passed upon the same bonds, and it was held that these bonds constituted a lien on the property of the old company, and were prior in right to the mortgage bonds of the consolidated company; refusing to follow Wabash, etc., R'y v. Ham, supra.

⁴Pullan v. Cincinnati, etc., R. R., 4 Biss., 35 (1865). A mortgage authorized on the "means, property and effects" covers the franchise or privilege, enabling the mortgagee to have the same use and beneficial enjoyment of the property which the company had, but does not cover the franchise to be a corporation. Meyer v. Johnston, 53 Ala.,

237 (1875); Arthur v. Commercial, etc., R. R. Bank, 17 Miss., 394 (1848); Carpenter v. Black Hawk, etc., Co., 65 N. Y., 43 (1875), holding that including this franchise without authority does not invalidate the mortgage as to other property. In the case of Pierce v. Emery, 32 N. H., 484, 512 (1856), the view is taken that the franchise to be a corporation passed also under the mortgage, but this certainly is not the law. The attempt to cover the franchise to be a corporation is nugatory, but does not invalidate the mortgage. Butler v. Rahm, 46 Md., 541 (1877). The right to mortgage the road carries with it the right to mortgage the use of the road, although the latter is a franchise. The franchises to be a corporation and to exercise the power of eminent domain do not pass, however. Coe v. Columbus, etc., R. R., 10 Ohio St., 372, 390 (1859). The legislature may of course authorize a mortgage on the franchise to be a corporation. St. Paul, etc., R. R. v. Parcher, 14 Minn., 297 (1869). See, also, Atkinson v. Marietta & C. R. R. Co., 15 Ohio St., 21 (1864), holding that a judicial sale under a mortgage which includes the franchise without authority does not invest pur"The franchise of becoming and being a corporation, in its nature, is incommunicable by the act of the parties and incapable of passing by assignment." Hence, the purchasers of a road on foreclosure sale succeed to the right to maintain and operate the road but not to the right to be a corporation.²

chasers with any corporate capacity whatever. The mortgage does not cover the power to exercise the right of eminent domain. Coe v. Columbus, etc., R. R., supra. Power to mortgage the property makes the mortgage of a railroad company valid although the mortgage also seeks to cover the franchise. Gloninger v. Pittsburg, etc., R. R., 21 Atl. Rep., 211 (Pa., 1891). The mortgage on the franchises covers them "so far as necessary to make the other property and effects conveyed by it productive and profitable." Mever v. Johnston. 53 Ala., 237, 324, 327 (1875). The word "property" includes also the franchises. Wilmington R. R. v. Reid, 13 Wall., 264 (1871). At an early day a dictum by Lord Coleridge was to the effect that a mortgagee, even if he took possession. could not operate the road; but this is now clearly not the law. Myatt v. St. Helms R'y, 2 Q. B., 364 (1841).

1 "The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders, or the purchasers at a foreclosure sale, the substantial rights intended to be secured. They acquire the ownership of the railroad and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment. All the franchises necessarv or important to the beneficial use of the railroad could as well be exercised by natural persons. The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators, while the powers and privileges, vested in and to be exercised by the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all its property and all its franchises." The court held that the purchasers at a foreclosure sale of a railroad might organize a corporation to operate the railroad, but that such new corporation did not succeed to an exemption from taxation which the old corporation possessed. Memphis, etc., R. R. v. Railroad Com'rs, 112 U. S., 609, 619 (1884). The purchasers of a road at foreclosure sale do not succeed to corporate capacity and franchise of the old corporation. Metz v. Buffalo, etc., R. R. Co., 58 N. Y., 61 (1874); Wellsborough, etc., P. R. Co. v. Griffin, 57 Pa. St., 417 (1868). See, also, an able article on Foreclosure of Railway Mortgages by R. Mason Lisle, in American Law Review, December, 1886: People v. Cook, 110 N. Y., 443 (1888).

² A franchise to be a corporation is distinct from a franchise, as a corporation, to maintain and operate a railway; the latter may be mortgaged without the former and may pass to a purchaser at a foreclosure sale. The court said: "The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders or the purchasers at a foreclosure sale the substantial rights intended to be se-They acquire the ownership of a railroad and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment. All the franchises necessary or important to the beneficial use of the railroad could as well be exercised by natural persons. The essential properties of corporate existence are quite distinct from the franchises of the

§ 791. Mortgages to directors.— Under certain circumstances and certain restrictions the mortgage may be given to a director of the corporation to secure a debt due to him, but not to a director if the corporation is insolvent.²

§ 792. Forfeiture of the charter — Effect upon a mortgage.— A forfeiture of the charter of the company at the instance of the state does not invalidate or affect an existing mortgage on the company's property; but a lapse of the charter by reason of a failure to do certain work within a certain time may destroy the franchises, even as covered by the mortgage.

corporation. The franchise of being a corporation belongs to the corporators, while the powers and privileges vested in and to be exercised by the corporate body as such are the franchises of the corporation. The latter has no power. to dispose of the franchise of its members which may survive in the mere fact of corporate existence after the corporation has parted with all its property and all its franchises." Memphis. etc., R. R. Co. v. R. R. Commissioners, 112 U. S., 609, 619 (1884); Bruffett v. Great Western R. R., 25 Ill., 353 (1861); Commonwealth v. Tenth, etc., T. Co., 59 Mass., 509 (1850); State v. Bank of Md., 6 G. & J., 205 (1834); Vilas v. Milwaukee etc., R'v. 17 Wis., 497 (1863); Smith v. Chicago, etc., R'y, 18 id., 17 (1864); Hall v. Sullivan R. R., 21 Month. L. Rep., 138 (1857); Commonwealth v. Central, etc., R'y, 52 Pa. St., 506 (1866); State v. Sherman, 22 Ohio St., 411 (1872); Commonwealth v. Smith, 92 Mass., 448 (1865). See, also, cases in ch. LII, infra, to effect that the purchaser at foreclosure sale is not liable for the debts of the old company. Purchasers at the sale succeed to all the rights of the company in the deeds of the right of way from property owners. Pollard v. Maddox, 28 Ala., 321 (1856). The purchasers at a foreclosure sale are "invested with the franchise of maintaining, operating and making profit from the use of the road, according to the grant made," but they do not succeed to the corporate existence of the foreclosed company, and hence they operate the road as individuals. Atkin-

son v. Marietta, etc., R. R., 15 Ohio St., 21 (1864). Upon the foreclosure sale of a railroad an individual may purchase it but unless a statute authorizes him to operate or sell it he is "in the awkward predicament of owning a property which it was not certain he could use or sell." People v. Brooklyn, etc., R. R., 89 N. Y., 75, 84 (1882). On an execution sale of a street railroad franchise, as authorized by statute, an individual may purchase and then operate the road. "There is no more difficulty in allowing individuals to exercise these powers than corporations, and the use of them for a brief period in no way interferes with the protection of the franchise in perpetuity. There might be difficulties in managing larger enterprises, and different rules have been applied to them. But there are no difficulties in the way of private management of a street railway, and there is no reason why the statute which by its language includes them should be made to exclude them." McKee v. Grand Rapids, etc., R'y, 41 Mich., 274 (1879).

¹ See § 661, supra.

² § 661, supra.

³ People v. O'Brien, 111 N. Y., 1 (1888). See, also, § 641, supra. A purchaser at a mortgage sale of lands mortgaged by a railroad is protected, although the lands were to be forfeited if the road was not completed within a certain time and the road was not completed. No forfeiture had been declared in this case. Mower v. Kemp, 8 S. Rep., 830 (La., 1890).

4 Where by the charter all rights are

§ 793. Waiver of a part or all of a mortgage and bonds.— A mortgage may be waived entirely or may be waived so as to allow a later mortgage to take priority. This is sometimes done by a state which holds a first mortgage on a railroad and wishes to enable the company to borrow more money.

Although a state issues its bonds in aid of a railroad and then takes a mortgage on the railroad as security for the state, yet a holder of the state bonds is not subrogated to the mortgage and cannot enforce it. The state may waive the mortgage.² Sometimes a part of the bondholders waive their priority of lien. This

to be forfeited unless the road is completed within a certain time, and it is not so completed, and the state forfeits all its rights and turns them over to another company, a mortgage of the old company falls also. Where no part of the money from the bonds was expended on the road, holders of bonds with notice get nothing. Silliman v. Fredericksburg, etc., R. R., 27 Gratt. (Va.), 119 (1876). See, also, Farnsworth v. Minnesota, etc., R. R., 92 U. S., 49, 66 (1875). Where the company's charter limits the time within which it must complete the road and it is liable to not do so, the trustee of the mortgage may have a receiver appointed for the purpose of completing the road. Allen v. Dallas, etc., R. R., 3 Woods, 316 (1878).

¹ Murdock v. Woodson, 2 Dill., 188 (1873); Woodson v. Murdock, 22 Wall., 351 (1874); Darby v. Wright, 3 Blatch., 170 (1854). The waiver may be to take effect only upon a consolidation. Gibbes v. Greenville, etc., R. R., 13 S. C., 228 (1879). The state may, instead of waiving its mortgage, allow new investors to be subrogated to its security. Ketchum v. Pacific R. R., 4 Dill., 78; affirmed, Ketchum v. St. Louis, 101 U. S., 306. Where the first-mortgage bondholders (the state in this instance) agree that the interest on new bonds to be issued shall be paid before the former take anything, this agreement constitutes an equitable mortgage on the property and to that extent displaces the first mortgage. A foreclosure by a mortgagee second to the first mortgage, but prior to the new bonds mentioned above, must take this equitable mortgage into consideration. Ketchum v. Pacific R. R., 4 Dill., 78 (1877).

²State aid bonds secured by a lien on the railroads to the state give no right to holders to enforce that lien. state may release the lien. Tennessee Bond Cases, 114 U. S., 663 (1885). Although bonds issued by a state in order to pay its subscription to stock of a railroad recite that the state holds the stock as security therefor, yet the state cannot be compelled by suit to apply its stock and dividends to the payment of such bonds. Christian v. Atlantic, etc., R. R., 133 U. S., 233 (1890), overruling Swazey v. North Carolina R. R., 1 Hughes, 17. For a case holding that railroad bonds issued by the state constituted a lien which subsequent owners of the bonds might enforce, see Tompkins v. Little Rock, etc., R'y, 15 Fed. Rep., 6 (1882). Concerning subrogation herein, see § 762, supra; also, Railroad v. Schutte, 103 U.S., 118 (1880); Chamberlain v. St. Paul, etc., R. R., 92 U. S., 299 (1875); Stevens v. Louisville, etc., R. R., 3 Fed. Rep., 673 (1880); Colt v. Barnes, 64 Ala., 108; Young v. Montgomery, etc., R. R., 2 Woods, 606; Gilman v. N. O., etc., R'y, 72 Ala., 566; Forrest v. Luddington, 68 Ala., 1; Morton v. N. O., etc., R'v. 79 id., 590; Branch v. Macon, etc., R. R., 2 Woods, 385; Clews v. Brunswick. etc., R. R., 54 Ga., 315; North Carolina. R. R. v. Drew, 3 Woods, 692; Florida v. Florida, etc., R. R., 15 Fla., 690; Improvement Fund v. Jacksonville, etc., R.

does not decrease or increase the rights of the other bondholders secured by the same mortgage.1

B. FORM AND PROVISIONS OF THE MORTGAGE DEED OF TRUST.

§ 794. The mortgage may be a deed of trust — Mortgages to a state - Equitable mortgages. - The mortgage of a corporation need not be in any particular form.2 It may be in the form of a deed in trust to trustees for the benefit of the bondholders,3 or it may be a mortgage made directly to one or more bondholders.4 Sometimes a mortgage is created by the words of a statute, and no formal instrument of mortgage is necessary.5

R., 16 id., 788; Hand v. Savannah, etc., R. R., 12 S. C., 314: Gibbes v. Greenville, etc., R. R., 13 id., 228.

¹Such of the bondholders as desire may agree that their bonds shall be subject to a new lien that is later than their mortgage, but their agreement of course does not bind bondholders who do not assent thereto. The agreement is given in full in this case. Polaud v. Louisville, etc., R. R., 52 Vt., 144 (1879). But in such a case the non-assenting stockholders cannot claim that the other bonds are paid. The secondary lienholders succeed to the rights of the first-mortgage bondholders who have waived their rights. Id. By unanimous consent a judgment on a claim may be allowed to be paid in priority to the mortgage bondholders. Central T. Co. v. Wabash, etc., R. R., 24 Fed. Rep., 98 (1885). Construction work may be entitled to payment in preference to mortgage bonds, if the bondholders request, direct or promise payment for the work. This would be by estoppel. But mere acquiescence does not raise an estoppel in pais. In re Kelly, 5 Fed. Rep., 846 (1881). See, also, § 762 on subrogation. Although the holders of coupons waive default and agree to give time, yet the agreement being without consideration they may change their minds and insist upon payment or a foreclosure for nonpayment of the interest. Union T. Co. v. St. Louis, etc., R'y, 5 Dill, 1 (1878).

65 N. Y., 43 (1875). "The mode in which the mortgage lien shall be created is left to the company." Hubbell v. Syracuse, etc., Works, 14 N. Y. Supp., 345 (1891).

³ See ch. XLVIII concerning this form of mortgage.

4 See § 812.

⁵ Wilson v. Boyce, 92 U. S., 320 (1875): Tompkins v. Little Rock, etc., R'y, 15 Fed. Rep., 6 (1882); United States v. Union Pac. R. R., 91 U. S., 72 (1875); Cincinnati City v. Morgan, 3 Wall., 275 (1865), holding, however, that the lien does not exist where the statute does not clearly create it; Woodson v. Murdock, 22 Wall., 351 (1874); Murdock v. Woodson, 2 Dill., 188 (1873); Spence v. Mobile, etc., R'y, 79 Ala., 576; Whitehead v. Vineyard, 50 Mo., 30 (1872); Colt v. Barnes, 64 Ala., 108 (1879). In this case the state indorsed railroad bonds and. created a statutory mortgage to secure the indorsement. The court held that. the holders of the bonds were entitled to the benefit of the mortgage. A statutory mortgage of a railroad to the state may entitle the state to the income. although no foreclosure has been commenced. Macalister v. Maryland, 114 U. S., 598 (1885). State bonds in aid of a railroad, to be repaid by the railroad by an annual tax, are not a lien on the railroad as against a purchaser thereof at a foreclosure sale. Tompkins v. Little Rock, etc., R'y, 125 U.S., 109 (1888). A ² Carpenter v. Black Hawk, etc., Co., 'mortgage by statute alone is valid.

An equitable mortgage exists where no formal mortgage has been executed, but a contract or the relations between the parties call for a mortgage. Such a mortgage exists where the bond and mortgage are both contained in one instrument and that instrument is not recorded as a mortgage.

Young v. Montgomery, etc., R. R., 2 Woods, 606 (1875). Where a large loan is made by a county to a railroad under a statute providing that the gross earnings of the railroad company should be received by a state officer and the interest on said loan be paid therefrom, an equitable assignment exists, and all subsequent mortgages are subject to such loan. Ketchum v. St. Louis. 101 U. S., 306 (1879). A statute giving a city power to loan money to a railroad and to take a mortgage or other security for payment, and making such lien a first lien, does not render a pledge of stock which is made by the railroad to the city, to secure the debt, a first lien over mortgages given by the railroad company to others. Cincinnati City v. Morgan, 3 Wall., 275 (1865). Concerning a waiver of such a mortgage by the state. see § 793, supra.

¹ A contract to make a mortgage and issue bonds may be enforced where the company has received the consideration therefor, even though the statute requires the assent of two-thirds of the stockholders. Texas, etc., R'y v. Gentry, 69 Tex., 625 (1888). An oral agreement to give a contractor a mortgage will be sustained only where it is clearly proven. Waco, etc., R. R. v. Shirley, 45 Tex., 355 (1876). A resolution which pledges the real and personal estate of said company is an equitable mortgage and may be enforced. Mobile, etc., R. R. v. Talman, 15 Ala., 472 (1849). See, also, Ketchum v. St. Louis, 101 U. S., 306 (1879). Bonds without a mortgage may be construed to be a mortgage under the terms of the bonds themselves, and a court of equity will so enforce them.

White Water, etc., Co. v. Vallette, 21 How., 414 (1858).

² White Water, etc., Co. v. Vallette, 21 How., 414 (1858): Town of Dundas v. Desjardins Canal Co., 17 Grant's Ch. Rep. (Upp. Can.), 27 (1870). A bond, though not directly providing for a lien, yet clearly intending it, was held to be a mortgage, the court saving that any writing showing the intent is sufficient. Where preferred stock is issued reciting that it is a lien on all the property of the corporation after the first mortgage. the lien will be upheld by the court as against subsequent mortgages and general creditors, although such lien was not secured by any mortgage. trustees in the subsequent deed of trust knew of and acquiesced in the priority of the preferred stock lien, and the deed itself recognized it. This bound the stockholders. Skiddy v. Atlantic. etc., R. R., 3 Hughes, 320, 355 (1878). In the case of Holroyd v. Marshall, 10 H. L. C., 191, 223 (1862), the court said: "Whatever doubts, therefore, may have been formerly entertained upon the subject, the right of priority of an equitable mortgage over a judgment creditor. though without notice, may now be considered to be firmly established," and such priority is sustained. There need not be a formal deed of conveyance, provided the statute of frauds is satisfied. To same effect as regards an unrecorded charge upon the property, In re General South, etc., Co., L. R., 2 Ch. D., 337 (1876). The Euglish debentures are a common instance of a bond and mortgage contained in one instrument. They, however, are expressly excepted from the recording acts. § 776, supra.

§ 795. Character of the various provisions in a corporate mortgage deed of trust—The granting clause.—A railroad mortgage generally contains many provisions which do not appear in the ordinary mortgage. Each of these provisions has a history, and each has grown out of emergencies, necessities and difficulties in protecting the rights of both the corporation mortgagor and the mortgagee. Some of the most important of these provisions are here referred to.

The deed of trust should convey a fee to the trustee, and should carefully specify all the property that it is intended to cover.¹

A formal and palpable omission of technical words in the mortgage, such as the words of inheritance, will be supplied by the court under its power to reform an instrument.²

§ 796. Provision that the mortgagor may retain possession until default.—At common law a mortgagee was entitled to the immediate possession of the mortgaged premises, although there had been no default. Consequently a provision was usually inserted in the mortgage that until default the mortgagor might retain possession. The statutes of many of the states now give this right to the mort-

¹The following is the form used in the Chicago, Milwaukee & St. Paul R'y Co. deed of trust to secure \$150,000,000 of bonds:

"Now, therefore, this Indenture Witnesseth: That the party of the first part, in consideration of the premises and of one dollar to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged and confessed. in order to secure the payment, principal and interest, of each and all of said bonds so to be issued as hereinbefore recited and provided, and every part of said principal and interest as the same shall become payable according to the tenor of said bonds, and also the performance of all covenants and conditions by the said party of the first part in the said honds and this indenture expressed, has granted, bargained and sold, and by these presents does grant, bargain, sell, convey and transfer, subject to the priority of lien of the several mortgages upon separate portions of its property hereinafter mentioned, to the United States Trust Company of New York, party hereto of the second part. as Trustee and in trust, and to lts successor or successors, all and singular the railway and railways of said party of the first part, with the road-heds, grades, rights of way, bridges, depot grounds and fixtures, embracing and including all its franchises and privileges appertaining to sald rallways now held by said company, amounting in the aggregate to about 5652 miles of railway in actual operation, described as follows: "

Here follows a detailed description of the lines of railway:

"To have and to hold, all and singular the above described and granted property, premises and appurtenances, and every part thereof, unto the party of the second part, and to its successor or successors, to its and their own proper use, benefit and behoof forever.

"In trust, nevertheless, for the persons, firms and corporations to whom the bonds described in and secured by this indenture shall be issued and delivered, or who shall at any time hereafter become the owners and holders thereof in the manner herein contemplated and provided, without preference of one bond over another by reason of its priority of issue or otherwise, that is to say, upon the trusts for the purposes, and with the powers and authority hereinafter set forth, to wit: "

²The lack of words of inheritance in the mortgage, it being to the trustees and their successors merely, is no bar to foreclosure. The court in the foreclosure suit will reform the instrument. Coe v. N. J. Midland R'y, 31 N. J. Eq., 105 (1879); Randolph v. N. J. West L. R. R., 28 id., 49 (1877). A deed to a corporation may convey a fee though it does not use the words "successors and assigns." City of Wilkes Barre v. Wyoming, etc., Soc., 19 Atl. Rep., 809 (Pa., 1890).

gagor. Nevertheless it is customary to insert such a provision in corporation mortgages.¹

§ 797. Provision that the mortgagor will pay the bonds and coupons, and waiver of statutory provisions as to redemption, stays, valuation, etc.— This is one of the common and elementary provisions in a railroad deed of trust. The effect of such a provision is considered elsewhere.²

§ 798. Provision giving power to the corporation to sell old material and parts of the property free from the mortgage.— This power is often reserved so that the company may sell old material the same as it would if the mortgage did not exist. Sometimes the power is reserved also to sell or take up any part of the line that proves to be valueless; also to sell portions of the plant and use the proceeds in replacing it.³

At common law the mortgagee is entitled to possession at once. First Nat'l Ins. Co. v. Salisbury, 130 Mass., 303 (1881). The clause that the mortgagee has the right to possession, etc., until default in the payment of principal or interest adds nothing to the rights of the mortgagor. It is merely declarative of the law. Dow v. Memphis, etc., R. R., 20 Fed. Rep., 260 (1884). Where the clause providing for the retention of possession by the mortgagor is not broad enough to cover land not used for railroad purposes, the mortgagee may take possession of such land before default in the terms of the mortgage. Youngman v. Elmira, etc., R. R., 65 Pa. St., 278 (1870)

The following is the provision in the St. Paul mortgage:

"Until default shall be made in the payment of the principal or interest of the said bonds secured hereby, or of some of them, or until default shall be made in respect to any other matter herein required to be done or observed by the party of the first part, in pursuance of the covenants on its part herein and in said bonds contained, the party of the first part shall be permitted and allowed to hold, possess and enjoy the premises hereby conveyed, and to take and use the rents, profits, issues, income and revenue thereof, and to dispose of the same in any manner not inconsistent with the provisions of this indenture, and until such default said party of the first part shall have, use and exercise all rights of ownership of said stock so deposited with said Trustee for the purposes of manage-

ment, use and operation of the railroads thereby represented, but subject always to the covenants and agreements expressed in these presents, and so long as no default exists under these presents, the party of the second part shall give to the party of the first part the necessary proxies from time to time, to vote said stock for the purposes aforesaid."

² See § 841 as to redemption. The following is a form:

"The party of the first part doth hereby covenant, promise and agree to and with the party of the second part and its successors, that the party of the first part will well and truly pay the said bonds which these presents are executed to secure, and the interest due and to grow due thereon, according to the true tenor thereof; and also that the party of the first part will not at any time or in any manner take, apply for or avail itself of any injunction or stay of proceedings, or plead, use, interpose or take advantage of any extension law, stay law, valuation law, redemption law, or any other law of the States or Territory in which such property is or may be located, now in force, or which may hereafter be in force in said States or Territory, and which may in any way alter, affect, impair or impede the rights or remedies of the holders of said bonds, or of the said party of the second part, or of its successors, as herein declared, or which shall affect or change the time, place, means or mode of perfecting, enjoying or enforcing any of such rights, interests or remedies, as the same are herein declared and set

³See cases in § 852, *infra*. The wide provision in the mortgage that the company "may dispose of any property, real or personal, . . . and make and exe-

§ 799. Provision relative to taxes, insurance, liens and maintenance.—A clause is usually inserted that the company must pay

cute titles for the same," is construed to authorize the sale of only such property as is not needed for operating the road, such as surplus lands and property not in use or required for use on the road. Spence v. Mobile, etc., R'y, 79 Ala., 576 (1885). In the case Nickerson v. Atchison, etc., R. R., 17 Fed. Rep., 408 (1881), where land was mortgaged, power was reserved to the company to sell the land and pay the proceeds to the trustees for the benefit of the bondholders.

In Butler v. Rahm, 46 Md., 541 (1877), the provision was as follows:

"Nothing herein contained shall prevent the said company, before default in the payment of any of the said bonds or the interest due thereon, from selling, hypothecating or otherwise disposing of any of their said property, real or personal, not necessary in their judgment for the use of the said road, nor from collecting and applying any money due to the said company from any source whatever, provided said application shall not be to the prejudice of any holder of any of the said bonds."

The court in holding that this provision was not fraudulent said:

"However suspicious the power here given might be in the case of a mortgage of ordinary goods, the very nature of this corporation, its business, the means and power necessary to keep it up, the wear and tear of its iron, ties and rolling stock, the constant necessity of replacing injured or wornout appurtenances with new, forbids the inference of a fraudulent purpose which might arise from such a provision under other circumstances. The power retained is manifestly in the interest of the mortgages, and is restricted by express language to be exercised in such manner as not to prejudice in any manner the rights of the bondholders. If the provision is in the interest of the bondholders, as it transparently is, it is also for

the same reasons in the interest of the other creditors and cannot be regarded as fraudulent."

Where a railroad mortgage covers. lands also, and provides that the mortgagor may sell the lands and pay over the proceeds to the trustee of the deed in trust, "after deducting the expenses of executing this trust," the mortgagor may deduct the expense of making the sales and also the taxes. Nickerson v. Atchison, etc., R. R., 17 Fed. Rep., 408 (1881).

The provision in the St. Paul mort-gage is as follows:

"Whenever in the oninion of the party of the first part, expressed in the manner hereinafter. set forth, any real or personal property covered by this mortgage is not necessary for the use or convenience of said first party in connection. with the operation of the line or lines of railway hereby conveyed, and it shall desire to dispose of or release the same, then and in any such case it may sell such real or personal property, and the proceeds thereof shall be paid to. the party of the second part or its successor or successors in this trust, and shall be by it or them held and applied as the party of the first part may in writing elect, either to the purchaseand cancellation of one or more of the bonds to he issued under this indenture, or to the purchase of other property, real or personal, nequired for the use or convenience of said first party in connection with the lines of railway conveyed by these presents.

"If the party of the first part shall elect to purchase property with such proceeds, then the property so purchased shall be at once conveyed to said party of the second part, or to its successor or successors in this trust, as part of the estate herehy conveyed; but if it shall elect to apply such proceeds to the purchase of bonds issued under this indenture, then the same shall be so applied, and the bonds so purchased at the market rate at the time heing shall be canceled by said party of the second part, or its successor or successors, and delivered to said first party.

"Upon receiving a certificate of the aforesaid opinion of the party of the first part, in the form hereinafter mentioned, together with the proceeds of the real or personal property so sold, the party of the second part, its successor or successors, shall make, execute and deliver all instruments requisite or necessary to free the same from the lien of this mortgage, and shall

all taxes levied on the property and shall pay all liens and maintain the rolling stock and road.¹

§ 800. Provision for declaring the principal sum due upon a default in interest.— This important provision corresponds to a similar provision found in most real-estate mortgages. There are many ways in which this provision may be worded. The right to declare the principal sum due may be left to the discretion of the trustee or to a specified proportion of the bondholders or to each bondholder for himself. It may provide that the right may be exercised only after a certain time has elapsed after default in the interest or that it may be exercised at once. Or it may declare that upon default in the payment of the interest the principal shall at once become due. Various provisions and the decisions thereon are considered in the notes below.²

hold the proceeds thereof subject to the election of the party of the first part, as hereinabove provided.

"The evidence to be furnished to authorize the party of the second part, its successor or successors, to release the same, and to receive and apply the proceeds thereof as above provided, shall be a resolution of the Board of Directors of the party of the first part hereto, or of the Executive Committee thereof, duly certified under its corporate seal, describing the property so to be sold or disposed of, and setting forth that the same is no longer requisite or convenient for the operation of the lines of railway hereby conveyed, and that the sum offered therefor is the reasonable value thereof, and that it is for the interest of the parties hereto that the same he sold or disposed of, and that the proceeds thereof be applied to the purchase of other real or personal property or to the purchase of bonds secured by this indenture, as the case may be.

"Provided, however, that the party of the second part, its successor or successors, may, at its or their discretion, require, and the party of the first part shall furnish, any reasonable additional proof as to the necessity or expediency of selling, disposing of or purchasing any such real or personal property, and as to the value of the property so proposed to be sold, disposed of or purchased."

¹A clause that the company shall pay the semi-annual interest "without any deduction . . . for or in respect of any taxes" is insufficient as regards the old government tax of five per cent. The company under such a provision was held not liable to pay that tax. Height v. Railroad, 6 Wall., 15 (1867). The following is a form:

"The party of the first part further covenants and agrees with the party of the second part and its successors, that the party of the first part will pay or cause to be paid, all taxes, charges or assessments imposed or assessed, or which may hereafter be imposed or assessed, upon the premises and property covered by this indenture; and will pay and discharge all claims of every name and nature which may hereafter become a lien upon the property hereby conveyed, or any part thereof, prior or superior to this indenture; and will maintain and keep up the railways, with their equipment and rolling stock, in good order, and will, from time to time. substitute new equipment and rolling stock. suited to the operations of the Company, for any of the present or future equipment and rolling stock, which may be destroyed or become unfit for use or unsuited to the operations of the Company; said equipment and rolling stock shall always he in quantity and amount sufficient for the operation of its said lines; and will at all times do all things requisite or proper to be done in order to preserve or make effectual the lien and security hereby created or intended so to be."

² Where the mortgage provides that upon default "the principal of all the said bonds shall, at the election of the trustees, become immediately due and payable," and the trustees have not so elected, the court cannot, in a proceeding against the company as an insolvent corporation, order the railroad to be sold free from all incumbrances. Not even a statute, passed after the mortgage was given, can authorize such a sale. Ran-

Although a trustee is given power to declare the principal sum due upon default in interest, yet he must not do so for the benefit

dolph v. Middleton, 26 N. J. Eq., 543 (1875); reversing 25 N. J. Eq., 306. In the case of Chicago, etc., R. R. v. Fosdick, 106 U.S., 47, 74 (1882), the trustee was authorized to declare the principal sum due after six months after default. Such a provision is legal (Id., p. 77), but is strictly construed, and if the written request of a majority of the bondholders is necessary, it must be obtained. If the bond differ from the mortgage in regard to this provision the bond controls. Railway Co. v. Sprague, 103 U.S., 756 (1880). In Wood v. Consolidated, etc., Co., 36 Fed. Rep., 338 (1888), the provision was that the princinal sum became due at the option of the holder where the interest was demanded and remained in default for ninety days. But if the statute authorizing the mortgage says that the principal shall not become due for thirty years, a provision in the mortgage for its becoming due six months after default in the interest is void. Howell v. Western R. R., 94 U. S., 463 (1876). Where the bond provides that the principal shall become due as provided in the mortgage, and the mortgage provides that upon default for six months after demand the principal sum shall become due, and that upon the written request of a majority in interest of the bondholders the trustee shall foreclose, the six months' default after demand is not sufficient to authorize a suit by a bondholder for the principal and interest of his bonds. The request of a majority is construed to apply to declaring the principal due as well as to foreclosing. Batchelder v. Council, etc., Co., 131 N. Y., 42 (1892). "The terms of the deed of trust ought to be very clear to justify the court in holding that there could be no sale, even for interest," until the bonds become due. Wilmer v. Atlantic, etc., R'y, 2 Woods, 447, 455 (1875). Where one-fifth of the bondholders in

interest may declare the whole sum due in thirty days after default, the trustee need not join with them in so declaring. American, etc., Co. v. Kentucky, etc., Co., 51 Fed. Rep., 826 (1892).

Where the principal sum may be declared due upon the trustee taking possession or upon a sale by him, it cannot be declared due except upon the occurrence of one of those events. Farmers' L. & T. Co. v. Bankers', etc., Tel. Co., 44 Hun, 400 (1887). Where upon ninety days' default in interest the holder may declare the whole sum due, a court will not relieve the corporation from payment. Wood v. Consolidated, etc., Co., 36 Fed. Rep., 538 (1888). When a mortgage provides that the principal shall become due for the purposes of foreclosure upon a default in interest continuing for sixty days, the trustees in the mortgage may proceed for the collection of the whole amount of principal and interest by bill in equity, without a formal declaration of the maturity of such principal. Morgan's, etc., Co. v. Texas, etc., R'v, 137 U.S., 171 (1890). The court will not sustain a declaration that the whole sum is made due, where there was trickery or where the mortgagor was ready and willing to pay. Union, etc., Ins. Co. v. Union, etc., Co., 37 Fed. Rep., 286 (1889). bondholder may enforce the unpaid coupons without electing to declare the principal due. Rutten v. Union Pac. R'y, 17 Fed. Rep., 480 (1883). A clause in the mortgage "that in case default shall be made for the space of four months in the payment of semi-annual interest due or to become due upon either of said honds, then, and in said case, the whole principal sum mentioned in all and each of said honds shall forthwith become due and payable," has the effect not to give the several bondholders action upon it for the. principal of the bonds, but to give the

of junior securities, or to aid a reorganization. The court will review his action. These various provisions do not limit the established remedy of foreclosure by a suit in equity.²

trustees, with whom, in trust for the bondholders, the covenant was made, a right of action upon it, so that through foreclosing the mortgage it might be a more complete security to the bondholders with such a clause than it would be without it. Mallory v. West Shore. etc., R. R., 3 J. & S., 174 (1872). A provision in the trustees' certificate to the effect that "the principal sum secured by said mortgage shall become due in case the interest on the bonds remains unpaid for four months" does not enable a bondholder to sue for the principal where the terms of the mortgage are inconsistent with such a right to sue. Id. The provision authorizing the trustee to sell and from the proceeds to pay principal and interest of the bonds does not enable the bondholder to declare the principal due because of a default of the company on the interest. Nevertheless, the court will order the whole railroad to be sold, inasmuch as it would be disastrous to sell only a part of it. McFadden v. May's Landing, etc., R. R., 22 Atl. Rep., 932 (N. J., 1891).

The following is a form:

"In case default shall be made in the payment of any semi-annual interest on any of the aforesaid bonds, at the time and in the manner expressed in the said bonds, and said default shall continue for the period of six months after said interest becomes due, then and in such case the principal of all the bonds secured hereby shall, at the election of the Trustee or Trustees, such election to be evidenced by a written notice thereof, served upon the party of the first part, become immediately due and payable, anything contained herein or in said bonds to the contrary notwithstanding."

And the following gives some control over the trustee:

"It is hereby declared and agreed that it shall be the duty of the Trustee, its successor or successors under this indenture, to declare the principal of said bonds to be due, or to exercise the power of entry, or the power of sale

hereby granted, or both, or to take appropriate legal proceedings to enforce the rights of the bondholders under these presents, upon any default under these presents, and upon receiving the requisition in writing hereinafter specified, in the manuer and subject to the qualifications herein provided, that is to say:

"If the default be in the non-payment of either the interest or principal of any of said bonds, such requisition upon the Trustee or Trustees chall be by the holders of not less than one-tenth in amount of said bonds then outstanding: and upon such requisition, and a proper indemnification by the persons making the same to the Trustee or Trustees against the costs and expenses and all other liabilities to be incurred in that behalf, it shall be the duty of the Trustee or Trustees to enforce the rights of the bondholders under these presents, either by the exercise of the powers granted herein, or by a suit or suits in equity or at law in aid of the execution of such powers, or otherwise, as such Trustee or Trustees shall deem most effectual for the enforcement of said rights; it being understood and hereby expressly declared that the rights of entry and sale hereinbefore granted are intended as cumulative remedies, additional to all other remedies allowed by law, and that the same shall not be deemed in any manner whatsoever to deprive the said Trustee or Trustees, or the beneficiaries under this trust, of any legal or equitable remedy by judicial proceedings consistent with the provisions of these presents. No action, suit or proceeding at law or in equity shall be had, prosecuted or maintained for the foreclosure of this mortgage or the enforcement of the lien hereby created, by any person or party other than the Trustee, except upon the failure, neglect or refusal of the Trustee to act within a reasonable time after it shall have been requested so to do as hereinabove provided."

¹ Bound v. South Carolina R'y, 50 Fed. Rep., 853 (1892).

²In the case of Farmers' L. & T. Co. v. Chicago, etc., R'y, 27 Fed. Rep., 146 (1886), this clause giving the various remedies of the bondholders and trustees came before the court, and it was held that the right of the trustees to foreclose was in no wise restricted or affected by provisions for declaring the whole debt due after six months' default, and for foreclosure by the trust-

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§ 801. Provision for a waiver of default.—Occasionally the provision is found in a mortgage by which a specified proportion of the bondholders may waive the right to declare the principal sum due upon a default in the payment of the interest. The courts, however, do not favor it, inasmuch as it puts the minority bondholders in the power of the majority.

ees at the request of a majority of the bondholders after six months' default, and for the control of the foreclosure proceedings by the majority of the bondholders. The court said:

"It is contended that no action can be taken by the trustees looking to the foreclosure of the mortgage or the appointment of a receiver without the written request or direction of the holders of at least a majority of the bonds, such consent or request heing the basis of all action for the enforcement of the trust: and that no right of action exists or can exist in favor of any one to enforce the lien of the mortgage for interest only. Under the provisions of the trust deed, without the direction or consent of the holders of a majority of the bonds, the trustee cannot take possession of the mortgaged property or declare the principal due before maturity, according to the terms of the bonds, nor without such consent can the trustee operate or sell the property or commence proceedings to foreclose the principal before maturity in 1920. It does not follow, however, that because this power is given to the holder of a majority of the bonds that the trustee, at the request of a minority or even of a single bondholder, may not commence proceedings to foreclose for the nonpayment of interest; or if, on proper demand, the trustee refuses to bring suit, that a minority or even a single bondholder may not sue. Failure to pay a single instalment of interest is a breach of the conditions of the trust deed. . . .

"The power of a majority to control proceedings to foreclose for the payment of principal when it shall become due at the election of a majority, before maturity in 1920, is not exclusive of the right which a single bondholder has to enforce the security for the non-payment of any instalment of interest on any bond. This right of a minority or even a single bondholder does not depend upon the consent of a majority. If it did the company might refuse to pay interest on the bonds held by a minority until maturity according to their terms, and even after that time if some of the counsel for the defendant are correct in their position that neither before nor after maturity can the trust be enforced without the consent of at least a majority. The right which is asserted by the majority must be found in plain and explicit terms in the mortgage or it will not be recognized. It cannot exist by mere implication.

"It is true that in article 4 of the mortgage it is declared 'that, upon indemnity to the trustees, a majority in interest of the holders of the bonds secured hereby shall from time to time have a right to control the proceedings for a foreclosure of this mortgage.' The proceedings here referred to are the proceedings to enforce the trust for the payment of principal which shall become due, under the provisions of the mortgage, at the election of the holders of a majority of the bonds before maturity, according to their terms. The right is given to control the proceedings for a foreclosure, not all proceedings for a foreclosure." Citing Chicago, etc., R. R. v. Fosdick, 106 U. S., 47, to same effect. See, also, §§ 803, 804.

¹ In regard to the provision authorizing a certain proportion of the bondholders to waive default, the court in Hollister v. Stewart, 111 N. Y., 644, 655 (1889, reversing 37 Hun, 645), said: "It

§ 802. Provision for the remedy of entry by the trustee or a receivership upon default.— The remedy of entry by the trustee is not often resorted to in these days on account of the danger of financial loss to the trustee. This subject is treated elsewhere. A receivership is often obtained in connection with a suit in equity for the foreclosure of the mortgage. The provision for entry was formerly more important than it is in these days when the trustee refuses to make entry.

is easy to see that discretion to waive a default sustained by a majority in interest of the bondholders might prudently and safely be given to the trustees as to covenants for assurance, and to furnish an inventory and the like, while it is scarcely possible to suppose that the enormous discretion of waiving every default of interest or principal was intended to be conferred. Stockholders of the company buying a trifling excess over half of the bonds could, with the aid of the trustees, practically annul and cancel the whole debt, and take to themselves the entire net earnings of the company. We are confident that the language of the subdivision, taken exactly as it stands in the record, does not refer to a default in principal or interest, but relates wholly to the other covenants to be kept and performed by the mortgagor." The provision in a mortgage that a majority of the bondholders may waive a default in payment of interest does not authorize a waiver of payment before the default has oc-McClelland v. Norfolk, etc., R. R., 110 N. Y., 469 (1888). Where the bonds and mortgage provided that a majority of the bondholders might postpone payment of the bonds and coupons, the bonds and coupons do not become due at a fixed time and are not nego-

The following form provides for a waiver of default in matters other than that of paying the bonds or coupons:

"If the default be the omission to comply with any of the provisions of these presents, other than the payment of the interest or principal of said honds, then, and in any such case, the requisition shall he the same as aforesaid;

but it shall be within the discretion of the Trustee or Trustees to either enforce or waive the rights of the bondholders by reason of such default; subject, however, to the power (hereby conferred) of the holders of the said bonds, acting by a majority in interest, to instruct the said Trustee or Trustees by requisition in writing (which shall be imperative upon such Trustee or Trustees) either to waive such default or to enforce the rights of such bondholders by reason thereof; provided, that no action of the said Trustee, or of the said bondholder, or both, in waiving such default or otherwise, shall extend to or be taken to affect any subsequent default, or to impair the rights resulting therefrom."

¹ Sèe ch. XLVIII, infra.

² See ch. LI, infra.

3 "In case default shall be made in payment of interest, or in payment of the principal of any of said bonds, and of continuance of such default for six months, or in case default shall be made in the observance or performance of any other matter or thing to be done or performed by the party of the first part, according to the covenants, conditions and requirements of said bonds and of these presents, such latter default continuing for the period of six months after notice in writing to the party of the first part to observe or perform the duty or obligation required, the said trustee, or its successors in said trust, is and are hereby authorized, either personally or by its or their attorneys or agents, to enter into and upon all and singular the premises hereby conveyed or intended so to be, and each and every part thereof, and to have, hold and occupy the same; and in its or their discretion, said trustee, or its successors, shall be authorized to apply to any court of competent jurisdiction for the ap§ 803. Provision giving power of sale to the trustee upon default. This is a cumulative remedy and does not prevent foreclosure instead.— This is one of the most important provisions in the mortgage. It is one of the modes in which the mortgagee may foreclose the mortgage. It corresponds to the provision usually contained in the ordinary mortgage on real estate, and hence its history is bound up with the history of mortgages themselves. The mortgage may provide for any mode of sale even without notice, unless the statutes of the state prescribe otherwise. Some-

pointment of a receiver of all the said mortgaged property, and of all the rents, incomes, profits, issues and revenues thereof, from whatever source derived; and thereupon it is hereby expressly covenanted and agreed that such court shall forthwith appoint a receiver of such mortgaged property, and of such income, profits, issues and revenues, with the usual powers and duties of a receiver in like cases, and that if such receiver be nominated and designated by the holders of a majority of the bonds which these presents are executed to secure, then that such appointment shall be made by the said court as a matter of strict right to the party of the second part and to the bondholders represented by it, and without reference to the adequacy or inadequacy of the value of the premises and property hereby mortgaged to fully secure the payment of the said bonds, or to the solvency or insolvency of the party of the first part to these presents; and such rents, income, profits, issues and revenues shall be applied by such receiver according to law and the orders and practice of such court." Where the right of the trustee to take possession exists upon a vote of a majority of the bondholders declaring the whole debt due. such declaration must be made before the trustee can take possession by reason of this particular clause. Union T. Co. v. Missouri, etc., R'y, 26 Fed. Rep., 485 (1880).

¹Unless a statute prohibits it, the parties to a mortgage may agree to any method of sale, even without notice,

and may so agree as to that part of the property which is situated in other states. Farmers' L. & T. Co. v. Bankers'. etc., Tel. Co., 44 Hun, 400 (1887). A sale without notice under a mortgage authorizing a sale upon sixty days' publication of notice is void. Bigler v. Waller. 14 Wall., 297 (1871). As a matter of fact, however, the statutes of the state generally do regulate the mode of selling under such a power, and in that case the statute, of course, must be strictly followed. Where the mortgage provides for the trustee taking possession after default and sixty days' notice of the intent to take possession, and for authority to sell after sixty days' publication, the two periods are successive. and one hundred and twenty days in all are required. Macon, etc., R. R. v. Georgia, etc., R. R., 63 Ga., 103 (1879). Under a provision that the trustees may take possession, and that they may sell at their option, "they may enter and afterwards decline to sell, or they may both enter and sell, when the conditions as to default, application, notice and persistence in default have all han-The income arising between entry and sale they are of course to use for the purposes of the trust." Id.

The following is a form:

"In case default shall be made and shall continue as aforesaid, it shall likewise be lawful for the said Trustee, or its successors, with or without actual entry, and acting either directly or by attorneys or agents, to sell and dispose of all and singular the premises and property hereby conveyed, or inteuded so to he, as an entirety, at public auction, in such place within the States of Wisconsin or Illinois as the said Trustee or Trustees may designate, and at such time as it

times it provides that the trustee shall take possession and operate the road or take possession and sell the property, as he thinks best.¹ All these provisions relative to the trustees entering into possession of the property and holding it or selling it do not affect or take away the right of the trustee to foreclose the mortgage whenever there is a default in the payment of the principal or interest. The power of sale is an additional or alternative remedy. It is not an exclusive remedy. The trustee may foreclose the same as though there were no provisions in the mortgage for the trustees selling or taking possession.²

or they may appoint, having first given notice of the place and time of such sale by advertisement published not less than three times a week for six weeks in one or more newspapers in the cities of New York. Milwaukee and Chicago. and to adjourn such sale from time to time at discretion, and if so adjourning said sale, to make the same at the time and place of such adjournment, or to make sale thereof in any other manner authorized by law, and to make and deliver to the purchasers thereof good and sufficient deeds in the law for the conveyance of all the right and title of the party of the first part to the premises so sold; which sale made as aforesaid, shall be a perpetual bar both in law and in equity, against the party of the first part, and all persons lawfully claiming or to claim the said premises, or any part thereof, by, from, through or under it or them; and after deducting from the proceeds of such sale just allowances for all expenses of sale, including attorney's and counsel's fees, and all other expenses, advances or liabilities which may have been made or incurred by the said Trustee or Trustees in the trust, and all payments which may have been made by it or them for taxes or assessments, and for charges and liens on the said premises or any part thereof, prior to the lien of these presents, as well as reasonable compensation for its or their own services, to apply the said proceeds to the payment of the principal of such of the aforesaid bonds as may be at the time unpaid (whether or not the same shall have previously become due), and of the interest which shall at that time have accrued on the said principal and be unpaid, without discrimination or preference, but ratably to the aggregate amount of such unpaid principal and accrued and unpaid interest; and if there shall remain any surplus after payment of all the said bonds hereby secured or so intended to be, in full, both principal and interest, then to pay over and account for such surplus to the party of the first part.

"And it is hereby declared that the receipts of the said Trustee or Trustees shall be a sufficient discharge to the purchasers of the premices for the purchase-money; and that such purchaser or purchasers, his or their heirs, executors or administrators, shall not, after payment thereof, and having such receipt, be liable to see to its being applied upon or for the trust and purposes of these presents, or be answerable in any manner for any loss, misapplication or non-application of such purchase-money or any part thereof, or be obliged to inquire into the necessity, expediency or authority of or for any such sale."

1 Under the clause authorizing the mortgagee to take possession and receive and apply the income to the debt. the mortgagee may take possession on failure to pay the interest by reason of damage to the mortgaged canal owned by the mortgagor. The mortgagor cannot insist upon a sale. The bondholders may incumber the property in order to repair it. A majority of the bondholders rule. State v. Brown, 21 Atl. Rep., 374 (Md., 1891). In Macon, etc., R. R. v. Georgia, etc., R. R., 63 Ga., 103 (1879), the trustee was authorized by the mortgage to take possession and then to sell or not to sell, as he might deem best.

² If a mortgage contains a power of sale by advertisement at public auction for cash upon the request of the holder or holders of seventy-five per cent. in amount of the bonds secured thereby, that remedy is cumulative, and the restriction does not operate upon the right to foreclose by bill in equity, especially when in a separate clause it is provided that nothing in the mortgage contained shall be held or construed to provent or interfere with the foreclosure of the instrument by any court of competent jurisdiction. Morgan's, etc., Co. v. Texas, etc., R'y, 137 U. S., 172 (1890); Central

§ 804. Provisions unreasonably limiting the right to foreclose.—Occasionally such a provision is inserted. But it is illegal and void. It is an attempt to contract away the established legal rem-

T. Co. v. Texas, etc., R'y, 23 Fed. Rep., 846 (1885); Farmers' L. & T. Co. v. Chicago, etc., R'y, 27 Fed. Rep., 146 (1886). "Powers of sequestration and sale given to the trustee are cumulative remedies of the courts. When a bondholder, on refusal of the trustee to act, prosecutes a suit in his own name for the payment of overdue interest by the foreclosure of the mortgage, he is restricted to the usual remedies of the court appropriate to the purpose." McFadden v. May's Landing & E. H. C. R. Co., 22 Atl. Rep., 932 (N. J., 1891).

The clause authorizing the trustee to take possession and to foreclose by a sale upon the request of one-third invalue of the bondholders is a cumulative, i. e., an additional, remedy. It is "not exclusive of the rights and remedies given by the law to mortgagees, in case of default in payment of the mortgage debt according to the terms of the mortgage." Dow v. Memphis, etc., R. R., 20 Fed. Rep., 260 (1884). The power given by a mortgage to the trustees to sell "if, after notice is served on the president of said company, the same shall remain unpaid for six months after such default." does not prevent foreclosure by suit without such notice. Robinson v. Alabama, etc., Mfg. Co., 48 Fed. Rep., 12 (1891). "The insertion of a power of sale in a deed of mortgage neither deprives the mortgagee of his right to strict foreclosure, where such right would otherwise exist, nor prevents a court of equity from foreclosing by a sale made under its direction in cases where it finds a strict foreclosure is not matter of absolute right on the part of the mortgagee, and a strict foreclosure would be inequitable." Hall v. Sullivan R. R., 21 Law Rep., 138 (U. S. C. C., 1857). The mere presence of a power of sale contained in a mortgage does not exclude other

modes for foreclosure provided by law, but it is in addition to them. Farmers' L. & T. Co. v. Bankers', etc., Tel. Co., 44 Hun, 400 (1887). In the case of Central T. Co. v. New York, etc., R. R., 33 Hun. 513 (1884), the defendant, a railroad company, executed a mortgage upon its road to the plaintiff, as trustee, to secure the payment of bonds issued by The mortgage provided, among other things, that if the company should make default in the payment of the principal moneys secured by the bonds or any part thereof, "or in the due and punctual payment of the interest, or any part thereof, from time to time accruing and pavable upon such bonds, or any of them, at the time and in the manner provided for payment of such principal or interest," and if such default should continue for twelve mouths then the trustee might enter into and take possession of the road and might sell the same upon giving three months' notice of the time and place of sale. Another provision of the mortgage authorized the company to remain in the possession of the road until some default had been made in payment of the principal and interest. Held, that the provision authorizing the entry and sale by the trustee, upon the expiration of twelve months after the default of the company in paying the principal or interest, did not prevent the trustee from at once bringing an action to foreclose the mortgage, to collect any instalment of interest falling due under the terms of the bonds as soon as default was made in its payment. A provision that the trustees, after default. should sell the property upon the request of a certain number of bondholders is no bar to a bondholder's suit on his bonds. Philadelphia, etc., R. R. v. Johnson, 54 Pa. St., 127 (1867). Although the mortgage provides that upon deedies which every man is entitled to. Even a provision limiting the right to foreclose until a certain time elapses does not prevent foreclosure at once.¹

§ 805. Provision exempting the trustee from liability.—A provision is generally inserted exempting the trustee from any and all liability except for his own wilful misconduct or gross negligence.²

fault the trustee, upon the request of one-half in amount of the bondholders, shall take possession and sell, yet this does not prevent foreclosure, and if the trustee refuses to foreclose a bondholder may file a bill to compel him to take possession and foreclose. trustee may sell without a request, although there can be a foreclosure only on request. First Nat'l Ins. Co. v. Salisbury, 130 Mass., 303 (1881); Alexander v. Central R. R., 3 Dill., 487 (1874). "The power of sale in a mortgage did not exclude the right of forcclosure by judicial proceedings. It was but a cumulative remedy." Eaton, etc., R. R. v. Hunt. 20 Ind., 457 (1863). To same effect. Williamson v. New Albany, etc., R. R., 1 Biss., 198 (1857).

¹ A provision in a mortgage that the trustee shall foreclose only upon the request of a certain proportion of the bondholders is void as "attempting to provide against a remedy in the ordinary course of judicial proceedings, and oust the jurisdiction of the courts." Guaranty Trust Co. v. Green Cove R. R., 139 U.S., 137 (1891). Although the trustees foreclose without being requested so to do by one-third of the stockholders as provided in the mortgage, yet if more than one-third put their bonds in evidence in the suit, this cures the defect. Moreover the foreclosure was good as to the unpaid interest in any event, and the amount claimed could be reduced if necessary. Credit Co., etc., v. Arkansas, etc., R. R., 5 Mc-Crary, 23 (1882). Where a mortgage authorizes entry by the trustee after six months' default in interest, and also sale by advertisement after a similar default, and also a foreclosure, "upon default being made as aforesaid," the court

will hold that foreclosure may commence immediately upon default without waiting for six months to elapse. The case is within the rule laid down in Railroad v. Fosdick, 106 U. S., 47. By the law of Kansas all remedies upon mortgages are prohibited except that of foreclosure. Mercantile T. Co. v. Missouri, etc., R'y, 36 Fed. Rep., 221 (1888). A provision that the trustee may sell. but shall not foreclose by suit, is valid so far as property outside of the court's jurisdiction is concerned, but not as regards property within the jurisdiction. Farmers' L. & T. Co. v. Bankers', etc., Tel. Co., 44 Hun, 400 (1887). The trustee may foreclose, even though the bondholders do not request it, as provided in the mortgage. Credit Co. v. Arkansas. etc., R. R., 15 Fed. Rep., 46 (1882). The charter provision that "foreclosure" shall not take place until after ninety days' notice by publication applies not to the suit to foreclose but to the subsequent foreclosure itself. Hodder v. Kentucky, etc., R'y, 7 Fed. Rep., 793 (1881). But where the trustee is authorized upon a default in the interest to foreclose for the principal sum upon the written request of a majority of the bonds, he cannot foreclose for the principal except upon this written request being made. Chicago, etc., R. R. v. Fosdick, 106 U.S., 47 (1882). But he may foreclose for the interest. Central T. Co. r. Texas, etc., R'y, 23 Fed. Rep., 846 (1885); Farmers' L. & T. Co. v. Chicago, etc., R'y, 27 id., 146 (1886). See. also, §§ 825, 836, infra.

²The decisions on this subject are given in § 815, infra.

The following is a form:

"The said United States Trust Company of t New York, and its successor or successors in 1290

§ 806. Provision for appointing a new trustee.— The deed of trust should provide for the appointment of a new trustee in case of the death, resignation or removal of the trustee named in the deed. The decisions on this subject are given elsewhere.

§ 807. Miscellaneous provisions.—Any additional provision which may be agreed upon by the parties and which is not contrary to public policy or beyond the powers of the corporation

this trust, shall not be responsible for the acts of any agent or attorney employed by it or them in pursuance hereof, nor for anything whatever in connection with this trust except its or their own wilful misconduct or gross negligence, anything in this indenture or in the bonds issued hereunder to the contrary thereof notwithstanding. The said Trustee, or its successor or successors, shall receive from sald Chicago, Milwaukee & St. Paul Railway Company for its services in the acceptance of this trust, and the signing and delivering of the honds issued hereunder, a sum not to exceed one dollar for each \$1000 hond, payable from time to time, as the bonds are delivered by said Trustee, which compensation shall be in full for all services to be rendered by said Trustee under this mortgage, unless a default shall occur, which will make it necessary to take steps to foreclose; in that case said Trustee, and its successor or successors. shall be entitled to receive proper compensation for all other services performed in the discharge of this trust, in case it is compelled to take possession of said premises or any part thereof, or commence suit to foreclose this mortgage. The Trustee shall also be entitled to receive reimbursement for necessary expenses in the employment of counsel, in executing the trust hereby created."

¹ See § 819, infra.

The following is a form that has been used:

"It is hereby understood and provided that the present or any future Trustee under this indenture may resign and discharge itself or himself of the trusts created by these presents. by notice in writing to the party of the first part, and to any other existing Trustee or Trustees, sixty days before such resignation shall take effect, or by such shorter notice as said party of the first part and such other Trustee or Trustees may accept as adequate. and upon due and proper accounting in respect to its or his Trusteeship, and execution of the conveyances hereinafter required; any vacancy in the office of any such Trustee, occurring in any manner or at any time, may be filled by appointment of the party of the first part, provided that such appointment shall be ratified States for the Southern District of New York.

and notice to the bondholders shall be published in two newspapers of general circulation in the city of New York, for thirty days, specifying the time and place of the application for such approval and ratification, which appointment and order ratifying and confirming the same shall be filed with the new Trustee and the party of the first part; and thereupon the Trustee or Trustees so appointed shall become vested, in common with any surviving or continuing Trustee, with all the powers and authorities granted to or conferred upon the party of the second part by these presents, and all the rights and interests requisite to enable it to execute the purposes of this trust, without any further assurance or conveyance; but the surviving or continuing Trustee, if any, shall immediately execute all such conveyances and instruments as may be fit or expedient for the purpose of conveying and assuring the legal estate in the premises to the Trustee so appointed, jointly with itself; and in like manner any Trustee so resigning or removed shall immediately execute a deed or deeds of conveyance to vest all his or its right and interest in said trust property in such new Trustee, jointly with any remaining Trustee, and upon the trusts herein expressed; and, in case it shall at any time hereafter prove impracticable to fill any vacancy which may have occurred in said trust in manner as aforesaid, application on hehalf of all the holders of the honds secured hereby may be made by the surviving or continuing Trustee, or, if the trust be wholly vacant, by holders of the said honds to the aggregate amount of \$100,000, to any court of competent jurisdiction, for the appointment of a new Trustee or new Trustees; and upon such application a majority in interest of the said bondholders shall he entitled to nominate the person or persons to be so appointed by such court, and who shall be appointed without giving other security than his or their acceptance of such trust; and it is further provided, that in case of the appointment of two or more Trustees under this indenture, the said new Trustees shall not be in any manner responsible for any default or misconduct of each other. and that the present and any new Trustees shall be entitled to just compensation for all services and approved by the Circuit Court of the United . which it, he or they may hereafter render in the said trust, as hereinafter provided."

may be inserted in the mortgage. Thus there may be provisions for converting the bonds into stock; ¹ for allowing a subsequent mortgage to be prior in right of payment; ² that a sinking fund shall be established; ³ that the trustee may purchase the property for the bondholders at a foreclosure sale; ⁴ a covenant for further assurance; ⁵ for allowing bondholders to turn in their bonds in payment for the property purchased at the foreclosure sale; ⁶ for the taking up, paying and canceling bonds secured by underlying mortgages.

There is sometimes a provision for selling some of the property and applying the proceeds to the bonds. A mortgage of railroad property often contains a provision authorizing the trustee to release portions of the property from the mortgage, provided the proceeds from the sale of such portion so released is paid to the trustee or is reinvested in the property. This provision is strictly construed, and the trustee is not allowed to extend or vary its terms.

¹ See § 283, supra.

² The mortgage may provide that thereafter another and new mortgage may he made prior in right of payment to the mortgage first mentioned. Campbell v. Texas, etc., R. R., 2 Woods, 263 (1872).

³ Where the mortgage provides that a certain amount annually shall be paid by the company as a sinking fund to buy the bonds with at once, until the bonds are above 110, and then only the interest on the bonds already purchased is to be added to the sinking fund, the latter clause will be enforced, and a stockholder cannot enjoin it. Wilds v. St. Louis, etc., R. R., 103 N. Y., 410 (1886).

⁴ The following is a form:

"In case of any judicial foreclosure sale or other sale of the premises embraced in this mortgage, under the decree of any court having jurisdiction thereof, based upon the foreclosure of this mortgage, and the holders of threefourths of the outstanding bonds secured by this mortgage shall, in writing, request the said Trustee, its successor or successors, to purchase the premises embraced herein, for the use and benefit of the holders of the outstanding bonds secured by this mortgage, the said Trustee, its successor or successors, are fully authorized, in its or their discretion, to make such purchase, and having so purchased said premises, the right and title thereto shall vest in said Trustee, its successor or successors, in trust to dispose of

the same in such manner as the holders of three-fourths of said outstanding bonds secured by this mortgage shall, in writing, request or direct."

⁵ The following is a form:

"The said party of the first part, for itself, its successor or successors, hereby covenants to make, execute and deliver all such other and further instruments, deeds or indentures, as may be necessary to enable the person or persons so appointed to execute the trust hereby created, as fully and perfectly in all respects as he or they could have executed the same if originally a party to this indenture; also to execute and deliver any further and reasonable and necessary deed or deeds, conveyance or conveyances to said Trustee, its successor or successors. for the more fully defining, designating and describing the railways and premises herein conveyed, and for the more fully securing the payment of said bonds, particularly for the conveyance of any railways, lots, blocks, lands, property or premises, or any right or interest therein, acquired by said party of the first part, or its successor or successors, subsequent to the date hereof, pertaining to the premises conveyed by this indenture, whether now owned by the party of the first part or hereafter acquired."

6 See ch. LII.

⁷ Chicago, etc., R. R. v. Pyne, 30 Fed. Rep., 86 (1387). As to selling land, see Little Rock, etc., R'y v. Huntington, 130 U. S., 160 (1887).

⁸ Where the mortgage is secured by land also, which the trustee is author-

C. AUTHORIZING, EXECUTING AND RECORDING MORTGAGES.

§ 808. The board of directors authorize the execution of mortgages — A stockholders' meeting is not necessary.— This is now the well-established rule. Formerly it was supposed that a vote of the stockholders was necessary, and it is still customary to have a stockholders' meeting as well as a directors' meeting authorize the mortgage. But the latter only is necessary. And the directors' meeting which authorizes the mortgage may be held out of the state in which the corporation is incorporated.2

§ 809. The resolutions authorizing the mortgage.—The terms of the resolution authorizing the mortgage should be as broad as the terms of the mortgage itself. The better plan is to have the resolution embody the mortgage as a part of the resolution itself. Otherwise there may be a controversy as to whether all the terms of the mortgage were authorized by the board of directors.3 A

being paid to the trustee, the trustee must apply the fund in strict accordance with the terms of the mortgage: otherwise he will be liable. Hollister v. Stewart, 111 N. Y., 644 (1889). Even though the trustees have made a serious mistake in waiving rights under the mortgage and declining to pay a bondholder, yet if they acted in good faith, judgment will be against them as trustees and not personally. Id., holding, also, that the trustee will not be removed but will be required to furnish indemnity for the past and future.

1 The directors may authorize the execution of bonds and a mortgage to secure them. The action of the stockholders is not necessary. Thompson v. Natchez, etc., Co., 9 S. Rep., 821 (Miss., 1891). A mortgage and bonds secured thereby may be authorized by the board of dia tors, and no action or authorization by the stockholders is necessary. Hodder v. Kentucky, etc., R'v. 7 Fed. Rep., 793 (1881). A vote of the directors ratifying an informally executed mortgage does not necessarily ratify a special provision in it relative to attorneys' fees, where such provision is not specially called to the board's attention. Pacific, etc., Mill v. Dayton, etc., R'y, 5

ized to release upon the price thereof Fed. Rep., 852 (1881). That the directors and not the stockholders are the proper authority to authorize a mortgage, see, also, the following cases: Kelly v. Trustees, etc., 58 Ala., 489 (1877); Thomas v. Citizens' Horse R'y, 104 Ill., 462 (1882); Hendee v. Pinkerton, 96 Mass., 387; Wood v. Whalen, 93 Ill., 153 (1879); Mc-Curdy's Appeal, 65 Pa. St., 290 (1870) See, also, § 712, supra. A subsequent mortgagee cannot set up that the first mortgagee foreign corporation had not complied with the law, he taking subject thereto. Pratt's Ex'r v. Nixon, 8 S. Rep., 751 (Ala., 1891).

² Butler v. Rahm, 46 Md., 541 (1877); Saltmarsh v. Spaulding, 147 Mass., 224 (1888); Arms v. Conant, 36 Vt., 744 (1864); Coe v. N. J. Mid. R'y, 31 N. J. Eq., 105 (1879); Ohio & M. R. R. v. Mc-Pherson, 35 Mo., 13 (1864); Bassett v. Monte Christo, etc., Co., 15 Nev., 293 (1880); Wright v. Bundy, 11 Ind., 398 (1858); Hodder v. Kentucky, etc., Co., supra; Galveston R. R. v. Cowdrey, 11 Wall., 459 (1870).

³Where the president is authorized to execute a mortgage the usual mortgage is understood. A provision that upon default in interest the bondholder might declare the principal due is unusual, and hence is void, but the rest of resolution authorizing a mortgage is sufficient to sustain such a mortgage given two months later. A resolution recognizing a prior mortgage is sufficient to sustain the validity of such mortgage.¹

§ 810. Signing, sealing and acknowledging the mortgage.— A corporation mortgage should be drawn, signed, sealed and acknowl-

the mortgage will be sustained. Jesup v. City Bank, 14 Wis., 331 (1861), A resolution authorizing a mortgage on the road and property sustains the mortgage on the franchises Bardstown, etc., R. R. v. Metcalfe, 4 Met. (Kv.), 199 (1862), Where the directors authorize a chattel mortgage in certain terms, but the officers execute it in materially different terms, the mortgage is void. Kendall v. Bishop, 43 N. W. Rep., 645 (Mich., 1889). A mortgage of the corporate property in California without a prior resolution authorizing it is void, although such resolution is recited in the mortgage and the president, secretary and two-thirds of the stockholders sign it and the corporate seal is attached. Separate assent of the directors is not enough. A subsequent assessment by the directors to pay the mortgage is not a ratification. Alta, etc., Co. v. Alta, etc., Co., 21 Pac. Rep., 373 (Cal., 1889). The fact that the proceeds of a mortgage are applied to the business of the company does not as against other creditors validate the mortgage which has been made without authorization by the board of directors. The absence of the corporate seal prevents any prima facie validity. Duke v. Markham, 10 S. E. Rep., 1017 (N. C., 1890). Where the stockholders build the road with their own money and take the mortgage bouds of the company as security without formal action of the corporation authorizing it, the bonds are not good in their hands, and an executiou sale of the property comes in ahead of the mortgage. McKee v. Grand Rapids, etc., R'y, 41 Mich., 274 (1879). A mortgage executed

by the president and secretary of a corporation, instead of by its trustees, and without any formal authorization, is valid where there were only three trustees and two of them were the president and secretary, and the money secured by the mortgage was received by the corporation and used for its benefit. Dexter. Horton & Co. v. Long. 27 Pac. Rep., 271 (Wash., 1891), A mortgagee need not inquire whether a resolution of the directors authorizing a mortgage and recited therein has been actually passed by them. Manhattan. etc., Co. v. Boland, 18 Atl. Rep., 428 (Pa., 1889). Although the resolution authorizing a mortgage does not specify many provisions which are in it, yet if these provisions are the usual ones the whole mortgage is valid. Savannah, etc., R. R. v. Lancaster, 62 Ala., 555 (1878). Under a general resolution authorizing a mortgage a provision may be inserted in the mortgage that the principal shall become due upon default in the payment of interest. Coe v. N. J. Midland R'y, 31 N. J. Eq., 105 (1879). A vote authorizing a mortgage on the road and appurtenances is broad enough to sustain a mortgage on the railroad itself and all that belonged to it as a railroad; in other words, all the property, real and personal. Kennebec, etc., R. R. v. Portland, etc., R. R., 59 Me., 9, 22 (1871). A directors' resolution authorizing a mortgage on "all the real and personal property now or hereafter belonging to the company" is sufficient and covers earnings, incomes and profits. Kelly v. Trustees, etc., 58 Ala., 489 (1877).

¹Shaver v. Hardin, 48 N. W. Rep., 68 (Iowa, 1891).

edged in substantially the same way as a corporate deed. Immaterial errors in respect to these matters are not fatal to the mortgage. The bonds and mortgage may be executed outside of the state which incorporated the company.

"The omission to attach the corporate seal to the mortgages is not fatal to their validity in equity." Although they may not be good as legal mortgages, yet the court will allow an allegation to be added for their enforcement as equitable liens.

In Montana the statute requires a deed of trust by a corporation to be accompanied by an affidavit that the same has been made in good faith and without any design to hinder or delay creditors.⁵

Various defects in the authorization, making or issuing of bonds and mortgages are waived where the corporation accepts the money or benefits derived from such bonds.

¹ Concerning the rules as to deeds, see § 722, supra. As to the mode of proving the execution, see Coe v. N. J. Midland R'y, 31 N. J. Eq., 105 (1879).

² Although the mortgage is irregular in the mode in which the corporate name is signed thereto, yet it may be good as an equitable mortgage, and notice to the trustees of subsequent mortgages is sufficient. Miller v. Rutland. etc., R. R., 36 Vt., 452 (1863). An attestation clause in the mortgage, followed by the corporate seal and the signature of the president as president, is not the usual mode of executiou, but is sufficient. Trustees, etc., v. McKechnie, 90 N. Y., 618 (1882). A mortgage given under the seal of the corporation is legally executed; and it is immaterial that the president and treasurer signed it instead of the president and secretary as specified in the resolution authorizing it. Whitney v. Union Trust Co., 65 N. Y., 576 (1875). A corporate mortgage may be made by an attorney of the corporation, in the name of the corporation, but under his own hand and seal, where his power of attorney was under the seal of the corporation. First Nat'l Bank v. Salem, etc., Co., 39 Fed. Rep., 89 (1889). A mortgage executed by the president and secretary of a corporation instead of by its trustees, and without any formal authorization,

is valid where there were only three trustees, and two of them were the president and secretary, and the money secured by the mortgage was received by the corporation and used for its benefit. Dexter, Horton & Co. v. Long, 27 Pac. Rep., 271 (Wash., 1891). The fact that the corporate officer who executes a mortgage for the corporation has himself a prior mortgage on the property does not invalidate his lien. Traders' Nat'l Bank v. Mfg. Co., 100 N. C., 345 (1888).

³ Hervey v. Ill. Mid. R'y, 28 Fed. Rep., 169 (1884); Wright v. Bundy, 11 Ind., 398 (1858). A mortgage on the Kentucky property of a Kentucky railroad corporation may be acknowledged by the president in Ohio. Hodder v. Kentucky, etc., R'y, 7 Fed. Rep., 793 (1881). When not otherwise provided by statute, a mortgage signed and acknowledged by a majority of the board of directors, and sealed with the corporate seal, is sufficiently executed. Gordon v. Preston, 1 Watts, 385.

⁴ Allis v. Jones, 45 Fed. Rep., 148 (1891).

⁵ Teitig v. Boesman, 31 Pac. Rep., 371 (Montana, 1892).

⁶ McCurdy's Appeal, 65 Pa. St., 290 (1870), where there was no actual delivery of the mortgage to the trustee; Wood v. Whelen, 93 III., 153 (1879), where the

The bonds should be of the same date as the mortgage, but a variance in their dates may be explained by parol evidence.¹

§ 811. Recording of a mortgage.—A railroad mortgage should be recorded. The railroad being real estate the mortgage should be recorded as a real-estate mortgage in every county into which the railroad runs, unless the statutes of the state provide otherwise.² Where the mortgage covers personal property also, as it generally does, it should be recorded as a chattel mortgage, in addition to its record as a real-estate mortgage.³ This question as

mortgage was authorized by the promoters instead of the directors: Harrison v. Annapolis, etc., R. R., 50 Md., 490 (1878), where it was alleged that the board was not legally constituted: Singer v. St. Louis, etc., R. R., 6 Mo. App., 427 (1879), where the honds were issued for what was alleged to be an ultra vires lease: Elwell v. Grand, etc., R. R., 67 Barb., 83 (1874), where the terms of the mortgage differed from those authorized; Aurora, etc., Soc. v. Paddock, 80 Ill., 263 (1875), where it was claimed that the stockholders as well as the directors must authorize a mortgage; Ottawa, etc., Co. v. Murray, 15 Ill., 336 (1854), where the officer signed his own instead of the company's name to the See, also, many cases in ch. XLIII, supra, sustaining the authority of officials who have been allowed to assume powers for a long time; also ch. XLIV concerning ratification, etc., of ultra vires and other acts; Lewis v. Hartford Mfg. Co., 56 Conn., 25 (1888), where the mortgage was made by an agent without a vote of the directors; Thomas v. Citizens' Horse R'y, 104 Ill., 462 (1882), where a stockholders' vote was not taken, although required by statute. See, also, §§ 723-725, supra. Samuel v. Holliday, 1 Woolw., 400 (1869), where there was a ratification of the mortgage.

¹ Although the bonds are dated October 1, 1871, while the mortgage is dated October 25, 1871, yet parol evidence may show that these are the bonds which are secured by the mort-

gage. Butler v. Rahm, 46 Md., 541 (1877).

²Record may be made by leaving for record a copy of the mortgage, which copy the clerk has compared with the original and found to be correct. Coe v. New Jersey Midland R'y, 31 N. J. Eq., 105 (1874). It has been held that a mortgage to the state made in pursuance of a public statute need not be recorded. Memphis, etc., R. R. v. State, 37 Ark., 632 (1881). A mortgage recorded but not properly executed for record is good as against a subsequent mortgage which refers to it and recognizes it as an existing lien. Coe v. Columbus, etc., R. R., 10 Ohio' St., 372 (1859). See, also, ch. L

³Under the New Jersey statutes a mortgage by a railroad covering all personal and real property need not be recorded as a chattel mortgage. court said: "This act was doubtless passed to put to rest in New Jersey the question which divided many of the federal and state courts: whether a mortgage embracing the franchises, rolling stock and chattels of a railroad corporation should be treated as a real-estate mortgage only, or also as a chattel mortgage." Metropolitan T. Co. v. Pennsylvania, etc., R. R. 25 Fed. Rep., 760 (1885). If the mortgage covers personal as well as real property, it must be acknowledged and recorded as a chattel mortgage also in order to cut off subsequent liens. Palmer v. Forbes, 23 Ill., 301 (1860). If the mortgage is not recorded as a chattel mortgage, then there applicable to rolling stock is considered elsewhere. An unrecorded mortgage or lien is good as against subsequent incumbrances where those who take the latter take them with knowledge or notice of the mortgage.2

arise the old and complicated questions be added that under the recording acts of whether, the mortgagor remaining in possession and continuing to use the property, the mortgage is not void so far as other creditors are concerned. See Bank of Leavenworth v. Hunt. 11 Wall., 391 (1870), and a multitude of decisions on this subject as regards the ordinary chattel mortgage.

1 See ch. L.

(82)

² A bondholder's rights are superior to those of a judgment creditor who had knowledge of the unrecorded mortgage before he obtained his judgment. Butler v. Rahm, 46 Md., 541 (1877). It may

of many of the states an unrecorded mortgage has priority over an attachment or judgment of a general creditor whether the latter had notice of the mortgage or not. A purchaser who took with knowledge of an equitable lien takes subject to that lien. Hervey v. Illinois Mid. R'y, 28 Fed. Rep., 169. Where the parties for whose benefit a mortgage is given are directors, they are chargeable with notice of an existing unrecorded chattel mortgage. Coe v. New Jersey Mid. R'y, 31 N. J. Eq., 105, 124 (1879). 1297

CHAPTER XLVIII.

TRUSTEES AND BONDHOLDERS -- REMEDIES OF EACH.

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A. THE POSITION, DUTIES AND LIABILITIES OF TRUSTEES.

§ 812. Mortgages in the shape of trust deeds — Reason therefor and nature thereof — Mortgages to bondholders direct — Legality of a mortgage deed of trust.— Where a mortgage debt is represented by a single note or bond, the mortgage itself is generally made directly to the person to whom the debt is payable. But when, as in the case of corporation mortgages, the debt consists of a large

number of bonds, and these bonds soon pass into many different hands, a mortgage running to the person to whom the bonds were originally issued, or the subsequent holders of the bonds, is found to be cumbersome, complicated and dangerous as regards its enforcement upon default.¹

In England it is customary to include both the mortgage and the evidence of debt in one instrument, and this instrument is called a debenture. The registration laws in America render this impracticable in the case of a large issue of bonds.² In consequence of the embarrassments due to having a mortgage run to the party to whom the bonds are originally issued, it is the custom and universal practice now to have the mortgage run to trustees for the benefit of the bondholders. Such an instrument is called a trust deed, or better still a mortgage deed of trust. It is a legal way of giving a mortgage.³

1 Where the power of sale runs to "the holder of said bonds or of any one or more thereof," the power of sale is not in the mortgagee but in the bondholders, and bence is void for indefiniteness. the mortgagee assigns the mortgage the assignee holds it in trust for all the bondholders. Mason v. York, etc., R. R., 52 Me., 82 (1861). In the cases In re Bondholders, etc., R. R., 50 Me., 552 (1861), and Mason v. York, etc., R. R., 52 Me., 82 (1861), the instrument was a mortgage and ran to a certain person "and his assigns, who shall become holders of the bonds and coupons hereinafter mentioned, each in the ratio of the bonds so held by him." The mortgagee assigned his interest to other parties. The court held that whoever held the mortgage held it as trustee for all the bondholders. and that no one bondholder had greater rights therein than any other. The court held also that a statute relative to changing trustees of railroads does not apply to such a mortgagee. The objection to a mortgagee as distinguished from a trustee is that the former is not subject to the will of the bondholders to the same extent that the latter is. Where a mortgage is created directly by a statute and no formal instrument is made by the corporation to trustees for the bondholders, the mortgagees are the bondholders themselves. Hence in any suit of foreclosure only those bondholders are bound who are parties to the suit. Young v. Montgomery, etc., R. R., 2 Woods, 606 (1875). Where the mortgage runs to all the bondholders in proportion to their interest, all the bondholders are necessary parties to any foreclosure suit. Railroad v. Orr, 18 Wall., 471 (1873).

²See ch. XLVI, supra, concerning debentures. "In the first place, as regards the powers that were given to the company, there was a power given to mortgage, and a power given to raise money by debentures; but of course they might include in one and the same instrument a mortgage and a debenture, which was in substance a bond, and a charge upon this property for the sum borrowed on bond." In re Panama, etc., Co., L. R., 5 Ch., 318 (1870).

³ A mortgage given by a corporation to a trustee to secure an issue of bonds made by the corporation is not such a trust estate as is referred to in the statute of uses and trusts. King v. Merchants' Ex. Ins. Co., 5 N. Y., 547 (1851). "Mortgages to one person in trust for the benefit of others have frequently been used, and upheld by the courts;" and bonds secured thereby and running to the trustee or bearer are legal. Such

Such a trust deed, or deed of trust, or mortgage deed of trust, is given for the purpose of securing debts or obligations. It is to all intents and purposes a mortgage, and is subject to substantially the same rules as a mortgage.¹

a trust deed is a mortgage. The mortgage may be "by a mortgage directly to the creditors, or to trustees for their benefit, or by a mortgage to secure bonds issued and delivered to the creditors, or sold to raise money to pay them." Carpenter v. Black Hawk, etc., Co., 65 N. Y., 43 (1875). It is not necessary that separate mortgages should be executed to each creditor to secure his debt. but a single mortgage to one or more persons in trust for the security of all the creditors is proper, and the mortgage may be given to secure bonds issued and delivered to creditors or sold to raise money to pay them. Lord v. Yonkers, etc., Co., 99 N. Y., 547 (1885). A deed in trust to trustees, instead of a direct mortgage to bondholders, is good. Butler v. Rahm, 46 Md., 541 (1877); Central Gold Min. Co. v. Platt, 3 Daly, 263 (1870). It "is a mortgage in substance, in law, and in fact, though it also creates a trust," and the right of possession is in the mortgagor. Southern Pac. R. R. v. Dovle, 8 Sawyer, 60 (1882).

Speaking of deeds in trust the court said in the case of Ashhurst v. Montour Iron Co., 35 Pa. St., 30 (1860): "They are tripartite in substance and effect. Besides the two contracting parties there are the creditors, unascertained indeed when the instrument is made, but well known as a party when the remedies come to be discussed. Between them and their trustees it is nothing but a trust: between the trustees and the mortgagor it is nothing but a mortgage. And if the creditors be regarded as the substantial plaintiffs on this record, then, as between them and the mortgagor, the instrument can be regarded as nothing else than a mortgage." In the case of McLane v. Placerville, etc., R. R., 66 Cal., 472 (1885), the court said: "Some question is made as to the nature of the

instrument sued on. We think it a mortgage executed and issued in the usual mode and form of railroad mortgages. . . Though executed to trustees, and in form a conveyance in trust. it is to all intents a mortgage - in essence a mortgage, taking the form usual with such securities executed by railroad corporations. From an apparent necessity and for the convenience of those interested the security takes the form of a trust deed, and thus becomes a contract between the corporation and the persons who may become holders of the bonds secured by it, who are entitled to the same benefit they would have if actually made parties to the instrument." The deed in trust is a mere security for the money obtained, and is in legal effect nothing more than a mortgage, and leaves the title and possession in the grantor subject to the lien. Wisconsin, etc., R. R. v. Wisconsin, etc., Co., 71 Wis., 94 (1888). Power to mortgage gives power to make a deed of trust in the nature of a mortgage. Pullan v. Cincinnati, etc., R. R., 4 Biss., 35 (1865). See, also Jones on Mortgages (4th ed.). §§ 1764-1771. When the bondholders take possession of the property covered by the deed of trust they are equitable mortgagees in possession. Chamberlain v. Conn., etc., R. R., 54 Conn., 472, 485 (1887). In Platt v. Union Pac. R. R., 99 U.S., 48, 57 (1878), the court said: "The instrument, we think, though in form a deed of trust, was substantially a mortgage."

Same cases; also, Pullen v. Cincinnati
C. A. L. R. R., 4 Biss., 35 (1865); Coe
v. Johnson, 18 Ind., 218 (1862); Coe v.
McBrown, 22 Ind., 252 (1864); Re Bondholders' York & C. R. R. Co., 50 Me., 552 (1861). See, also, White Water Valley, etc., v. Vallette, 21 How., 414 (1858); Galveston R. R. v. Cowdrey, 11 Wall.,

§ 813. Who may be the trustee? — The trustee or trustees, for there may be more than one, may be individuals or may be a trust company. The latter is generally preferred because such a company makes this a business; it has had more or less experience; it gives weight and stability to the bonds; it renders the expense of trusteeship more easily ascertainable, and the trustee does not die.

A statute to the effect that non-residents shall not be trustees in mortgage deeds of trust of property in the state is unconstitutional.²

§ 814. Trustee's certificate on the bonds.— The trustee generally accepts in writing at the end of the deed of trust the trusteeship. He also generally signs a certificate on the back of the bonds to the effect that the bond is one of the bonds secured by the deed of trust and sometimes that the deed of trust has been duly recorded. This certificate, however, is not considered a part of the bond.³

459, 480 (1870); Meyer v. Johnston, 53 Ala., 237 (1875).

1 "The trustee in such case is usually. if not always, selected and appointed by the company for the convenience and benefit of itself and of those who may become the owners of its obligations. One mortgage to the trustee is all that is required, no matter how numerous the holders of the notes or bonds secured thereby. He is the representative of the common interests of all who may invest in the security." Hays v. Galion, etc., Co., 29 Ohio St., 330 (1876). An Illinois railroad corporation may execute a mortgage to a New York trust company. Hervey v. Ill. Mid. R'y, 28 Fed. Rep., 169 (1884). As to whether a trust company has no power to hold as trustee and vote the majority of the stock of a great railroad system, especially where it is also the trustee in a trust deed of the company, see Clarke v. Central R. R., etc., 50 Fed. Rep., 338 (1892); reversed, Id. (1893). The trustee may be an officer of the company. Ellis v. Boston, etc., R. R., 107 Mass., 1 (1871). A director may be the trustee in a trust deed executed by his corporation. Bassett v. Moote, etc., Co., 15 Nev., 293 (1880). It is not necessary that there be a manual delivery of the mortgage to the trustee in order to constitute a delivery. McCurdy's Appeal, 65 Pa. St., 290 (1870).

² Although the statutes of a state require the trusted of a deed in trust to be a resident, yet the trust deed is not void although the trustee is a non-resident. The court, if necessary, will appoint a competent trustee to execute the trust. A foreclosure will be decreed without appointing a new trustee. A statute prohibiting citizens of other states from acting as trustee is unconstitutional. Farmers' L. & T. Co. v. Chicago, etc., R'y, 27 Fed. Rep., 146 (1886). The Indiana statute that the trustee of a mortgage shall not be a non-resident is unconstitutional and void. Citizens of other states under the federal constitution have the right to be such mortgagee. Robey v. Smith, 30 N. E. Rep., 1093 (Ind., 1892); Shirk v. La Fayette, 52 Fed. Rep., 857 (1892). In Illinois neither a domestic nor foreign trust company can accept a trust until after they have complied with certain formalities and prerequisites, and deposit \$200,000 in stocks, bonds or mortgages with the state auditor. Until such compliance the trustee cannot enforce the trust. Pennsylvania Co., etc., v. Bauerle, 33 N. E. Rep., 166 (Ill., 1892).

³ A provision in the trustee's certificate to the effect that "the principal

§ 815. The nature of the trusteeship and the duties of the trustee. The trustee, when he accepts the trust, undertakes something more than the receipt of his compensation. He is bound to see that the property is not wasted or destroyed. This trust is not a dry, naked agency, but is coupled with important duties. Many bondholders rely upon the trustee to protect them, and when it is considered that the trustee alone has a standing in court to protect or enforce the mortgage security, and that the bondholders have no such standing, except in exceptional cases, it is right that the trustee should be held to an active and rigid performance of duty.

The duty of the trustee is an active one. He is not allowed to sit quietly by where there is danger to the mortgaged property, or where a foreclosure should be had. The courts compel the trustee

sum secured by said mortgage shall become due in case the interest on the bonds remains unpaid for four months" does not enable a bondholder to sue for the principal where the terms of the mortgage are inconsistent with such a right to sue. Mallory v. West Shore, etc., R. R., 3 J. & S., 174 (1872). Bonds may be good, though not certified to by the trustee. The failure of the trustee to sign certain bonds set apart for a specific purpose may be disregarded by the court in carrying out the contract plan. Atwood v. Shenandoah, etc., R. R., 9 S. E. Rep., 748 (Va., 1889). The trustee's certificate is not a part of the bond, but a vendor of the bond impliedly warrants that it is correct. Edwards v. Marcy, 84 Mass., 486 (1861). Where the bonds are stolen before the trustee's certificate is attached, such certificate being required by the terms of the bond, the bonds are void absolutely, and there can be no bona fide purchaser of them. Maas v. Missouri, etc., R'y, 83 N. Y., 223 (1880). A certificate indorsed on the bond is construed with the bond and mortgage as part and parcel of the same security. Benjamin v. Elmira, etc., R. R., 49 Barb., 441 (1867). Where a contract is to be approved by the trustees before it is valid, the court cannot dispense with such approval, even though one of the trustees has resigned. Taylor v. Atlantic, etc., R'y, 55 How. Pr., 275 (1877). The certificate, although

it refers to the trust deed, does not thereby give notice to the bondholder of all the terms of that deed. Guilford v. Minn., etc., R'y, 51 N. W. Rep., 658 (Minn., 1891).

¹ As regards trustees, the court said. in Trust National Ins. Co. v. Salisbury, 130 Mass., 303 (1881): "As the defendants hold the mortgage not to secure a debt due to themselves, but as trustees for the holders of the bonds of the mortgagor, their duties are regulated by the general rules of law which affect all trustees, and whenever they fail to perform them, either through wilfulness. indifference or error of judgment, the bondholders who are aggrieved by their conduct may obtain relief in this court sitting as a court of equity. . . . Among the duties of the defendants as trustees are these: They must act in good faith for the best interests of the bondholders; they must take care that the property is not wasted nor depreciated; they must see that its income is not improperly diverted from the payment of interest on the mortgage debt as it accrues; and in case of a manifest purpose on the part of the mortgagor to waste or destroy the property, or not to apply the income to payment of interest, to the injury of the bondholders, it is their duty to enter and take possession of the property, and manage it for the security of the cestuis que trust. Perry on Trusts, § 749."

to act, and a bondholder, by suit, may compel the trustee to act.1 The trustee's duties after default in the mortgage are active and exacting.2 It is the duty of the trustee to act when occasion requires, and not let a part of the bondholders act for him. Hence, if on default in interest he allows a part of the bondholders to use his name in foreclosing, and other bondholders are injured thereby, the latter may hold the trustee liable in damages.3

The duty of the trustee is to each bondholder severally and not to a majority of the bondholders.4

It is fraudulent for the trustee to enter into an agreement with a part only of the bondholders to get control of the property to the injury of the other bondholders. Bondholders may compel the trustees to render accounts where the trustees are in possession of the property.6 A bondholder may compel the trustee to record the mortgage. The bondholders may hold the trustees personally liable for breach of duty.8 The trustee has a right to examine the books of the company where there has been a de-

¹ See § 830. infra.

²The duties of the trustee after a default occurs are not only active and responsible, but critical and delicate. not only is not a dead, dry trust, but is one of the most active and momentous responsibility." Sturges v. Knapp, 31 Vt., 1, 55 (1858).

3 Merrill v. Farmers' L. & T. Co., 24 Hun, 297 (1881), where the majority controlled the foreclosure, sold the property at a very low figure and bought it in. Ordinarily the trustee is not personally liable where he acts in good faith in the administration of the property. Hollister v. Stewart, 111 N. Y., 644 (1889).

⁴ Hollister v. Stewart, 111 N. Y., 644 (1889). As regards the trustee, "the bonded debt is a unit so far as his duties and powers are concerned. He must regard the bondholders as a class and not as individuals. He cannot permit, and if so wanting in fidelity to his trust as to be willing, the courts will not permit, the least discrimination between members of the same creditor class." Commonwealth v. Susquehanna, etc., R. R., 122 Pa. St., 306, 320 (1888).

⁵ A sale may be set aside where the trustee of the mortgage entered into a

combination with part of the bondholders to purchase at the sale at a small price and reorganize, at a sacrifice to minority boudholders. Sahlgard Kennedy, 1 McCrary, 291 (1880),

6 Bondholders may file a bill in equity for an accounting by the trustees in the deed of trust who have taken possession of the property, operated it, received net earnings and turned it over to another company. Dwight v. Smith. 13 Fed. Rep., 50 (1882). A bill in equity by bondholders to compel trustees to account for net earnings received must allege clearly and definitely the various facts that make up the breach of duty. Dwight v. Smith, 9 Fed. Rep., 795 (1881).

7 A bondholder bringing suit to compel the recording of the deed in trust securing his bonds must prove the due execution of the deed in trust and must make subsequent mortgagees parties defendant. Riggs v. Penn., etc., R. R. 16 Fed. Rep., 804 (1883).

⁸See § 830. The sale of bonds does not carry also a cause of action against the trustees unless there is an assignment of that also. Dwight v. Smith. 9 Fed. Rep., 795 (1881).

fault.¹ The power and duty of the trustee to bid for the mortgaged property at the foreclosure sale is considered elsewhere.²

Where the trustee sells trust property to himself personally, and the cestui que trust are cognizant thereof and do not object for several years, they cannot set the transaction aside.³

The trustee of a mortgage will be required to discharge the same, where the bonds secured by the mortgage are owned by the receiver of the corporation.⁴

The trustee is trustee not only for the bondholders, but also for the corporation mortgagor. He occupies a fiduciary position towards both.⁵

§ 816. Right and duty of the trustee to protect the mortgaged property — Purchasing prior liens — Releasing part of the property — Delivery of bonds in trust to trustee.— It is the right and duty of the trustee to protect the mortgaged property from injury or loss. One of the latest and extreme instances of this is the right of the trustee to institute a suit to declare void the orders of a railroad commission reducing rates to a point where the mortgaged property would be inadequate to pay the mortgage. It is not necessary that the trustee wait until there is a default in the payment of interest on the mortgage debt. The trustee may enjoin the foreclosure, by advertisement, of a prior mortgage that has been paid. The trustee may pay off a prior incumbrance in

¹Where there has been a default in interest it is the duty and right of the trustee to examine the books of the company and the company is bound to allow it. Pullman v. Cincinnati, etc., R. R., 4 Biss., 35 (1865).

² See ch. LII, infra.

 3 Hoyt $\boldsymbol{v}\!.$ Latham, 143 U. S., 553 (1892).

⁴ Wilson v. Welch, 31 N. E. Rep., 712 Mass., 1892).

5 A trustee in possession is trustee not only for the bondholders but also for the corporation. In a bill by the company to redeem, the acts of the trustee in breach of trust as regards the corporation may be set aside. Ashuelot R. R. v. Elliot, 57 N. H., 397 (1874).

⁶The trustees may maintain a suit in equity to enjoin the enforcement of a state statute which allows the state railroad commissioners to reduce railroad rates in their discretion, it being shown that the reductions made are ruinous to the companies, and will pre-

vent the payment of interest on the bonds secured by the mortgages. Mercantile T. Co. v. Texas, etc., R'y, 51 Fed. Rep., 529 (1892). In the case Detroit v. Detroit, etc., R'y, 54 Fed. Rep., 1 (1892), the court held that where a city filed a bill for a decree that the franchises of the company had expired, a non-resident trustee of the mortgage might remove the case into the federal court on the ground of local prejudice. In the case Clapp v. City of Spokane, 53 Fed. Rep., 515 (1892), a trustee obtained an injunction against the city tearing up the tracks for the purpose of laying a sewer. it being shown that the sewer could be laid on the side of the street, and the remedy by injunction was granted because both the mortgagor and the city itself were practically insolvent.

7 Id.

⁸The trustee may enjoin a former mortgagee, whose mortgage has been paid, from foreclosing by advertisement. order to avoid a forced sale and be subrogated to such lien. Where the trustee and the company deed the mortgaged land for certain of the bonds the company cannot afterwards object.²

The trustee of course has no power to release any part of the mortgaged property unless expressly authorized so to do.³ Sometimes the bonds are left with the trustee to be thereafter delivered to certain persons or on certain conditions. He is then a trustee in two different capacities.⁴ The trustee may institute suit to de-

The effect of the advertising "could not be otherwise than seriously to depreciate the value of the bonds secured by the mortgage to the plaintiffs; and this injurious effect would be greatly increased if a sale were actually to be made in advance of a legal determination of the respective rights of the parties." Murdock v. Woodson, 2 Dill., 188.

¹The trustees in a mortgage may pay off a prior incumbrance in order to prevent a forced sale of the property, and may then by a bill in equity be subrogated to the lien so paid. Memphis, etc., R. R. v. Dow, 120 U. S., 287 (1887).

² Where honds are exchanged for land and the trustee and the railroad join in the deed, the railroad cannot afterwards say that the trustees had no power to make the deed. Wood r. Dubuque, etc., R. R., 28 Fed. Rep., 910 (1886).

3 See Fidelity, etc., Co. v. Shenandoah, etc., R. R., 9 S. E. Rep., 180 (W. Va., 1889). Improvements on mortgaged real estate are subject to the mortgage, and the trustee of the mortgage will be enjoined from waiving the lien. Gibson v. American, etc., T. Co., 58 Hun, 443 (1890). Where the bondholders deliver their bonds to the trustee under an agreement by which the bonds are to be exchanged for a new issue, and the trustee proceeds to release the mortgage before the specified new issue is made, the release is voidable, and subsequent mortgages are not prior in right where the trustees of such mortgages had substantial notice of the facts. Fidelity, etc., Co. v. Shenandoah, etc., R. R., 9 S. E. Rep., 180 (W. Va., 1889). Where the trustees wrongfully

release the mortgages the bondholders may file a bill to set aside the releases and to foreclose, and two years' delay is not fatal where the trustees themselves had filed a similar bill soon after the releases were given. Chicago, etc., Land Co. v. Peck, 112 Ill., 408 (1885). The bondholder may also hold the trustee liable. Id. Where bondholders sue to restrain trustees from conveying land, and to set aside certain agreements to convey, any conveyance subsequent to service in the suit is subject to the decree canceling such contracts, principle of lis pendens applies. Trust Co. v. Southern Nav. Co., 130 U.S., 565 (1889), where a mortgage by the grantee was held to be void. Concerning a provision in the mortgage authorizing the release, see § 807.

4 Where the trustee is to issue the bonds as fast as ten-mile sections are completed, and the construction involves many short branches, each being less than ten miles in length, they are to be added together and for every ten miles bonds are to be issued. Denver & R. T. R. R. v. United States T. Co., 41 Fed. Rep., 720 (1890). The bonds may be delivered to the trustee to deliver to creditors upon their asking for them. Until so delivered the creditor has no claim upon them. Hubbell v. Syracuse. etc., Works, 14 N. Y. Supp., 345 (1891). A trust company is a necessary party defendant in a suit to eujoin it from issuing bonds in violation of its trust and of the mortgage. Denver, etc., R. R. v. United States T. Co., 41 Fed. Rep., 720 (1890),

termine the priority of liens where a sale, which is about to take place, would create a cloud upon his title. The trustee may bring suit to enjoin a lease of the property in derogation of the bondholders' rights, and may defend against liens alleged to be prior to the mortgage. Where the trustee fails to properly protect the mortgaged property a bondholder may institute suit in his stead.

§ 817. In the absence of fraud the bondholders are bound by what is done by the trustee within the scope of his authority — Notice to the trustee.— The bondholders are bound by what is done by the trustee in the foreclosure proceedings. They are bound by the decree the same as the trustee unless fraud is involved on the part of the trustee.

¹Trustees may bring suit to have determined the priority of mortgages where another mortgagee claims priority and is about to sell the property, thereby creating a cloud on the title of the complaining mortgagee. Murdock v. Woodson, 2 Dill., 188 (1873).

² In an action brought by a trustee to enjoin a lease in derogation of the rights of creditors secured by deed to the trustee, the court, in Phillips v. Eastern R. R., 138 Mass., 122 (1884), ordered notice by publication to be given to creditors so secured.

³In a suit to declare a vendor's lien of personalty to be superior to a mortgage given by the company, the nonresident trustee of the mortgage need not be made a party if substantially all the bondholders are before the court. New Chester Water Co. v. Neally Mfg. Co., 53 Fed. Rep., 19 (1892). The trustee cannot remove a case to the federal court on the ground that its controversy is separable, where the suit is to enforce liens against the railroad company. March v. Atlanta, etc., R. R., 53 Fed. Rep., 168 (1892).

⁴ See § 830, giving instances of the exercise of this right.

⁵ In the absence of fraud the bondholders are bound by what is done by their trustee in foreclosure proceedings. Credit Co. v. Arkansas, etc., R. R., 15 Fed. Rep., 46 (1882). In the absence of fraud or bad faith the bondholders are

bound by the action of the trustee in foreclosing. Richter v. Jerome, 123 U.S., 233 (1887): Shaw v. Railroad, 100 U. S., 605 (1879). Bondholder is bound by a decree against his trustee. Corcoran v. Chesapeake, etc., Co., 94 U. S., 741 (1876). The trustee may execute a release of errors in the decree and of the right to appeal. If given in good faith, the boudholders are bound and cannot appeal. Elwell v. Fosdick, 134 U.S., 500 (1890). Bondholders are bound by a decree which passes upon the priority of two different mortgages, although only the trustees were parties to the suit. Board of Supervisors v. Mineral Point R. R., 24 Wis., 93 (1869); McElrath v. Pittsburgh, etc., R. R., 68 Pa. St.. 37 (1871); Union T. Co. v. Morrison, 125 U. S., 591, 608 (1887); New Jersey, etc., Co. v. Ames, 12 N. J. Eq., 507 (1859), where on foreclosure of the first mortgage, bondholders under the second mortgage were not allowed to become parties. In the case Farmers' L. & T. Co. v. Kansas City, etc., R. R., 53 Fed. Rep., 182 (1892). the court held that the trustee might assent to claims growing out of labor, material, etc., being paid before the bondholders were paid, and that the bondholders were bound by this assent of the trustee. The court said: "The bondholders claiming under the mortgage have no interest in the security except that which the trustee holds and represents, and, if the trustee acts in In a suit brought to have bonds declared illegal and void, the bondholders whose bonds are attacked need not be made parties defendant if the trustee is a party defendant. The bondholder cannot claim railroad iron free from a lien where the trustee knew of the lien and impliedly assented thereto when the iron was laid.

In general, a notice to the trustee is sufficient notice to all the bondholders.³ But there is a limit to this principle of law, and notice to a trustee while acting as director is not notice to the bond-

good faith, whatever binds it in any legal proceedings it begins and carries on to enforce the trust, to which they are not actual parties, binds them. . . . And where the trustee in good faith assents to terms imposed by the court as a condition for appointing a receiver. the bondholders are bound by such assent as fully and absolutely as if it had been given by them in person," Reviewing the cases. In the case Pollitz v. Farmers' L. & T. Co., 53 Fed. Rep., 210 (1892), it was held that the trustee represents the bondholders in all litigation relative to the trust, even in a suit which resulted in a decree that the property be reorganized without a foreclosure, ample provision being made for the payment in full of those bondholders who preferred to have their bonds paid in cash. The trustee will not be allowed on his mere motion to discontinue the suit to the prejudice of parties interested in the trust. A bondholder will be allowed to intervene and carry on the suit. Bill v. New Albany, etc., R. R., 2 Biss., 390 (1870). Although the trustees are the same for the first and second mortgagees. yet in a suit by a bondholder under the first mortgage to compel the trustees to take possession, he need not join the bondholders under the second mortgage as defendants. First Nat'l Ins. Co. v. Salisbury, 130 Mass., 303 (1881). bondholders cannot appeal. Sage v. Central R. R., 93 U. S., 412 (1876). See, also, \$ 849.

¹A decree in equity canceling bonds of one corporation which are secured by the mortgage of another corporation,

the bill being filed by the latter against the former company and against the trustee under the mortgage, is binding upon all the bondholders, although they were not parties thereto, unless the decree was fraudulent and collusive. Beals v. Illinois, etc., R. R., 133 U.S., 290 (1890). The deed of trust and bonds may be declared invalid in a suit instituted against the trustee and all known boudholders. Other bondholders cannot afterwards follow the property into other hands. Beals v. Illinois, etc., R. R., 27 Fed. Rep., 721 (1886). Where a foreclosure is pending, a few of the bondholders cannot bring a suit to have other bonds declared void. Sickles v. Richardson, 23 Hun, 558 (1881). Contra. Appeal of Harrisburg, etc., R. R., 36 Am. & Eng. R. R. Cas., 249 (Pa., 1888), Cf. Des Moines, etc., Co. v. West, 44 Iowa. 23 (1876).

² If iron is purchased by the company on an agreement that the vendors shall retain a lien on it and the trustees of the mortgage assent thereto, the mortgage does not come in ahead of the lien, although the iron is actually laid on the tracks. Pierce v. Emery, 32 N. H., 484 (1856).

³ Fidelity, etc., Co. v. Shenandoah, etc., R. R., 9 S. E. Rep., 180 (W. Va., 1889). Although the mortgage is irregular in the mode in which the corporate name is signed thereto, yet it may be good as an equitable mortgage, and notice to the trustees of subsequent mortgages is sufficient. Miller v. Rutland, etc., R. R., 36 Vt., 452 (1863).

holders.¹ An unknown lien or equity in the property is cut off by the mortgage, the same as by a deed.²

§ 818. Compensation of trustees and reimbursement of trustees' disbursements for counsel, etc.—The trustee of a mortgage deed of trust is entitled to reasonable compensation for real services performed by him.³

If the court allows the trustee a compensation larger than the bondholders think reasonable, they may contest the same, and

¹ Curtis v. Leavitt, 15 N. Y., 9, 194 (1857); Com'rs of Johnson County v. Thayer, 94 U. S., 631 (1876), where notice to the trustee of defenses to municipal bonds was held not to be notice to bondholders.

²The trustees and bondholders without notice are bona fide purchasers to the extent of cutting off a claim against the mortgagor by a vendor that the latter in conveying to the mortgagor made a mistake as to boundaries. Western, etc., Co. v. Peytona, etc., Coal Co., 8 W. Va., 406, 441 (1875).

³ See Perry on Trusts, vol. II, §§ 916-919. An allowance of \$5,000 on account made to a trust company during the litigation. Allowance to mortgagor refused. Mercantile T. Co. v. Missouri, etc., R'y. 41 Fed. Rep., 8 (1889). As to the compensation of trustees of a railroad mortgage under the New York law, see Dow v. Memphis, etc., R. R., 32 Fed. Rep., 185 (1885). Where in a foreclosure suit by a mortgagee of a whole system of railroads, counsel fees and compensation to the trustees of first mortgages on various parts of the system were allowed, similar compensation and fees will be allowed to one of those trustees up to the time when he instituted a separate suit of foreclosure on another division and had receivers appointed. Central T. Co. v. Wabash, etc., R'y, 36 Fed. Rep., 622 (1888). In the case of Williams v. Morgan, 111 U. S., 684 (1884), \$75,000 were allowed to the trustees; \$30,000 for services and counsel fees were allowed in Memphis. etc., R. R. v. Dow, 120 U. S., 287 (1887). Where a trustee takes a lease of the

railroad upon his agreeing to pay the principal and interest of the bonds and he sublets the same to another railroad company on the same terms, and the latter company defaults and foreclosure is had, and the trustee succeeds in making the latter company pay a large sum of interest, he is entitled to reasonable compensation and attorneys' fees out of the property, even twenty-five per cent. of the amount recovered, he having done all things for the benefit of the property and the bondholders. Woodruff v. N. Y., etc., R. R., 129 N. Y., 27 (1891), the compensation being computed on the same basis as that for executors. Compensation to the trustee and his counsel and his successor in the trust was allowed in Newport, etc., Bridge Co. v. Douglass, 12 Bush, 673, 721 (1877). In the case of Coe v. Columbus, etc., R. R., 10 Ohio St., 372, 408 (1859), the court held that the trustees were not entitled to compensation out of the fund for their services and the services of their counsel any more than any mortgageo is entitled thereto. Where the statutes of the state prescribe that trustees making a sale shall have two per cent. of the gross proceeds as their compensation for services of administration, the court will apply this rule to trustees selling a railroad on foreclosure, but will deduct the 'fee of the master who actually made the sale. Duncan v. Atlantic, etc., R. R., 4 Hughes, 125 (1881). See, also, id., p. 150, for form of decree.

⁴ A bondholder or a purchaser at foreclosure sale who has agreed to pay the trustee's expense may contest the appeal from the decision of the court.¹ If, however, the trustee has performed no services, or has refused to act, he cannot claim compensation for services.² A bondholder, however, who brings suit to protect the property, or to foreclose upon failure or refusal of the trustee to do so, is not allowed pay for his personal services or personal expenses, but is allowed payment for counsel fees, costs and necessary expenses in the litigation.³ The trustee is entitled also to have his disbursements refunded to him, including fees paid by him to his counsel.⁴ But the trustee cannot claim reimbursement for

amount of that expense and may appeal. Williams v. Morgan, 111 U. S., 684 (1884). A bondholder may intervene to contest extravagant compensation to the receiver and others, where the trustee has joined in a reorganization scheme of the majority of the bondholders. De Betz's Petition, 9 Abb. New Cas., 246 (1878).

¹Cowdrey v. Galveston, etc., R. R., 93 U. S., 352 (1876); Trustees v. Greenough, 105 U. S., 527 (1881).

² If the trustee refused to act, and was made a party defendant, an allowance to his counsel may be refused. Investment Co. v. Ohio, etc., R. R., 46 Fed. Rep., 696 (1891). Where a trustee is removed because of absence from the country (Farmers', etc., T. Co. v. Hughes, 11 Hun. 130), he cannot collect compensation for his services. Hughes v. Chicago, etc., R'y, 15 J. & S., 531 (1881).

³Trustees v. Greenough, 105 U. S., 527 (1881); Central R. R., etc., Co. v. Pettus, 113 U. S., 116 (1885), where the counsel for the creditor was held to have a lien on the property even though the client had compromised the case.

⁴ The trustee is entitled to payment of his disbursements out of the trust fund, and if that is insufficient to require payment thereof from the bondholders. They have a lien on the property therefor and for compensation for themselves and their attorney. Rensselaer, etc., R. R. v. Miller, 47 Vt., 146 (1874). The trustee is entitled to have deducted from the trust fund any rent which has become due on the property of the company while in his possession and for

which he is liable. In re Exhall, etc., Co., 35 Beav., 449 (1866). In the case Patterson v. Hempfield R. R., 1 Weekly Notes of Cas., 127 (Pa., 1874), where the trustee took possession and proceeded to complete the road by laying down rails and buying iron, and doing a large amount of work, the court allowed claims therefor to come in ahead of bonds. The mortgage authorized him to preserve, repair and maintain the property. In the case Gilman v. Des Moines, etc., R. R., 41 Iowa, 22 (1875), the mortgage provided for a commission of two per cent, on bonds which were paid off by the sale of the mortgaged land by the trustees. If the sales of the land in such a case are to be made by the mortgagor and the proceeds paid to the trustee, the mortgagor is entitled to reimbursement of reasonable expenses. Nickerson v. Atchison. etc., R. R., 3 McCrary, 455 (1881). The trustee, who is also receiver, has a lien on the property ahead of the hondholders for his reasonable expenses, including compensation to his counsel. Mc-Lane v. Placerville, etc., R. R., 66 Cal., 606 (1885); Cowdrey v. Galveston, etc., R. R., 93 U. S., 352 (1876), where the attorney was allowed \$2,500. See, also, Memphis, etc., R. R. v. Dow, 120 U. S., 287 (1887). The solicitor for the trustee in a foreclosure suit is not absolutely entitled to his fees from the fund, and the court will exercise its discretion in allowing or refusing payment. Robinson v. Ala., etc., Co., 51 Fed. Rep., 268 (1892). The attorneys for second-mortgage bondholders who first applied for any expenses except those incurred in preserving the property, unless the additional expense is authorized by the court. These disbursements, when large and when made in connection with a railroad, are generally met by the issue of receiver's certificates. The trustee's claim for services is not barred by the statute of limitations if the mortgage still exists. The trustee may under certain circumstances pay off a prior lien on the property, and he will then be subrogated to that lien and be entitled to repayment out of the property which he holds as trustee.

§ 819. Death, resignation and removal of trustees—Removal under the terms of the mortgage.—If the trustee dies a court of equity has power to appoint a new trustee.⁵ A trustee cannot resign from his trusteeship unless his resignation is accepted.⁶ The duties and office of the trustees do not end so long as they are not

and obtained a receiver were allowed \$6,000 on account in Bound v. South Car. R. R., 43 Fed. Rep., 404 (1890).

¹ Cowdrey v. Galveston, etc., R. R., 93 U. S., 352 (1876).

² See § 876, infra.

³ Although a trustee's claim for services is barred by the statute of limitations, yet the mortgage security for the bonds secures him also, and that is not barred except after the period raising a presumption of payment. He is entitled to pay and is paid before the bonds are paid. Smith's Ex'rs v. Washington, etc., R. R., 33 Gratt. (Va.), 617 (1880).

⁴ Memphis, etc., R. R. v. Dow, 120 U. S., 287 (1887).

⁵ The courts have inherent power to remove and appoint new trustees in a mortgage. Hale v. Nashua, etc., R. R., 60 N. H., 333 (1880). Although the mortgage is made to a certain person, his heirs and assigns, as trustee for the bondholders, yet upon the death of the trustee the court may appoint a new one and the heirs have no interest therein. Gibbes v. Greenville, etc., R. R., 13 S. C., 228 (1879). When there are two trustees, and one dies, the trust passes to the survivor. The heirs and representatives of the deceased trustee have no interest in the deed in trust. McAllister v. Plant, 54 Miss., 106 (1876). A trustee substituted in a deed of trust

by a court has all the powers to sue in a foreign jurisdiction that the original trustee had. Glenn v. Soule, 22 Fed. Rep., 417 (1884). If one of the trustees dies pending suit, the suit is postponed until the vacancy is filled. Shaw v. Norfolk, etc., R. R., 71 Mass., 162 (1855). If the trustee is dead the court takes jurisdiction for foreclosure without appointing a new trustee. Gibert v. Washington, etc., R. R., 33 Gratt. (Va.), 586, 614 (1880). If one of the trustees is dead and another is interested in a manner hostile to the trust, the third trustee may bring the suit for foreclosure. Robinson v. Alabama, etc., Mfg. Co., 48 Fed. Rep., 12 (1891). A stockholder cannot set aside a foreclosure on the ground that the order substituting new trustees in the mortgage in place of trustees who were dead was informal, where five years have elapsed since the sale and the property has become valuable. Godwin v. Whitehead, 14 S. E. Rep., 344 (Va., 1892).

⁶Richards v. Merrimack, etc., R. R., 44 N. H., 127 (1862). A trustee is not relieved from his trust by the mere fact that he has parted with his qualification bonds. Id. Where a trustee has resigned he need not join in the foreclosure. Coe v. N. J. Midland R'y, 31 N. J. Eq., 105 (1879).

discharged, incapacitated or released by final distribution of the money going to the bondholders.¹ It is generally a difficult thing to induce a court to remove a trustee. A court of equity has power to do so but will not readily use that power.²

It is, however, cause for removal that the trustee has been guilty of bad faith 3 or is incapacitated by reason of absence. 4 But the mere fact that the same corporation is trustee in two deeds of trust of the same property is not sufficient cause for removal. 5 In some cases the trustees are authorized to name their successors. 6

¹ Knapp v. Railroad, 20 Wall., 117 (1873). ² The court will not readily remove a trustee in a deed of trust. McPherson v. Cox. 96 U. S., 404 (1877).

3 Where it appears that a trust company, which has acted as trustee under a mortgage covering lands in another state given by a corporation as collateral to bonds issued by it, has acted in bad faith in the prosecution of an action for the foreclosure of the mortgage, and in a manner prejudicial to the interests and rights of the holders of the bonds. such trust company, its officers, agents and attorneys, will be enjoined by the courts of the state of New York from taking any further proceedings in the matter, pending the final hearing and determination of an action for its removal as a trustee, although the proceedings in foreclosure are pending in another state. and relate to real estate therein. Gibson v. American L., etc., Co., 58 Hun, 443 (1890).

4 Where a trustee goes abroad to reside, a new trustee may be substituted and the former trustee will be enjoined from acting or bringing suits. Farmers' L. & T. Co. v. Hughes, 11 Hun, 130 (1877). During the late war a southern railroad company applied to a court for and obtained a change of trustees on the ground that the sole trustee lived in New York and was not fulfilling his trust. The new trustees acted and conveyed large tracts of land. Ten years afterwards the New York trustee filed his petition to obtain a decree that he was still trustee. The court dismissed the petition. Ketchum v. Mobile, etc.,

R. R., 2 Woods, 532 (1876). But in Washington, etc., R. R. v. Alexandria, etc., R. R., 19 Gratt. (Va.), 592 (1870), the court held that such an appointment by reason of the old trustee, president and directors going into the southern army was illegal and void, although the new trustee was appointed by a court loyal to the federal government.

⁵ The fact that one trust company is trustee under twelve different mortgages executed by several companies in one system of roads is not sufficient reason for allowing a bondholders' committee to intervene and become a party plaintiff in a foreclosure suit, where no negligence on the part of the trustee is shown. aud no conflict between the various interests represented by him. Clyde v. Richmond, etc., Co., 55 Fed. Rep., 445 (1893). The court will not, even upon the application of a majority of the firstmortgage bondholders, remove a trustee who is also trustee of the second mortgage and who is foreclosing both mortgages in one suit, the first mortgage being on a portion of the whole road. If he is acting in good faith these facts are no cause for removal, nor the fact that he refuses to employ counsel named by the majority of the bondholders. Beadleston v. Knapp, 13 Abb. Pr. (N. S.). 335 (1872),

⁶ In the case of Matthews v. Murchison, 17 Fed. Rep., 760 (1883), upon a reorganization, the stock "was to be held by the reconstruction committee for five years from November 1, 1879, in trust for the holders of new first-mortgage bonds, . . . but the same may be

The mortgage itself frequently provides that the trustee may be changed by a written instrument signed by a majority in interest of the bondholders. The statutes of a state relative to the appointment of new trustees apply to a railroad mortgage deed of trust.

issued sooner, when full interest upon second mortgage shall have been paid. upon request in writing of two-thirds in amount of the first-mortgage bondholders." The trustees, being the owners of a majority of the stock thus held in trust, sold that majority and then resigned their positions as trustees and substituted the purchasers as trustees. The purchasers sold to still other parties and also resigned their trusteeship and substituted the purchaser as trustee. A minority stock and bondholder brings this suit to remove the trustee. The court refused to do so, and, after stating that the trust is different from any that appears anywhere in the reports, proceeds to say: "We do not think that, even if they did what the trust did not allow, they did it with such dishonesty as to brand them as incapable of holding positions of trust; and a fortiori we do not think such incapacity attached to the third set of trustees, who, at the most, merely accepted the positions left vacant by their resignations. We hold that the case, at the most, comes under the head of misunderstanding, and this we are the more inclined to do, as we have ourselves experienced great difficulty in understanding the trust. We do not know what may have been the purposes of the different parties to the creation of the trust. The plaintiff's agent may have expected to protect his thirdmortgage bonds by it: the other bondholders may have devised it to protect themselves against the plaintiff and prevent her from obtaining an immediate control of the road. But if we look only at the terms of the trust itself, meagerly as it is expressed, there is enough in it to show that it was so written as to make a trust for the benefit of the holders of the new second-

mortgage bonds, and of them only. This clause, the only one indicating the purpose of the trust, shows it. 'But the same may be distributed sooner, when full interest upon second mortgage shall have been paid,' upon request, and so forth. The purpose indicated is that there should be no separation of the stock from the second-mortgage bonds for five years, so that the direction of the road should be determined by the holders of those bonds, with a view to the road being so controlled as to earn income for this class of bonds."

1 Where the trust deed provides that the trustee may be changed by a specified party, subject to the approval of the court, no notice of the application for a change in the trustee need be given to the mortgagor. Macon, etc., R. R. v. Georgia R. R., 63 Ga., 103 (1879). A provision in the mortgage for another person to act as trustee in case the regular trustee is absent from the state refers to a permanent and not to a temporary absence. Equitable Trust Co. v. Fisher, 106 Ill., 189 (1883). Where the mortgage provides for the mode of appointing new trustees, a subsequent statute relative to that subject does not apply to that mortgage. Fletcher v. Rutland, etc., R. R., 39 Vt., 633 (1858). A new trustee caunot act until he has been fully appointed strictly in accordance with the terms of the mortgage. nor can he then date back his notice of sale to a time prior to his appointment. Equitable Trust Co. v. Fisher, 106 Ill., 189 (1883). A person may legally purchase bonds in order to control the election of new trustees of the mortgage and to elect himself. Richards v. Merrimack, etc., R. R., 44 N. H., 127 (1862).

Mercantile T. Co. v. Portland, etc.,
 R. R., 10 Fed. Rep., 604 (1882).

B. THE REMEDIES OF THE TRUSTEE TO ENFORCE THE SECURITY — FORE-CLOSURE, SALE AND TAKING POSSESSION.

§ 820. The trustee, upon default of the mortgagor, may sell the property, or may have a strict foreclosure, or may foreclose by suit in equity, or may take possession and operate the road.— Such is the rule where the statutes of the state wherein the property is located have not provided otherwise.

§ 821. The trustee is the proper party to foreclose the mortgage—In a trustee's suit to foreclose the bondholders are not necessary parties.—This rule is due to two reasons: First, because the trustee represents and acts for all the bondholders; second, because the bondholders are generally numerous, scattered and more or less unknown, and hence it would be impracticable to make them parties to the suit.²

¹ Dow v. Memphis, etc., R. R., 20 Fed. Rep., 260 (1884), where the court held that even ejectment or a bill in equity to put the mortgages in possession after default would lie. The mortgage deed of trust itself generally contains provisions covering all of these points. See §§ 794-807, supra. In McAllister v. Plant, 54 Miss., 106, 119 (1876), the court said that the trustees or bondholders were not "confined to any particular order of priority in resorting to any one or all of the several powers conferred by the mortgage; and even if they were, this would not as before remarked, deprive the chancery court of its right to foreclose in a proper case."

Vose v. Bronson, 6 Wall., 452 (1867). None of the bondholders need be joined in a trustee's suit to foreclose. Shaw v. Norfolk, etc., R. R., 71 Mass., 162 (1855); Skiddy v. Atlantic, etc., R. R., 3 Hughes, 320, 350 (1878), holding, however, on pages 342, 343, that if the bondholders wished to extend the time of payment the trustees would not be allowed to proceed with the foreclosure. Wetmore v. St. Paul, etc., R. R., 1 McCrary, 466 (1880), where the court refused to set aside a decree. Where the number of boudholders is large the trustee may file a bill in his own name for the benefit of the bondholders to foreclose without

making any of the bondholders parties to the suit. But if a single bondholder brings the suit he must bring in the other bondholders. Hackensack Water Co. v. De Kay, 36 N. J. Eq., 548 (1883). Although ordinarily the bondholders, as cestuis que trust, should be joined as parties, vet where they are numerous they need not all be made parties, the trustee being their representative. Chicago, etc., Land Co. v. Peck, 112 Ill., 408 (1885). The bondholders are not necessary parties. Railroad v. Howard, 7 Wall., 392, 415 (1868); Shaw v. Railroad, 100 U.S., 605 (1879), where the court said: "The trustee of a railroad mortgage represents the hondholders in all legal proceedings carried on by him affecting his trust to which they are not actual parties, and whatever biods him if he acts in good faith binds them." See, also, Boston, etc., R. R. v. Coffin, 50 Conn., 150, 159 (1882). That the trustee is the proper party to foreclose, see, also, Hays v. Galion, etc., Co., 29 Ohio St., 330 (1876); Coe v. Galion, etc., R. R., 10 Ohio St., 372 (1859); Campbell v. Railroad, 1 Woods, 368 (1871). In Vermont it seems that some of the bondholders must be joined as parties. Brooks v. Vermont Central R. R., 14 Blatch., 463 (1878). Although the state is a boudholder, a failure to make it a party is not fatal to the

If one of the trustees refuse to join in the suit he is made a party defendant.¹ The bondholders may prove their bonds in the foreclosure suit without becoming parties to the suit.² The remedies of the bondholders for fraud in the foreclosure are discussed elsewhere.³ In certain cases the bondholders may appeal from the decision of the court.⁴ In a suit to foreclose the trusteeship should be alleged.⁵

§ 822. Possession of the mortgaged property may be taken by the trustee, when?—The trustee of the mortgage is entitled to take possession of the property as soon as the mortgage is executed, unless the mortgage or the statutes of the state forbid. A provision, however, against the trustee taking possession before a default is almost always inserted in the mortgage itself. A provision is also generally inserted expressly authorizing the trustee to take possession whenever a default occurs. Sometimes such possession upon default is provided for only upon the written request of a specified number of the bondholders to the trustee.

The possession taken by the trustee is for the purpose of effecting a strict foreclosure, or to operate the property and apply the

bill. Young v. Montgomery, etc., R. R., 2 Woods, 606 (1875). The bondholders need not be joined as parties where they are numerous. Hall v. Sullivan R. R., 21 Law Rep., 138 (U. S. C. C., 1857). A trustee may bring suit in his name alone to enforce the debt, etc. Carey v. Brown, 92 U.S., 171 (1875); Coe v. Columbus, etc., R. R. Co., 10 Ohio St., 372, 410 (1859), holding that the bondholders are not proper parties to trustee suits; Shaw v. Norfolk, etc., R. R. Co., 71 Mass., 162 (1855); and Kerrison v. Stewart, 93 U. S., 155 (1876), to same effect. In the case of Coal Co. v. Blatchford, 11 Wall., 172, the trustees of the mortgage instituted suit to foreclose. One of them was a citizen of the same state as one of the defendants. The court held that this was fatal to the jurisdiction, and said in regard to the trustees: "So long as they do not refuse to discharge the trusts reposed in them, other parties are not authorized to institute or prosecute any proceedings for the enforcement of the mortgage, or to exercise any control over them." Heirs of a deceased trustee are not necessary parties. Newport.

etc., Co. v. Douglass, 12 Busb, 673, 719 (1877).

¹ Tillinghast v. Troy, etc., R. R., 48 Hun, 420 (1888): aff'd, 121 N. Y., 649.

² Hackensack Water Co. v. De Kay, 36 N. J. Eq., 548 (1883).

3 See § 828.

⁴Williams v. Morgan, 111 U. S., 684 (1883), where they appealed upon the question of compensation given to the trustee. *Cf.* Elwell v. Fosdick, 134 U. S., 500 (1889).

⁵ Trusteesbip is sufficiently alleged by setting forth the mortgage and alleging that complainants are the trustees therein named. Savannah, etc., R. R. v. Lancaster, 62 Ala., 555 (1878).

6 See § 796, supra.

7 Id.

6 See § 802, supra.

⁹ See § 828. A bondholder may upon a default compel the trustees to take possession, although thereby "a great burden of labor and a great responsibility, moral and financial, will be imposed on the defendants, in that they will be personally liable for all injuries done and debts incurred to others in profits to the payment of the mortgage debt, with a view to returning the property to the mortgagor when the debt is paid, or to operate the property until a foreclosure by suit in equity has been effected.

The trustee is always disinclined to take possession. Great risk and responsibility are attached to such an act. He becomes personally liable, like other common carriers, for damages due to loss or injury to freight or passengers, and becomes liable for wages, etc. Hence it is that the trustee generally refuses to take possession, and prefers to have a receiver appointed and a foreclosure by bill in equity obtained. Sometimes, however, the court, on the suit of a bondholder for that purpose, may compel the trustee to take possession. or may appoint a receiver instead.

§ 823. Strict foreclosure by the trustee — Liability of the trustee. At an early day in New England this was a common remedy. It is a harsh remedy, however, and is not favored by the courts. Sometimes it has been accomplished by a decree of a court that the mortgagee shall be entitled to keep the property absolutely if the mortgagor does not pay the debt within a specified time.

managing the property." First Nat'l Ins. Co. v. Salisbury, 130 Mass., 303 (1881). Concerning this class of cases, see, also, § 802.

1 See § 823.

² See § 823. infra.

³ After default a bondholder may file a bill to compel the trustee to take possession. The court will order him so to do, or will appoint a receiver in his place. Wilmer v. Atlantic, etc., R. R., 2 Woods, 409 (1874). In the case of Scott v. Clinton, etc., R. R., 6 Biss., 529 (1876), the trustees were put in possession of the property by the state court pending the foreclosure. The case was removed to the federal court, and the latter court sustained the order placing the trustees in possession.

⁴Where a strict foreclosure is had and the court decrees title to the mortgagee unless the mortgagor redeems within a fixed time, the court may order the mortgagee to pay such necessary operating expenses as were incurred in earning the income which the mortgagee has received. A transferee of such claims may enforce them. Burnham v. Bowen,

111 U.S., 776 (1884). Although by the terms of the mortgage, on default of payment, the property is to be turned over to the trustees, and after eighteen months is to vest absolutely in them, and although the court decreed a delivery and vesting under this clause, yet in this case a release of the right of redemption was obtained. Graham v. Boston, etc., R. R., 118 U.S., 161 (1886). A decree of strict foreclosure without finding the amount due and without giving time to redeem is void. Clark v. Reyburn, 8 Wall., 318 (1868). The trustees may file a bill for the strict foreclosure of the mortgage whereby the trustees take absolute title. A bondholder's separate suit to foreclose and sell will be staved. Stern v. Wisconsin Cent. R. R., 1 Fed. Rep., 555 (1880). Under the Vermont statutes, where the railroad is foreclosed (apparently by a strict foreclosure) and is being operated by a corporation formed by the bondholders, other bondholdholders are tenants in common of the railroad with such corporation and may sue for their . proportionate share of the income, alIn Connecticut strict foreclosure seems still to be the usual mode of realizing upon railroad mortgages.¹ The statutes of many of the states now forbid a strict foreclosure. In other states such a foreclosure is regulated by statute, and the procedure is made somewhat similar to a foreclosure by advertisement and sale.²

though the corporation sets up that there is a receivership of the property in a proceeding in a state court. Brooks v. Vermont, etc., R. R. 22 Fed. Rep., 211 (1884). Strict foreclosure is undesirable, because it cuts off all second, etc., mortgagees and makes the first mortgagees tenants in common. Foreclosure and sale may be ordered under the general prayer for relief although strict foreclosure is asked for. Sage v. Central R. R., 99 U. S., 335 (1878). A strict foreclosure was made and decreed by the court in Ellis v. Boston, etc., R. R., 107 Mass., 1, 18 (1871), and a receiver appointed pending the suit for such foreclosure. trustee after default may file a bill in equity to obtain possession for the purpose of applying the railroad and the income and profits thereof to the payment of the bonds, no foreclosure being sought. Shepley v. Atlantic, etc., R. R., 55 Me., 395 (1868). In the case Duncan v. Mobile, etc., R. R., 3 Woods, 597 (1879), Mr. Justice Bradley said: "A strict foreclosure may be attended with difficulties in those states where a mortgage is a mere security and does not give a legal title, besides which it places the property in the hands of a vast number of beneficiaries whose consent may he very difficult to obtain in perfecting a new organization for conducting the business."

In the case of Gates v. Boston, etc., R. R., 53 Conn., 333, 344 (1885), the court said: "In this state, irrespective of legislative or judicial authority in the special instance, the effect of a foreclosure is to vest absolutely the property of the mortgager in the mortgagee. It simply cuts off the right of redemption existing in the mortgagor, and thereafter the mort-

gagee stands with reference to the mortgaged property in the same relation as did the mortgagor. He has the title of the former owner of the equity and nothing more. He holds the property subject to all charges, duties, pledges and equities existing prior to the execution of the mortgage deed. We have not adopted the practice of selling the property upon foreclosure."

² After a decree of foreclosure and the expiration of the three years in which to redeem, the mortgagor or its assigns cannot attack the mortgage on the ground that it was not properly sealed. This was a case in which the trustees took possession and still retained it, the court having put them in possession by a decree. Such was the mode of foreclosure. Haven v. Grand, etc., Co., 94 Mass, 337 (1866). The trustees, after several years, now file a bill to have the title declared valid and to have the property sold for the benefit of the bondholders. The court sustained the bill. Id. In the case of Kennebec, etc., R. R. v. Portland, etc., R. R., 59 Me., 9 (1871), the trustees had made a strict foreclosure, i. e., had taken the road themselves for the bondholders by giving public notice of intent so to do in accordance with the statutes, and publishing the same and recording a copy of the notice as required by statute. Three years' possession after this vested the title absolutely in the trustees. The court held that the foreclosure was good. In this case a clear statement is made of the various modes of foreclosing mortgages, showing that in those states where equity jurisdiction is entirely statutory. a foreclosure in a court of equity was not allowed at an early day. The only modes of foreclosure were "by entry,

The chief danger, however, of a strict foreclosure is in taking possession of the property. The trustee, generally, dare not do so. The property being a losing one, the trustee is unwilling to take the risks of operating the road. He is liable personally for any deficiency in operating it, and this frequently is a serious risk. Consequently he generally refuses to take possession, even though requested to do so by the bondholders. It has been held, however, that a court will compel him to take possession. If the trustee desires to take possession he may file a bill in equity for specific performance and in this way obtain possession.

by consent, by suit at law, by entry before witnesses and by advertisement in a newspaper." The mode of foreclosure sanctioned in Kennebec, etc., R. R. v. Portland, etc., R. R., 59 Me., 20, is binding on the federal court in a case involving the same facts. A reorganized company is not liable on the contracts of the old company. Interest released by first-mortgage security holders may be expressly payable on other securities, and yet holders of the latter are not subrogated to the mortgage to that extent. Sullivan v. Portland, etc., R. R., 94 U. S., 806 (1876).

1 See infra.

² In the case of Poland v. Lamoille, etc., R. R., 52 Vt., 144 (1879), the trustees refused to take possession because, as they said, they regarded it "as simply impossible for them so to do without the greatest peril of pecuniary loss and ruin to themselves."

³ Trust Nat'l Ins. Co. v. Salisbury, 130 Mass., 303 (1881).

⁴Where the mortgage authorizes the mortgagee to take possession upon default, he may do so and may maintain an action to be put in possession. Seibert v. Minneapolis, etc., R'y Co., 53 N. W. Rep., 1151 (Minn., 1893). Where the mortgage provides for the trustees taking possession upon default, the trustees may by bill in equity obtain a decree ordering the company to deliver possession of the road to them. Shepley v. Atlantic, etc., R. R., 55 Me., 395 (1868); Shaw v. Norfolk, etc., R. R., 71 Mass., 162, 182 (1855). Although a majority of

the bondholders are opposed to the trustees equity will order the company to deliver possession to the trustees. Sacramento, etc., R. R. v. Superior Ct., 55 Cal., 453 (1880); McLane v. Placerville, etc., R. R., 66 Cal., 606 (1885), where the court appointed the trustee a receiver and gave him a receiver's powers. Where, under the terms of a mortgage the trustee demands possession, which is refused, and he begins suit to obtain such possession, the income of the railroad from the time of the demand belongs to the mortgagee and not to the company nor its creditors. Dow v. Memphis, etc., R. R., 124 U. S., 652 (1888); rev'g 20 Fed. Rep., 768. Where the trustee has not taken and does not seek to take possession of the road he cannot replevy wood which has been levied on by creditors of the company. He must take possession of the whole road and property or none. Coe v. Peacock, 14 Ohio St., 187 (1863). The trustees under the power to take possession and operate the road may do so, and an execution levied on personal property in their possession while operating the road cannot be seized under levy of execution by a judgment creditor of the company. Palmer v. Forbes, 23 Ill., 301 (1860). Earnings prior to the time when the trustee files a bill to obtain possession of the road belong to a judgment creditor who filed a bill as such before the trustee filed his bill. American Bridge Co. v. Heidelbach, 94 U. S., 798 (1876). In the case of Dow v. Memphis, etc., R. R., 20 Fed. Rep., 260 (1884), the trustee The statutes, however, sometimes provide that possession can be obtained only upon a foreclosure. Where the trustees are in possession after foreclosure they may make a lease of the railroad, provided the lease is a reasonable and desirable one. While in possession he must build fences the same as required by statute from the company.

Trustees in possession take the place practically of the corporation. They are liable for accidents and loss of freight, and occupy

filed a bill to obtain possession and asked for a receiver in the meantime. It is true that after foreclosure by bill the trustees will still hold the property as trustees, nevertheless they will then hold it absolutely as trustees for the bondholders. Hall v. Sullivan R. R., 21 Law Rep., 138 (U. S. C. C., 1857).

1 By the statutes of Minnesota "a mortgage of real property is not to be deemed a conveyance so as to enable the owner of the mertgage to recover possession of the real property without a foreclosure." Hence ejectment by the mortgagee does not lie even after default. But where the special charter allows the company to give its mortgagee the right of possession on common-law conditions, and the company does so, the trustees may maintain ejectment and obtain possession. Hence this power to take possession existing, the court will not appoint a receiver in a suit in equity by the trustees for foreclosure, there being no allegation that possession to the trustees is refused. Rice v. St. Paul, etc., R. R., 24 Minn., 464

² Sturges v. Knapp, 31 Vt., 1, 59 (1858), where the court passed upon the reasonableness of the various provisions of the lease. An injunction against the lease having been granted in a bondholders' suit to set aside this lease made by the trustee, and the suit having failed (31 Vt., 1), a bond for \$30,000 which was given by the bondholder may be enforced, and the trustee is entitled to damages to the extent of rent lost during the suit, less the portion that would

go to the complainant bondholders. Sturges v. Knapp, 36 Vt., 439 (1863). But no damages were allowed for counsel fees. Id., 33 Vt., 486 (1860). See. also, Knapp v. Railroad Co., 20 Wall., 117 (1873), holding that, after a strict foreclosure, the trustees still continue to represent all the bondholders. But the trustee cannot lease the railroad to another company in which he is interested. Ashuelot R. R. v. Elliott. 57 N. H., 397 (1874). Where in a foreclosure suit aud before sale the corporation and the bondholders agree to rent the railroad to another company, and do so rent it at a rental which meets the interest, but leaves nothing for the unsecured creditors, the latter may have the railroad subjected to the payment of Farmers', etc., T. Co. v. their debts. Missouri, etc., R'y, 21 Fed. Rep., 264 (1884). If the security is ample it has been held that the court may authorize a lease without a foreclosure. Bardstown, etc., v. Metcalfe, 4 Metc. (Ky.), 199. See, also, § 838 concerning defaults for the purpose of paying off the debt. The court has no power, even upon the application of the trustees who are in possession of the road, to allow them to pay a floating debt out of the income, where the boudholders do not expressly assent thereto. Ashuelot R. R. v. Elliott. 57 N. H., 397 (1874).

³The trustees in possession under the mortgage may be compelled by specific performance to build fences, the same that the company itself might be compelled. Jones v. Seligman, 81 N. Y., 190 (1880).

a dangerous position unless the property is abundantly able to meet the liabilities arising out of the operation.¹

§ 824. Sale of the mortgaged property by the trustee under the power of sale upon a default.— The usual mortgage of a corporation contains a provision that upon default in any of the conditions the trustee may proceed to sell the property at public sale after a specified notice and advertisement thereof has been made. This power of sale is an old mode of foreclosure and was formerly quite common. In most of the states the mode of sale in such cases is regulated by statute. The remedy is a summary one, inasmuch as no suit in equity is involved. It is, however, a harsh remedy and is not particularly favored by the courts. The various equities of creditors cannot be adjusted in such a foreclosure as they may be in a suit in equity to foreclose. Strict compliance with the provisions of the mortgage and of the statute is required where sale

¹Trustees in possession are liable in damages for any accident that occurs on the road the same as the company itself would be liable if it were still operating the road. Daniels v. Hart, 118 Mass., 543 (1875). In Maine, by statute, this liability is limited to the extent of the moneys held by the trustees as trustees. Stratton v. European, etc., R'y, 74 Me., 422 (1883). The bondholders are not liable. The trustees are not their agents. Id. Where a new corporation purchases the railroad from the trustees who have foreclosed it the new company is liable in damages for accidents during the time that the trustees were operating the road, the same as where receivers are operating a road. Stratton v. European, etc., R'y, 76 Me., 269 (1884). Where the trustees have obtained foreclosure in the New York courts and have purchased the road for the benefit of the bondholders and are operating it, they are liable for loss of freight the same as a company would be. Barter v. Wheeler, 49 N. H., 9 (1869). Neither the company nor the trustees in possession are liable for rental on a spur of track, which by license is made to certain mills, and which is used for loading, etc. Central Mills Co. v. Hart, 124 Mass., 123 (1878). The corporation itself is liable for the acts of the trustees in possession. Grand Tower, etc., Co. v. Ullman, 89 Ill., 244 (1878). If the trustees continue to use the company's name in the business, a judgment against the company for damages for an injury done while the trustees are in possession may be enforced against the property in the trustees' possession. Wilkinson v. Fleming, 30 III., 353 (1863). The trustees are liable for injuries to passengers the same as the company would have been if in possession. Sprague v. Smith, 29 Vt., 421 (1857); Lamphear v. Buckingham, 33 Conn., 237 (1866); Ballou v. Farnam, 91 Mass., 47 (1864); Rogers v. Wheeler, 43 N. Y., 598 (1871), where the trustees were operating the road after sale. Where the trustees take possession of the road and operate the same and afterwards foreclose and buy the same, a claim for freight earned while they are operating it cannot be offset by a note against the company coming due after the trustees took possession. Murray v. Devo, 10 Hun, 3 (1877). Creditors who by compromise are made directors cannot be held liable as partners in the running of the road. Beeson v. Lang. 85 Pa. St., 197 (1877). A railroad is liable for torts although it has turned over the road to mortgage trustees. Naglee v. Alexandria, etc., R'y, 2 S. E. Rep., 369 (Va., 1887).

is made under the power of sale, and irregularities which are cured by a decree in a suit for foreclosure are fatal to a sale under this power of sale. Hence it is unusual to foreclose a corporate mortgage by a sale under the power of sale and without a suit in equity. Various decisions on this subject are given in the notes below.¹

The sale of mortgaged property under a power of sale must comply strictly with the statute or mortgage provisions. Shillaber v. Robinson, 97 U.S., 68 (1877). A trustee's sale of property under a deed of trust is valid though the price was very small, and though the cestui que trust, a corporation, purchased. v. Trust Co., 100 U.S., 149 (1879). trustee may enter a bill for interest. Macon, etc., R. R. v. Georgia R. R., 63 Ga., 103 (1879). A sale by the trustee without a notice from the bondholders strictly in accordance with the terms of the mortgage is illegal. Equitable Trust Co. v. Fisher, 106 Ill., 189 (1883). The trustee should not sell under his power of sale if there is any doubt as to the priority of liens. That question should be settled first. Washington, etc., R. R. v. Alexandria, etc., R. R., 19 Gratt. (Va.), 592, 616 (1870). The trustee may under this provision file a bill for specific performance and to be put in possession. The court will put him in possession as receiver, and will order him to sell the property if the interests of the parties call for a sale. McLane v. Placerville. etc., R. R., 66 Cal., 606 (1885), holding that such sale may be ordered, although the principal is not due and sale is not authorized for non-payment of the interest.

If the statutes of the state prohibit any proceedings by the mortgagee except by suit for foreclosure in equity, a sale by the trustees under the power of sale is illegal, and the corporation may make them account for the property. But it must offer to redeem, and long delay may be fatal. Its stockholders must do the same if they sue, and must allege a request to the corporation to sue. Samuel v. Holladay, 1 Woolw., 400 (1869). A sale by the trustee as provided

for by the trust deed is the proper remedy where the property runs into different states. The statutes of any state in relation to foreclosure by advertisement may be complied with at the same time. Farmers' L. & T. Co. v. Bankers', etc., Tel. Co., 44 Hun, 400 (1887). A sale by the trustee under the express power of sale may be subject to the mortgagor's right to redeem. Where the trustee may foreclose for non-payment upon the request of a majority of the bondholders, he cannot foreclose unless that request is made. Chicago, etc., R. R. v. Fosdick, 106 U. S., 47 (1882). It would seem that a bona fide purchaser at a trustee's sale under the power of sale is not bound to investigate whether the debt has been paid or not. But a purchaser chargeable with knowledge of that fact is not protected. Chicago. etc., R. R. v. Kennedy, 70 Ill., 350 (1873). Where a statute authorizes bonds and gives them a lien on the company's property, the lien is held to have been satisfied by a sale after notice by the trustee of a mortgage given subsequently to secure said bonds. Brunswick, etc., R. R. v. Hughes, 52 Ga., 557 (1874). In the case Collins v. Central Bank, etc., 1 Ga., 435 (1846) such a lien was upheld, no foreclosure having been made. Under a power of sale contained in a mortgage, a sale at public auction by the trustee may be made. Although the advertisement of sale required a cash payment of one-third, vet the mortgagee after the sale may give credit for the whole if the mortgagor does not object. The mortgagee so selling acts as a trustee for all creditors, and is not held liable for errors of judgment and discretion. Markey v. Langley, 92 U.S., 142 (1875). A court of equity may order the trustee to sell

In Pennsylvania at an early day, inasmuch as a bill in equity to foreclose a mortgage would not lie, the court would compel the trustee to sell under the power of sale.1

Where there are two or more trustees, a power of sale cannot be exercised by a part of them.2

Under certain circumstances a trustee may purchase at the foreclosure sale for the benefit of the bondholders. A reorganization of the company may also be brought about for the benefit of the bondholders. These questions, however, are discussed elsewhere.3

C. BONDHOLDERS' SUITS TO FORECLOSE AND TO PROTECT OR ENFORCE THEIR RIGHTS.

§ 825. Bondholders may bring suit to foreclose where the trustee declines to do so after default.— This is a well-established principle of law. It is the duty of the trustee to foreclose where a default has taken place. If, however, he refuses to do so, the law does not require the bondholders to remove the trustee or file a bill to compel him to act; but the law allows the bondholder himself to file a bill for the foreclosure of the mortgage.4

under the power of sale and to bring the in another state. The bill in this case was proceeds into court for distribution. Railroad Co. v. Bradleys, 7 Wall., 575 (1868). Sales and conveyances of parts of the mortgaged property by the trustees of the mortgages were upheld in Claffin v. South Carolina R. R., 8 Fed. Rep., 118, 138 (1880). Concerning the reasons why sales under the power of sale are not often made, see, also, Jones on Corporate Bonds, etc., § 29. A mortgage on land in Colorado may provide for a sale in New York upon default. In such a case the sale in New York need not conform with the statutes of New York in reference to such sales of real estate located in New York. Carpenter v. Black, etc., Co., 65 N. Y., 43 (1875). The sale under the statute extinguishes the rights of a second mortgagee. Searles v. Jacksonville, etc., R. R., 2 Woods, 621.

¹The trustee of the mortgage, being within the jurisdiction of the court, may be authorized and compelled to sell whatever interest of the company will pass under his sale made in accordance with the power of sale contained in the mortgage, although a part of the road is

filed by the trustee and a boudholder. McElrath v. Pittsburgh, etc., R. R., 55 Pa. St., 189 (1867). The court may order the trustees to exercise the power of sale given to them by the mortgage. Youngman v. Elmira, etc., R. R., 65 Pa. St., 278 (1870). Where the deed in trust makes it the duty of the trustees upon default to take possession and sell the road, and they decline so to do, the court will appoint a receiver. Wilmer v. Atlanta, etc., R'y, 2 Woods, 409 (1874).

² Pennsylvania Co., etc., v. Bauerle, 33 N. E. Rep., 166 (Ill., 1892).

³ See ch. LII.

⁴ If the trustee declines to foreclose, a bondholder may sue and make him a party defendant. Hotel Co. v. Wade, 97 U.S., 13 (1877). If the trustee "neglects or refuses to move, any bondholder may proceed by bill filed on behalf of himself and the other members of the class of creditors to which he belongs, to compel a sale of the mortgaged premises, a removal of the trustee, or such other relief as may be appropriate." Commonwealth v. Susquehanna, etc., R. R., 122 A bondholder may bring such a suit to foreclose, even though he bought his bonds for that express purpose. The holder of

Pa. St., 306 (1888). In Campbell v. Railroad, 1 Woods, 368 (1871), a part of the bondholders brought suit for foreclosure, alleging that one trustee was in Europe and the other refused to act. An owner of five bonds may file a bill alleging the inability of the railroad to pay the next coupons and other pressing debts, the dangers of attachments and the stoppage of business and the disruption of the railroad, and ask for and obtain a receiver when it is clear that a receivership is inevitable. Brassev v. N. Y., etc., R. R., 19 Fed. Rep., 663 (1884): Hackensack, etc., Co. v. De Kav. 36 N. J. Eq., 548 (1883). A bondholder may sue for foreclosure for non-payment of interest when the mortgage is given to secure interest as well as principal. Chicago, etc., R. R. v. Fosdick, 106 U.S., 47, 68 (1892). Although the mortgage provides that upon default the trustee, upon the request of one-half in amount of the bondholders, shall take possession and sell, yet this does not prevent foreclosure, and if the trustee refuses to foreclose a bondholder may file a bill to compel him to take possession and foreclose. First National Insurance Co. v. Salisbury, 130 Mass., 303 (1881). Where the trustee intends to sell only such part of the railroad as is within one state, a bondholder may file a bill to compel him to sell the whole road at one time. The federal court has jurisdiction over the entire line. Randolph v. Wilmington, etc., R. R., 11 Phil., 502 (U. S. C. C., 1876). See, also, Mercantile T. Co. v. Lamoille, etc., R. R., 16 Blatch., 324.

If the trustees are officers of the company, and hence have adverse interests, any bondholder may file a bill to foreclose making the trustees parties defendant. Webb v. Vermont, etc., R. R., 9 Fed. Rep., 793; S. C., 20 Blatch., 218 (1881). Where the trustees' foreclosure is collusive and brought for the purpose

of paving off bonds bearing a high rate of interest, a bondholder may stop it by buying all bonds which desire the foreclosure. Tillinghast v. Troy, etc., R. R., 48 Hun. 420 (1888). A bondholder may bring suit to foreclose where the mortgage was made to the individual, not as trustee but as an individual, who first took the bonds, and a request to sue need not be made to him. Mason v. York, etc., R. R., 52 Me., 82, 107 (1861), holding also that all the bondholders need not be joined. If bonds are owned by two or more jointly, one of them cannot bring a bondholder's suit unless the other joint owners join. Messchaert v. Kennedy, 4 McCrary, 133 (1882). A second mortgage is not foreclosed and wiped out by a foreclosure of the first mortgage, even though the second mortgagee is a party defendant to the suit, where the orders and decree in the suit do not foreclose all rights under the second mortgage. Bondholders under the second mortgage may subsequently assert their rights under such second mortgage. Simmons v. Taylor, 23 Fed. Rep., 849 (1885). In Galveston R. R. v. Cowdrey, 11 Wall., 459 (1870), foreclosure by bondholders was sustained because the trustees were dead. Bonds issued in Wisconsin in pledge for a debt of the company with the stipulation that they should be accounted for at least seventy-five cents on the dollar are void and the pledgor caunot maintain a bill in equity to enforce their lien by reason of the bonds. Pfister v. Milwaukee, etc., R'y Co., 53 N. W. Rep., 27 (Wis., 1892). A bondholder may join in his suit to foreclose a cause of action in which he claims bonds held by others. Hale v. Nashua, etc., R. R., 60 N. H., 333 (1880).

¹A bondholder's foreclosure is valid, even though he purchased the bonds at the instigation of certain interests hostile to the railroad, and even though past-due coupons has also the same right to foreclose that a bond-holder has. In fact, it usually is on past-due coupons that the suit is commenced. A pledgee of bonds may bring suit for foreclosure the same as the pledgor might do. In regard to costs and dibursements, one person suing for the benefit of himself and others is entitled to reimbursements if he succeeds, but to no contribution if he fails in the suit. The right of bondholders to appeal from the decision of the court is considered elsewhere.

§ 826. Such a suit, however, cannot be maintained unless the trustee has first been requested to bring it.— The proper person to foreclose is the trustee to whom the deed of trust runs. Unless he refuses or neglects to perform his duty, his cestui que trust, the bondholders, have no standing in court. Hence the bondholder must in good faith place the matter before the trustee and ask him to commence suit. If the trustee then refuse or decline to do so the bondholder may sue. But the bondholder in his bill of complaint must allege the request to the trustee and the refusal or neglect of the trustee to act. Such a suit brought by a bondholder must be for

he expects those interests to protect him from loss. If he owns the bonds himself, this is sufficient. McFadden v. May's Landing, etc., R. R., 22 Atl. Rep., 932 (N. J., 1891). See, also, § 736, supra.

1 A foreclosure suit may be instituted by holders of past-due coupons. Farmers' L. & T. Co. v. Chicago, etc., R'y, 27 Fed. Rep., 146 (1886); Hotel Co. v. Wade. 97 U.S., 13 (1877), where a coupon-holder foreclosed, making the trustees and other coupon-holders and bondholders co-defendants: Alexander v. Central R. R. of Iowa, 3 Dill., 487 (1874), to the same effect. Although the holders of coupons waive default and agree to give time, yet, the agreement being without consideration, they may change their minds and insist upon payment or a foreclosure for non-payment of the interest. Union T. Co. v. St. Louis, etc., R'v. 5 Dill., 1 (1878).

² Parties holding bonds as collateral security may foreclose the same as owners of bonds. Chicago, etc., Land Co. v. Peck, 112 Ill., 408, 439 (1885). Pledgee may compel foreclosure. McCurdy's Appeal, 65 Pa. St., 290 (1870); Morton v. N. O., etc., R'y, 79 Ala., 590; Gilman v. N. O., etc., Ry, 72 Ala., 566;

Jesup v. City Bank, 14 Wis., 331, where the corporation itself was the pledgor. Where the pledgees of bonds join with the trustee in foreclosure, the pledgor must be joined. Ackerson v. Ledi, etc., R. R., 28 N. J. Eq., 543 (1877).

³ Hobbs v. McLean, 117 U. S., 567 (1886). See, also, § 748, supra.

4 See § 849.

⁵The bondholder must allege and prove a request to the trustee to bring the suit. Morgan v. Kansas, etc., R'y, 15 Fed, Rep., 55 (1882). The case of Davies v. N. Y. Concert Co., 41 Hun. 492, was the ordinary case of a foreclosure suit instituted by a bondholder upon the refusal of the trustee to institute the suit. The court, however, held that the bondholder's suit would not lie. inasmuch as the right to foreclose had not yet accrued, and inasmuch as the request to the trustee did not specifically state the failure of the mortgagor to pay taxes, one of the grounds upon which the suit for foreclosure was instituted. In Weeijen v. Vibbard, 5 Hun, 265 (1875), a bondholder's suit to restrain two of the three trustees from a breach of trust failed because no request to bring the suit had been made to the himself and all other bondholders.¹ It is not necessary to make all the bondholders parties to the suit.² The other bondholders, however, may at any time, upon proper application, become parties to the suit.³

third trustee. If the trustee has commenced foreclosure, and all but one of the bondholders propose to enter a decree avoiding foreclosure and providing for a reorganization, that bondholder may insist upon a foreclosure, but he cannot bring a separate suit for that Stern v. Wisconsin Central purpose. R. R., 1 Fed. Rep., 555 (1880). That a bondholder may foreclose after a request to the trustee, see, also, Wilmer v. Atlanta, etc., R. R. Co., 2 Woods, 409 (1875); Galveston R. R. v. Cowdrey, id., 459 (1870), where the trustees were dead and the bondholders sued; Western R. R. Co. v. Nolan, 48 N. Y., 513 (1872), where the suit of the cestui que trust to set aside a tax failed because no request to the trustees had been made and the latter had not been made co-defendants. Bondholders may foreclose where the trustee has become the assignee of all the corporate property, and hence has interests adverse to the bondholders. American, etc., Co. v. Kentucky, etc., Co., 51 Fed. Rep., 826 (1892). A single bondholder may foreclose for his interest where the trustees refuse to proceed. even though the mortgage provides that the trustees shall foreclose upon the request of a majority of the bondholders in amount. Beekman v. Hudson, etc., R'y, 35 Fed. Rep., 3 (1888). A bondholder may commence an action of foreclosure where the trustee is insane and incompetent to do so. Ittinger v. Persian, etc., Co., 66 Hun, 94 (1892). A bondholder may foreclose if a mortgagor unreasonably neglects or refuses to do so. A provisiou in the mortgage that no proceedings in law or equity shall be taken by any bondholder secured thereby, to foreclose the equity of redemption independently of the trustee, until after the refusal of the trustee to comply with a requisition first made upon him

by the holders of a certain percentage of the bonds secured by such mortgage, is reasonable and valid. Where such provision exists, a single bondholder cannot commence suit to foreclose. Seibert v. Minneapolis, etc., R'y Co., 53 N. W. Rep., 1134 (Minn., 1893). Cf. § 804.

1 A bondholder who forecloses does so for the benefit of all the bondholders and not of himself alone. Hackensack Water Co. v. De Kay, 36 N. J. Eq., 548 (1883). The holder of any one of a series of bonds secured by a mortgage made to trustees may, on refusal of the trustees so to do, maintain a suit for the foreclosure of the mortgage, for default in the payment of interest. "Such suit ordinarily should be brought by the bondholder in behalf of himself and all other bondholders, but an averment to this effect is unnecessary when default has been made only on the bonds held by complainant." McFadden v. May's Landing & E. H. C. R. Co., 22 Atl. Rep., 932 (N. J., 1891). A bondholder may foreclose. Martin v. Somerville, etc., Co., 27 How. Pr., 161 (U. S. C. C., 1863). But he does so for the benefit of all bondholders, and they may come in as defendants or petitioners. Id.

² Wilmer v. Atlantic, etc., R'y, 2 Woods, 447 (1875). In Carpenter v. Canal Co., 35 Ohio St., 307 (1880), a foreclosure by a part of the bondholders in behalf of all was held to bind the other bondholders. The other bondholders may, however, be made defendants in the suit. Hotel Co. v. Wade, 97 U. S., 13 (1877).

³ New Orleans, etc., R'y v. Parker, 143 U. S., 42 (1892). In a bondholder's suit to foreclose other bondholders may come in. First Nat'l Ins. Co. v. Salisbury, 13 Mass., 303 (1881). In a suit of foreclosure brought by bondholders, other bondholders may come in at any time, even after the case has gone to the upper

Although one bondholder brings suit to foreclose in behalf of all bondholders, yet he will not be allowed to obtain any advantage over them. He must see that the sale is conducted fairly and that all are treated alike.1 Where a bondholder forecloses and by collusion buys in the property at an inadequate price, he may be held liable for the value of the property.2

The trustee himself is a necessary party defendant. Otherwise the trustee might bring another suit and the first suit be of no In addition to this, all the bondholders are bound if the trustee is made a party defendant.3

If the trustee, however, prefers to take up the suit and carry it on, he may apply to be made a party complainant. After becoming one of the complainants, the trustee controls the conduct of the case. So, also, where the trustee files a bill of foreclosure, after a bondholder has filed such a bill, the court will consolidate the two and allow the trustee to control the case.4

court on appeal, In re Chickering, 56 Vt., 82 (1883).

1 A bondholder cannot by foreclosing obtain any advantage over other bondholders who are secured by the same mortgage. He must allow other bondholders to intervene and must protect them equally in the decree. New Orleans, etc., R'y v. Parker, 143 U.S., 42 (1892), holding that a decree ordering a sale for the sole benefit of a few bondholders was invalid. To same effect, Jackson v. Ludeling, 21 Wall., 616 (1874): S. C., 99 U. S., 513 (1878); New Orleans R. R. v. Morgan, 10 Wall., 256 (1869).

² Ittinger v. Persian, etc., Co., 66 Hun, 94 (1892).

3 In a suit by the bondholders for an accounting and foreclosure, the trustees of the deed of trust are necessary parties defendant. Mercantile T. Co. v. Portland, etc., R. R., 10 Fed. Rep., 604 (1882). In a bondholder's suit to compel the corporation to apply its earnings to the payment of the bonds, the trustee of the deed of trust is a necessary party. Barry v. Missouri, etc., R'y, 22 Fed. Rep., 631 (1884). In a bondholder's suit the trustee is a proper party defendant. Mass, etc., Ins. Co. v. Chicago, etc., R. R., 13 Fed. Rep., 857 (1882). A non-resident trustee is not a neces- Chesapeake, etc., R. R., 1 Hughes, 28

sary party to a bondholder's suit, where the other four trustees of the deed in trust have been served. Stewart v. Chesapeake, etc., Co., 1 Fed. Rep., 361 (1880). In Hale v. Nashua, etc., R. R., 60 N. H., 333 (1880), bondholders brought the suit to foreclose, two of the three trustees being in collusion with the corporation to the injury of the bondholders. The court ordered the appointment of two new trustees and the bringing them in as parties. The trustee having obtained judgment, the bonds are merged in the judgment. A foreclosure obtained by a bondholder who does not make the trustee a party defendant does not bind the trustee or other bondholders, and receiver's certificates, allowances, etc., in such an action fall. Laches is no bar unless the facts were fully known. Stevens v. Union T. Co., 11 N. Y. Supp., 268 (1890). But in an action by an income bondholder to compel the corporation to ascertain the amount of income, as required by the terms of the mortgage, the trustee is not a necessary party. Spies v. Chicago, etc., R. R., 30 Fed. Rep., 397 (1887).

⁴ Trustees who are admitted as parties in a bondholder's suit to foreclose control the case thereafter. Richards v.

§ 827. Bondholders may foreclose in the federal courts if the requisite diverse citizenship exists.—Such is the established rule, and it is an important one. In these days nearly all important railroad foreclosures are brought in the federal courts. This is done in order to include the whole road, although it runs into several states; also to obtain one receiver only; also to secure a decision free from prejudice or local influence; and also to obtain the benefit of the established tendency of the federal courts to confirm and enforce bonds instead of allowing a repudiation thereof. Hence, a bondholder who brings a foreclosure suit gen-

(1876), where the jurisdiction even was was destroyed by the trustees coming in. The trustee may file a bill to foreclose after the bondholder's bill is filed, and then the two suits will be consolidated and the trustee controls the case. Farmers' L. & T. Co. v. Central R. R., 11 West. Jur., 428 (U. S. C. C., 1877).

1 Although a foreclosure suit on another mortgage, which is claimed to be a first mortgage, is pending in the state court and a receiver has been appointed, yet a bondholder may commence another foreclosure suit in the federal court. setting up that the trustees of his mortgage, which he claims is prior to the above-named mortgage, are committing a breach of trust, one carrying on the suit in the state court and the other acting as receiver therein. No request to the trustees to bring the suit is necessary. The federal court, however, will not appoint a receiver in such a case. Mercantile T. Co. v. Lamoille, etc., R. R., 16 Blatch., 324 (1879). In the case of Brooks v. Vermont, etc., R. R., 14 Blatch., 463 (1878), the court held that a bondholder might institute a suit in the federal court for foreclosure, even though the trustee had already instituted a suit for the same purpose in the state court. This case, however, both in its reasoning and its conclusions, can hardly be considered correct. Where foreclosure is commenced in the federal court, and then by agreement of nearly all the bondholders a plan of reorganization is adopted and approved by the court and is acted on by nearly all the

parties, the suit not being formally discontinued but apparently abandoned. the suit continues nevertheless, and a subsequent foreclosure by the trustee in a state court gives no rights to a purchaser at the foreclosure sale as against a bondholder who did not take part in the reorganization. He may revive and proceed with the case in the federal court. Bill v. New Albany, etc., R. R., 2 Biss., 390 (1870). If the trustees decline to act then the bondholders may bring suit. They may sue in the federal court if they are citizens of states other than the states wherein the trustees and corporation are citizens. If one of the complainants is a citizen of the same state as any defendant the bill may be dismissed as to him and proceed as to the others. Nebraska, etc., Nat'l Bank v. Nebraska, etc., Co., 14 Fed. Rep., 763 (1883). Although a foreclosure suit is pending in a state court with an injunction against suits being brought against the corporation, yet a bondholder under another mortgage who is not a party to the first suit may sue on his bonds in the federal court. Parsons v. Greenville, etc., R. R., 1 Hughes, 279 (1876). Although the trustees of the deed of trust in a suit brought by the bondholders are made defendants, the federal court is not ousted of jurisdiction by reason of the fact that the complainants and the trustees are citizens of the same state. They are merely nominal parties. Barry v. Missouri, etc., R'v. 27 Fed. Rep., 1 (1886).

erally brings it in the federal court, if he is a citizen of a different state from the states wherein the trustee and the mortgagor company reside.¹ It has been held that all the bondholders who come into the suit must be citizens of states other than that of the defendants.² Questions relative to a conflict of jurisdiction between the state and federal courts are considered elsewhere.³

§ 828. Remedy of bondholders where the foreclosure was fraudulent—Intervention—Laches.—If in the foreclosure suit the trustee is acting collusively or fraudulently and the effect will be that the property will not realize so much as it should, any bondholder may apply to the court to intervene and may be allowed to become a party thereto in order to remedy the wrong.⁴

1 Bondholders residing in another state may institute the foreclosure suit in the federal court. All the bondholders, however, will be allowed to participate in the amount realized by the foreclosure. Jackson, etc., Co. v. Burlington, etc., R. R., 29 Fed. Rep., 474 Although the mortgage has been foreclosed and the property sold to the trustees, who then lease it, in a suit brought by the trustee to enforce the lease the trustees are necessary and not merely nominal parties, the funds in their hands not yet having been distributed, even though a corporation has been formed to take over the property from the trustees. Knapp v. Railroad, 20 Wall., 117 (1873). In Hotel Co. v. Wade, 97 U.S., 13 (1877), Pennsylvania and Ohio bondholders foreclosed a mortgage on Nebraska hotel property. In a suit by trustees to foreclose, they cannot sue in the federal court if one of them is a citizen of the same state as the mortgagor, even though the bondholders are residents of other states. Coal Co. v. Blatchford, 11 Wall., 172 (1870). Where, however, the trustee afterwards comes into the suit, the jurisdiction may be thereby destroyed. Richards v. Chesapeake, etc., R. R. Co., 1 Hughes, 28 (1875). The United States courts will entertain a suit by bondholders for the foreclosure of a mortgage and the removal of the trustees for cause, although suit is pending in the state court brought by the trustees

for foreclosure of the same mortgage. Brooks v. Vermont Central R. R., 14 Blatch., 463 (1878). A bondholder may sue to foreclose the mortgage securing his bonds, although the trustees have already commenced an action in a state court for such foreclosure. Beekman v. Hudson, etc., R'y, 35 Fed. Rep., 3 (1888). See, also, Stanton v. Embrey, 93 U. S., 548 (1876); Insurance Co. v. Brum's Assignee, 96 U. S., 588 (1877).

² In the case of Mangels v. Donau, etc., Co., 53 Fed. Rep., 513 (1892), a bondholder brought suit to foreclose the mortgage. Other bondholders intervened and were joined as parties plaintiff. The federal court dismissed the case on the ground that although the original plaintiff was a citizen of another state, some of the other bondholders were citizens of the same state as the defendant.

³ See § 839; also note 1, p. 1326.

4 Where in a foreclosure suit in the federal court by a consent decree the trustee is put in possession, and by a subsequent decree a sale is ordered and the trustee files a report of a sale having been made, and then long subsequently the trustee forecloses the same mortgage in a state court and the purchaser takes possession, the federal court will oust him from possession and put in a receiver, on the application of a bondholder, the trustee being charged with a misapplication of the funds. The court is not bound by the foreclosure in

The bondholders or any of them may apply to the court to be allowed to come into the suit as parties, and the weight of authority holds that such application should be granted.¹ But after the

the state court. Bill v. New Albany, etc., R. R., 2 Biss., 390 (1870). A bondholder may intervene in a foreclosure suit and may prevent the foreclosure by proving that the foreclosure is a scheme to pay off the seven per cent. bonds in order to enable the mortgagor to issue new bonds at a lower rate of interest. He must, however, stand ready to buy all bonds which are presented for payment. The trustees' suit to foreclose will then be staved. Tillinghast v. Trov. etc., R. R., 48 Huu, 420 (1888); affirmed, 121 N. Y., 649. A bondholder as an intervenor carried on the litigation in Farmers', etc., T. Co. v. Bankers', etc., Tel. Co., 119 N. Y., 15 (1890). Bondholders or stockholders who are allowed to intervene will not be allowed to intervene and file a cross-bill to set aside the proceedings or interpose obstacles to the suit. They may intervene, however, to contest the claims of creditors or show that the suit is collusive. Forbes v. Memphis, etc., R. R., 2 Woods, 323 (1872). In the case Farmers' L. & T. Co. v. Kansas City, etc., R. R., 53 Fed. Rep., 182, 186 (1892), the court held that "Unless fraud or bad faith is alleged against the trustee, the individual bondholders will not be permitted to intervene, and will not be heard to complain of any action of the court based upon the consent of the trustee acting in . . . When any ungood faith. founded or fraudulent claim shall be presented, and the trustee shall fail to make a proper defense thereto, or whenever it fails in any other respect to discharge its trust honestly and faithfully. it will be time to consider the question of making the bondholders parties for own protection." Concerning fraudulent foreclosures and bonds, see, also, § 766 supra, and Skiddy v. Atlantic, etc., R. R. Co., 3 Hughes, 320, 350 (1879), refusing to allow bondhold-

ers to come into a suit which the trustees were carrying on; Williamson v. N. J. S. R. R. Co., 25 N. J. Eq., 13 (1874), admitting the bondholders as co-defendants on their application.

1 "The bondholders, if not parties to the suit, were quasi-parties, and had the right at any time to intervene and become actual parties." Campbell v. Railroad, 1 Woods, 368 (1871), per Bradley, J.: In re Chickering, 56 Vt., 82 (1883), holding also that although the bondholders may prove their claims without becoming parties, yet that the better practice is to make them parties. The trustees are the only necessary parties plaintiff to the foreclosure suit. The bondholders might, pro interesse suo, become parties thereto: it is not essential that they should. vannah, etc., R. R. v. Lancaster, 62 Ala., 555 (1878). But in Skiddy v. Atlantic, etc., R. R., 3 Hughes, 320, 351 (1877), the court refused to allow the bondholders to become parties to the suit although the trustees favored a plan of reorganization which was proposed by a part of the bondholders. A bondholder has no right to intervene in a suit where the corporation, as defendant, is moving to dissolve a temporary injunction forbidding it to lay its tracks in a street. In re Ferris, 15 Atl. Rep., 751 (1888). In the case Adelbert College, etc., v. Toledo. etc., R'y, 47 Fed. Rep., 836 (1891), it appears that certain equipment bonds had been adjudicated not to be a lien, while the supreme court of Ohio decided directly the contrary. The removal of a new case by bondholders in the state court to the federal court was held not valid. Trustees of mortgages which have been foreclosed are merely nominal parties and cannot remove the case. Bondholders under the first mortgage will not be allowed to come in as defendants in a foreclosure suit by the second mortgagee, where the first mortgagee is

alleged fraudulent foreclosure is completed, the bondholder has more difficulty. It seems that he should seek his remedy in the court that decreed the foreclosure.¹ It has been held that his remedy is by an original bill and not as an intervenor to set the sale aside.² The remedy of the corporation and of other creditors as against a fraudulent mortgage is considered elsewhere.³ Under the civil law, even though the sale is set aside for fraud, yet the purchaser is entitled to reimbursement for improvements made by him.⁴

Long delay in beginning suit to set aside a foreclosure on the ground of irregularity or fraud is a bar to the suit.

not a party to that suit and the firstmortgage bonds are fully protected. Such is the rule even though the trustee in both mortgages is the same trust company. McHenry's Petition, 9 Abb. New Cas., 256 (1878). A second-mortgage bondholder cannot attack a foreclosure suit brought on both the first and second mortgages, even though there was no defense, and the same parties controlled both the complainant and defendant and put in a receiver by consent. Farmers' L. & T. Co. v. Green B., etc., R. R., 6 Fed. Rep., 100 (1881). A bondholder who knows that a foreclosure is going on cannot have it opened on the ground of surprise, even though the foreclosure does not take the exact course that he supposed. Peck v. N. Y., etc., R'y, 85 N. Y., 246 (1881).

1 Bondholders seeking to set aside a foreclosure on the ground of fraud must seek their remedy in the court which rendered the decree and confirmed the sale. Kent v. Lake Superior, etc., Co., 144 U.S., 75 (1892). Although a railroad has been foreclosed and sold by suit in a state court, yet a bondholder may file a bill in the federal court to reestablish the lien of the mortgage on the ground that the foreclosure was collusive, fraudulent and void. He may sue to reach the stock for which the road was sold by the purchaser to a new corporation. He need not obtain a judgment at law on his bonds before resorting to this suit in equity. Massachusetts, etc., Ins. Co. v. Chicago, etc., R. R., 13 Fed. Rep., 857 (1882).

² Wetmore v. St. Paul, etc., R. R., 3 Fed. Rep., 177 (1880). Cf. Shaw v. Railroad. 100 U. S., 605 (1879); Kropholler v. St. Paul, etc., R. R., 2 Fed. Rep., 302 (1880), and § 659. Where the trustee has commenced foreclosure on two mortgages. and then, by reason of a reorganization agreement of most of the bondholders. he drops the foreclosure of the first mortgage and proceeds with the other. but intends to allow certain receivers' iudebtedness to come in and affect the first-mortgage bonds, the minority bondholders, who object to all this and claim that the trustee is acting in a way hestile to their interests, may file a bill for the removal of the trustee, and an accounting of all outstanding bonds and for foreclosure. Farmers' L. & T. Co. v. McHenry, 9 Abb. N. C., 235 (1878); Campbell v. Railroad Co., 1 Woods, 368 (1871), where a boudholder was allowed to sue to set aside a fraudulent foreclosure under a prior mortgage which the trustees under the second mortgage had not opposed; Ribon v. Railroad Co., 16 Wall., 446 (1872), where a similar suit failed because the trustees were not made co-defendants. Bondholders, after foreclosure has been commenced by the trustee, may file an auxiliary and dependent bill attacking the validity of other bonds which are out. Grant v. East, etc., R. R., 50 Fed. Rep., 795 (1892).

³ See § 767.

⁴ Jackson v. Ludeling, 99 U. S., 513 (1878).

Sullivan v. Portland, etc., R. R., 49
 U. S., 806 (1876); 4 Cliff., 212, where it

§ 829. A bondholder cannot levy an execution upon the mortgaged property.— The reason of this rule is that all the bondholders are entitled to share proportionally in the security, and no one bondholder has a right to seize the security himself and exclude the others from participation.¹

§ 830. Bondholders' suits in behalf of all the bondholders to prevent waste, etc.—In addition to bondholders' suits to foreclose the mortgage, where the trustee refuses to do so, the bondholder may bring suit to protect the property where there is imminent danger to it, and the trustee refuses to bring suit. He may sue to restrain the mortgagor corporation from obeying a state law which has reduced railroad rates.² The law applicable to this class of cases is very similar to that applicable to stockholders' suits, where a fraud has been committed and the corporation refuses to bring suit.³ He may also, of course, sue the trustee to make him account for moneys received.⁴ So, also, a bondholder may enjoin the company from taking up a part of the mortgaged railroad.⁵ A bondholder may also sue to enjoin the trustee and company from selling iron rails which are subject to the mortgage,⁶ and in certain cases may

was claimed that the process of foreclosure was irregular, without warrant of law and void. Seventeen years' delay was held to be fatal. In Coddington v. Railroad, 103 U. S., 409 (1880), a stockholder's delay for eight years in moving to rescind the contract by which he took stock for his bonds, prior to foreclosure of the mortgage, was held to be a bar. In Foster v. Mansfield, etc., R. R., 36 Fed. Rep., 627 (1888), ten years' delay on the part of a stockholder was held to be fatal to his suit to set aside the foreclosure suit on the ground that the directors were interested in the purchase and allowed foreclosure by default. So also where there was five years' delay. Harwood v. Railroad, 17 Wall., 78 (1872). The court will not especially favor the application of a bondholder to attack the foreclosure where the application is made just before the sale and after the foreclosure has been going on for nearly three years. Farmers', etc., T. Co. v. Green, etc., R. R., 6 Fed. Rep., 100 (1881). Where a bondholder delays five years after the sale before objecting to an ir-

regularity in the foreclosure which his trustee made, and before objecting to the purchase of the property by the president of the company at the sale, his suit to set aside the sale will fail. Credit Co., etc., v. Arkansas, etc., R. R., 15 Fed. Rep., 46 (1882).

¹This subject is considered in § 773, supra.

² Peik v. Chicago, etc., R. R., 94 U. S., 164 (1876), one of the "Granger Cases," in which, however, the law was sustained.

³ See ch. XLV, supra.

⁴ Dwight v. Smith, 13 Fed. Rep., 50 (1882). By a previous decision in this case, 9 id., 795 (1881), it was held that a purchaser of the bonds did not acquire an existing cause of action against the trustee.

⁵ A bondholder may enjoin the corporation from taking up a part of its road, the whole road being subject to the mortgage. Watt v. Railroad, 1 Brews. (Pa. Com. Pl.), 418 (1867).

⁶ Weeijen v. St. Paul, etc., R. R., 4 Hun, 529 (1875). See same case, 5 id., 265, sustaining a demurrer because a enjoin another corporation from using the name of the mortgagor.¹ A bondholder may protect the property from an illegal tax.² Bondholders have no right to complain of the *ultra vires* acts of the corporation, nor of the frauds of its officers,³ until after judgment has been obtained on their bonds and execution returned unsatisfied.⁴ A bondholder has no standing in court to compel the president of the corporation to return to the corporate treasury the proceeds of bonds sold by him.⁵

§ 831. Bondholders cannot claim the benefit of all contracts made by the company with third persons. 6— The bondholders cannot claim the benefit of the agreement of a third party with the cor-

proper request to one of the trustees who was not implicated, to bring the suit, had not been made.

1 A bondholder may maintain a suit to enjoin another corporation from using the same corporate name as the company which issued his bonds, and thereby obtaining land which secures the bonds of the latter company. It is immaterial that he purchased the bonds for the very purpose of bringing this suit. He may sue in the federal court, being a citizen of California, if the defendant company is organized in Oregon and his own corporation is organized in Oregon. He must allege that the corporation, although requested so to do, has refused to bring any suit or seek any remedy. Newby v. Oregon Central R. R., 1 Sawyer, 63 (1870).

² In the case Western R. R. Co. v. Nolan, 48 N. Y., 513, the court said in a dictum that the beneficiaries may bring suit to protect the trust fund where an illegal tax is laid upon it and the trustees refuse or are reluctant to bring suit to protect the trust fund. The court held, however, in this case, that an injunction to restrain the collection of a tax would not lie.

³ See § 735, supra; also the litigation in Belden v. Burke, referred to in § 763. A bondholder cannot object to the corporation buying the stock of another corporation. Matthews v. Murchison, 15 Fed. Rep., 691 (1883).

4 Id.

⁵ In the case Van Weel v. Winston, 115 U.S., 228 (1885), a bondholder sued to compel the president to account for the proceeds of the bonds which the president had misappropriated. court said: "The charges in this bill on which relief is sought may be arranged under two heads: 1. Fraudulent misrepresentations of the defendant affecting the character and value of the security on which the bonds in question were negotiated. 2. The violation of certain obligations, in the nature of a trust, which he assumed in regard to the security and ultimate payment of the bonds." The bill was dismissed. also, ch. XLV, supra.

⁶ A bondholder cannot sue in equity to enforce the agreement of an outside party to pay a sum of money to the mortgagor, even though the mortgagor placed the claim under the mortgage. New York Guaranty Co. v. Memphis, etc., Co., 107 U.S., 205 (1882). A mortgagee foreclosing cannot enforce a lease which was executed subsequently to the mortgage, and to which the mortgagee was not a party. Moran v. Pittsburgh, etc., R'y, 32 Fed. Rep., 878 (1887). The vendee of stock in the company who retains enough of the price to pay the bonds of the company does not thereby become trustee for the bondholders, nor is there any enforceable contract relation between them. Nebraska City, etc., Bank v. Nebraska, etc., Co., 14 Fed. Rep., 763 (1883).

poration to pay or guaranty the payment of the bonds.¹ The bondholders cannot claim a mortgage on land which the mortgage purports to cover but does not cover.²

¹ National Bank v. Grand Lodge, 98 U. S., 123 (1878), where the third party agreed to pay for stock by paying the bonds of the company. The agreement of a railroad company to pay the bonds of another railroad company is not enforceable by the bondholders. The court said: "A mere valid promise or undertaking, taken by the company to give it support financially, by enabling it to escape default for the non-payment of interest, evidently is not the property which the mortgagee took by force of this indenture, although it was obtained by the mortgagor for its financial relief and support, and its performance would have had the effect to enable it to operate its road." A different case is presented where the contract is executed, as where a lease has been made. There is no privity of contract between the contracting company and the bondholders in such a case as this. The contract is between the two companies alone. The outside company owed no debt and held no fund in trust for the other company nor for the latter's bondholders. Metropolitan Trust Co. v. N. Y., etc., R.

R., 45 Hun, 84 (1887). Where, several years after state bonds are issued, the state allows a corporation to do certain things, provided the company will pay such bonds, a bondholder cannot enforce this contract, not being a party to it. Stuart v. James, etc., Co., 24 Gratt. (Va.), 294 (1874).

² Although a bond purports to be secured by more than the mortgage specifies, yet if the mortgage does not cover the lands in controversy, the bondholder cannot subject such lands to the mortgage that actually is given. New Orleans, etc., R'y v. Parker, 143 U. S., 42 (1892). Cf. O'Bierne v. Bullis, N. Y. Supp. (1891), where, under the rule of Lawrence v. Fox, 20 N. Y., 268, the court held that a bondholder might enforce the contract of a third person with the company to put certain land under the In the case Van Weel v. mortgage. Winston, 115 U. S., 228, 242 (1885), the court said that if the mortgage differed from the circulars of the company the mortgage "must be looked to as the security on which the bondholders alone had a right to rely."

CHAPTER XLIX.

THE FORECLOSURE OF MORTGAGES BY SUIT IN EQUITY.

- § 832. Railroad mortgage bonds.
 - 833. In England no foreclosure of railroad mortgages is allowed.
 - 834. Courts of equity originally had no power to foreclose mortgages.
 - 835. The various modern remedies of the mortgagee.
 - 836. The mortgage may be foreclosed if there is a default in the payment of the interest, even though the principal is not due—The court may declare the principal sum to be due at once.
 - 837. Power of the court to order a sale of the property free and clear of all incumbrances, including those prior to the one under consideration Consolidation of suits.
 - 838. Default in interest for the express purpose of paying off bonds bearing a high rate of interest.
 - 839. Conflict between the federal and state courts in foreclosure suits.
 - 840. Foreclosure of a mortgage on a railroad that runs into two or

- § 841. State statutes relative to foreclosure may be but need not be followed by the federal courts.
 - 842. Claim of title in opposition to the mortgagor's title cannot be tried in a foreclosure suit Priority of liens may be tried.
 - 843. Parties complainant in a suit for foreclosure Who may foreclose.
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 - 845. Cross-bills.
 - 846. Miscellaneous defenses to the foreclosure Validity of incorporation Statute of limitations.
 - 847. Evidence and proof in foreclosure suits — Defaults.
 - 848. Collusive foreclosures Remedies of the various parties.
 - 849. The decree and consent decrees— Appeals.
 - 850. Sale—Remedies against the purchaser—Redemption—Tender of interest due.

§ 832. Railroad mortgage bonds.—"Railroad mortgages are seldom made to be paid. If the company is successful they are often renewed, and the money which might have been used for this discharge is largely spent in heavy salaries, increasing expenses and questionable extensions of the line. If the company is unsuccessful the end is foreclosure and wreck." Such is the language of the New York court of appeals.¹

A broader view, perhaps, is that a railroad mortgage debt is practically a part of the capital stock. It resembles preferred stock, except that it cannot vote, and its interest, being secured by mortgage, must be paid whether there are profits or not.

§ 833. In England no foreclosure of railroad mortgages is allowed.— In England a railroad mortgage is not allowed to cover the railroad and property. It covers the income and earnings only.²

¹ Wilds v. St. Louis, etc., R. R., 102 N. ² In England a railway mortgage "is Y., 410 (1886). a mortgage only of the tolls and sums

Hence the only thing to realize on is the undertaking, the right to operate the road and take the profits. In order to do this, an application is made to the court for a receiver to operate the road and turn over the profits to the mortgagees. An English railroad mortgage seems to be similar to what is called a "Welsh mortgage."

In England, however, the acts of parliament provide for a reorganization of the company by scaling down or rearranging the obligations on some basis which is agreed to by a certain proportion of the security holders and is approved by the court. But foreclosure and sale of a railroad is not allowed. If the same law prevailed in America the reorganizations would be under the direction of the court, instead of as at present, where disaster enables the strong to take advantage of the weak.

§ 834. Courts of equity originally had no power to foreclose mortgages.—It was not until modern times that the powers of courts of equity were extended so as to enable them to foreclose mortgages. Consequently in those states where the extended powers of courts of equity were held not to exist, a foreclosure in a court of equity was impossible, and the old common-law remedies of the mortgagee were the only remedies that he had. In New England especially the courts so held, and consequently the early foreclosures of corporation mortgages were strict foreclosures, or the mortgagee resorted to entry, possession and sale.³ Pennsylvania also rejected the English chancery jurisdiction, but found in the course of time that it was necessary to restore that jurisdiction by statutes, especially in regard to the foreclosure of mortgages.⁴

of money arising by virtue of the acts." Bowen v. Brecon, etc., R'y, L. R., 3 Eq., 541 (1867). A mortgage on the undertaking, rates and tolls is not a mortgage on the land so as to sustain ejectment by the mortgagee. Doe v. St. Helen's R'y, 2 Q. B., 364 (1841).

¹ Hodges on Railways (7th ed.), pp. 121-131. An English railway mortgage being on the "undertaking" and not the railway itself, ejectment does not lie by the mortgagee against the mortgagor. Myatt v. St. Helen's R'y, 2 Q. B., 364 (1841), the company in this case having been incorporated by 11 Geo. IV. and 1 Wm. IV.

Welsh mortgages are frequently "the deed of trust were to convey in mentioned in the English books. They fee-simple discharged of all trusts," as resemble, says Chancellor Kent, the provided for in the mortgage, or "the vivum vadium of Lord Coke, under common-law remedy of entry or eject-

which the creditor took the estate to hold and enjoy it without any limited time of redemption and until he repaid himself whatever was due to him out of its rents and profits. But they are now entirely out of use in that country. 4 Kent's Com. (6th ed.), 137. They are inconsistent with the Massachusetts statutes. Shaw v. Norfolk, etc., R. R., 71 Mass., 162 (1855).

3 See §§ 823, 824.

4 In 1860 the court held (Ashland v. Montour Iron Co., 35 Pa. St., 30) that it had no power as a court of equity to decree a foreclosure of a mortgage, and that the remedies of the trustees in "the deed of trust were to convey in fee-simple discharged of all trusts," as provided for in the mortgage, or "the common-law remedy of entry or eject-

§ 835. The various modern remedies of the mortgagee.— The mortgagee, unless restrained by statute, may sue on the debt, or bring suit for ejectment, or foreclose. He may pursue any one of these remedies, or may pursue all three of them at the same time.¹ Generally, also, the mortgage itself gives him the power to sell the premises upon default in the payment of principal or interest.² The mortgagee cannot, however, after obtaining judgment on the debt, sell the mortgaged premises by levy of execution.³ The mortgagee may foreclose although there is an action pending in behalf of the state to dissolve the corporation.⁴ A railroad mortgage trustee may foreclose although other remedies exist.⁵ A subsequent mortgagee cannot compel a prior mortgagee to foreclose.⁶ Where a mortgagee of the corporation has appeared and filed his claim under a receivership, he will not be allowed to begin an independent action of foreclosure.¹

§ 836. The mortgage may be foreclosed if there is a default in the payment of the interest, even though the principal is not due—The court may declare the principal to be due at once.—The mortgagee

ment by the mortgagee," whereby he took the possession and profits subject to redemption, or a scire facias as provided by statute, whereby after a year's default the estate could be sold and the equity cut off. In Bradley v. Chester Valley R. R., 36 Pa. St., 141 (1860), the court again disclaimed any chancery powers on this subject. Where a provision exists in the mortgage, however, that the trustees may take possession and operate the property, or may, after the principal is due, sell it upon request of the bondholders, the court will not order the trustees to sell the property for non-payment of the interest, since the remedy specified in the mortgage for such a breach is to take possession and operate the road; but the court said that upon default in the payment of the principal the court could and would compel the trustees to sell the property. In the case Mendenhall v. West Chester, etc., R. R., 36 Pa. St., 145, note, the court reviewed the modes of enforcing a mortgage and said: "In Pennsylvania a decree of foreclosure is entirely unknown." The same result, however, is accomplished under different forms. In 1862 the legislature of Pennsylvania

passed an act giving the supreme court the power of a court of chancery to foreclose corporation mortgages. The court held that this enabled them to foreclose mortgages which were executed prior to the act, McElrath v. Pittsburg, etc., R. R., 55 Pa. St., 189 (1867); McCurdy's Appeal, 65 id., 290 (1870).

¹ Gilman v. Ill., etc., Tel. Co., 91 U. S., 603 (1875). See, also, § 820, supra. For an approved form of a bill in equity to foreclose, see 3 Hughes, 320, 333. Concerning ejectment, see § 820.

² See §§ 803, 824, supra.

³ Jones on Mortgages (4th ed.), § 1229. See, also, § 773, *supra*.

⁴ Herring v. N. Y., etc., R. R., 105 N. Y., 340 (1887).

⁵ Mercantile, etc., Co. v. Missouri, etc., R'y, 36 Fed. Rep., 221 (1888). See, also, § 803.

⁶ Seibert v. Minneapolis, etc., R'y Co.,53 N. W. Rep., 1151 (Minn., 1893).

⁷ And the fact that the corporation has made a deed to its receiver does not affect the mortgagee's substantial rights. Meeker v. Sprague, 31 Pac. Rep., 628 (Wash., 1892).

may foreclose in case the interest is not paid, even though the principal is not vet due. There also may be a foreclosure although only a part of the mortgage debt is due.2

The question of whether a demand of payment of the coupons must be made before foreclosure is considered elsewhere.3 mismanagement and fraud on the part of the directors is no cause for foreclosure.4 Default in the payment of taxes may by the terms of the mortgage be made cause for a foreclosure. The question of whether the mortgage itself may restrict the right of the bondholders or coupon-holders to have a foreclosure for nonpayment of interest is considered elsewhere. So also is the question of the construction of the provision generally contained in a mortgage, to the effect that upon default in the payment of interest a certain proportion of the bondholders may declare the principal sum due. There of course can be no foreclosure for the principal unless it is due, nor can it be declared due upon a default in the payment of the interest unless the mortgage provides for such declaration.8 Accordingly where the mortgage is foreclosed for non-pay-

¹ Howell v. Western R. R., 94 U. S., 463 (1876); Chicago, etc., R. R. v. Fosdick, 106 U.S., 47, 68 (1882); Credit Co. v. Arkansas, etc., R. R., 15 Fed. Rep., 46, 52 (1882); Wabash, etc., R'y v. Central T. Co., 22 id., 138, 142 (1884). Although the holders of coupons waive default and agree to give time, yet, the agreement being without consideration, they may change their minds and insist upon payment or a foreclosure for nonpayment of the interest. Union I. Co. v. St. Louis, etc., R'y, 5 Dill., 1 (1878). "Failure to pay the principal of the bonds is not a condition precedent to sale. The prompt payment of the coupons can no more be neglected than prompt payment of the face of the bonds." Macon, etc., R. R. v. Georgia R. R., 63 Ga., 103, 121 (1879); Goodman v. Cincinnati, etc., R. R., 2 Dis. (Ohio), 176 (1858). The mortgagor may of course deny that any coupons are unpaid, and show that the bondholders, as lessees of the property, have been paid their interest. Chamberlain v. Conn., etc., R. R., 54 Conn., 472 (1887).

² Mortgaged property may "be sold under a judgment in an action for the terest in default but not the principal

foreclosure of the mortgage, even where only a part of the mortgage debt may have matured and become payable." Central T. Co. v. N. Y., etc., R. R., 33 Hun, 513 (1884).

³ See § 773, supra.

⁴ A mortgagee cannot commence foreclosure and have a receiver appointed before there is any default in principal or interest, merely because the mauagers of the corporation have obtained control fraudulently, and are fraudulently mismanaging the traffic arrangements, misappropriating earnings and neglecting to secure terminal facilities. American L. & T. Co. v. Toledo, etc., R'y, 29 Fed. Rep., 416 (1886). Cf. Union, etc., Ins. Co. v. Union, etc., Co., 37 Fed. Rep., 286 (1889).

⁵ Davies v. N. Y. Concert Co., 41 Hun, 492 (1886), where, however, the suit failed because the bondholder had not properly requested the trustee to foreclose before commencing foreclosure himself.

6 See § 804.

7 See § 800.

8 The bondholder may sue for the in-

ment of the interest a serious question arises as to how the property shall be sold, and how the principal sum is affected. The courts refuse to sell a portion of the property, inasmuch as in the case of a railroad this would disrupt and destroy the line. The supreme court of the United States say that the property should be sold subject to the mortgage lien for the principal of the bonds and the coupons not yet due. But the court may order the whole property sold. In that case the surplus after paying the interest is to be applied on the principal. This practically means that the court

where the mortgage shows that the principal was to become due only when a majority of the bondholders so decided. Batchelder v. Council, etc., Co., 14 N. Y. Supp., 306 (1891). The principal cannot be declared due upon a default in the payment of the interest unless the bond or mortgage so provides, and hence the foreclosure can be for the interest only. Union T. Co. v. St. Louis, etc., R'y, 5 Dill., 1 (1878).

¹ Howell v. Western R. R., 94 U. S. 463 (1876). The court may order a sale of mortgaged premises to satisfy that part of the mortgage debt which is due and preserve the lien upon the mortgaged premises in the hands of the purchaser as to the unmatured part of the debt. So, also, as to coupons. Penn. R. R. v. Allegheny, etc., R. R., 48 Fed. Rep., 139 (1891). The court will order a sale of the whole road although one class of bondholders oppose, where the receiver is running behind and interest is not being paid. Bound v. South Car. R. R., 50 Fed. Rep., 853 (1892). Even though the principal is not to become due until maturity, notwithstanding there is a default in interest, yet if the company is insolvent and in arrears, and has large unsecured debts, the court will declare the principal to be due and will decree foreclosure. Where various mortgages are inextricably interwoven and interest paid on none, the court will declare them all due. Carey v. Houston, etc., R'y, 45 Fed. Rep., 438 (1891). "Where a mortgage or deed of trust is given to secure the interest and principal of notes or bonds, and the mortgaged property can-

not be sold in part without injury to its value, the whole may be sold on default of the payment of interest before the principal is due." After the sale the court will decide what shall be done with the proceeds. Wilmer v. Atlanta. etc., R'y, 2 Woods, 447, 455 (1875). See, also, ch. LI, infra. Concerning the question of priority of coupons, ch. XLVI, supra. Concerning the statutes ou this subject see Jones on Corporate Bonds. etc., § 634. Where a company gives a mortgage on its whole line, but constructs only the middle section, and then another company constructs the two ends on a right of way procured by such latter company, the mortgage does not cover the two ends. On a foreclosure the court will not order a sale of the middle section alone, but of the whole, in order to preserve the system. Chicago, etc., R'y v. Loewenthal, 93 Ill., 433 (1879). In Goodman v. Cincinnati, etc., R. R., 2 Dis. (Ohio), 176 (1858), the court said that a part of the railroad would be sold, and directed an inquiry in order to ascertain what part could be advantageously sold. May sell whole property when interest is unpaid, though principal not due. Mendenhall v. West Chester, etc., R. R., 36 Pa. St., 145, note.

²Where foreclosure is made for non-payment of interest, the foreclosure being for such interest only, and the property is sold, any surplus money remaining after payment of the principal is properly to be ordered paid on the principal. Central R. R. v. Central Trust Co., 133 U. S., 83 (1890); Penn. R. R. v. Allegheny, etc., R. R., 48 Fed.

has power to declare the principal sum due at once if it deems best so to do. Moreover, inasmuch as it would be disastrous to sell a part of a railroad line, the court on a foreclosure for a failure to pay interest will order the whole line to be sold and apply the proceeds to the payment of the debt.¹

Where a corporation is dissolved even voluntarily under the statute, a mortgage given by the corporation prior to the dissolution cannot be foreclosed, but the remedy of the mortgagee is to apply in a proceeding for a dissolution and receivership. The court may order delivery of the possession of the property to the trustees in accordance with the terms of the mortgage.²

§ 837. Power of the court to order a sale of the property free and clear of all incumbrances, including those prior to the one under consideration — Consolidation of suits.— A legislature has no power to direct that a railroad system shall be sold free and clear of all incumbrances, so far as concerns mortgages existing at the time of such act of the legislature. It seems also that a court of equity has no power to make such a decree in a suit brought by a junior mortgagee. The senior mortgagee is entitled to retain his lien if he so

Rep., 139 (1891). Foreclosure may be to enforce payments of interest, and if the railroad cannot be advantageously sold in parcels, the court may order a sale of the whole free from the mortgage, thereby practically foreclosing for the entire mortgage debt. Farmers' L. & T. Co. v. Oregon, etc., R'y, 24 Fed. Rep., 407 (1885). A deed of trust with power to sell on non-payment of interest sustains a sale of all the premises in one lump, the sale taking place on the premises. Although the principal sum is not due and cannot be declared due, yet the proceeds of the sale may be applied to the debt. Olcott v. Bynum, 17 Wall., 44 (1872). Where a manufacturing plant, such as a car manufacturing company, owned by a corporation, is foreclosed, the court may direct that it be sold as an entirety, if a sale of its assets in parcels would lessen the selling value. Central, etc., Co. of New York v. United States, etc., Co., 56 Fed. Rep., 5 (Ill., 1893).

¹ In a proceeding to collect the interest and to enforce payment from the mortgaged property the whole property

may be sold although the principal is not yet due. West Branch Bank v. Chester, 11 Pa. St., 282 (1849); Chicago, etc., R. R. v. Fosdick, 106 U. S., 47 (1882). In the case of Carey v. Houston, etc., 'R'y, 52 Fed. Rep., 671 (1892), the court refused to set aside a foreclosure sale although a part of the debt had been declared due before its maturity and had been included in the amount upon which the sale was made.

² Nelson *et al. v.* Hubbard, 11 S. Rep., 428 (Ala., 1892).

³The legislature cannot subsequently to the giving of a mortgage prescribe that certain persons shall sell the property free from incumbrance, and pay off the liens in the order of their priority. A statute in New Jersey to that effect is unconstitutional. Martin v. Somerville, etc., Co., 27 How. Pr., 161 (U. S. C. C., 1863). Where the court orders a sale of the property by the receiver free from all liens, a judgment creditor who claims a prior lien, and who was a party to the suit, is bound by such decree of sale. Nelson et al. v. Jenks et al., 52 N. W. Rep., 1081 (Minn., 1892).

wishes.¹ The foreclosure suit of the junior mortgagee, however, generally stops the payment of the interest on the senior mortgage and thus forces the senior mortgagee to begin foreclosure himself.²

When the foreclosure suit, either by bill or cross-bill, leads to a foreclosure of several mortgages at the same time in one suit, the court will endeavor to protect the divisional mortgages by ordering a separate sale, unless the value of the property as a system will be thereby destroyed. The court will consolidate the various suits if the proceedings will thereby be simplified and substantial justice forwarded.

§ 838. Default in interest for the express purpose of paying off bonds bearing a high rate of interest.—This is a device which is occasionally resorted to by unscrupulous managers in order to re-

¹A general mortgagee cannot: by bringing into its foreclosure suit ninety other mortgagees, thereby compel a sale of the whole system as an entirety. Each mortgagee is entitled to a separate sale of the property mortgaged to him. Wabash, etc., R'v v. Central T. Co., 22 Fed. Rep., 138 (1884). The court may order the receiver to make a sale without mention of prior liens or incumbrances. This leaves them to be litigated and enables the purchaser to contest them. Such is the rule even though the sale is subject to prior legal incumbrances. Hackensack Water Co. v. De Kay, 36 N. J. Eq., 548 (1883). The court may order the sale to be made subject to judgments, taxes, claims, etc., the adjudication as to them to be made subsequently. Turner v. Indianapolis, etc., R'y, 8 Biss., 380 (1878). Where a mortgage bondholder of one of the three companies which have been consolidated into a single company files a bill for foreclosure and makes the consolidated company a party defendant, the court will order a sale of the road as a whole, although there are three divisional mortgages on the property. The proceeds were apportioned according to the earnings of the different divisions upon equitable principles and the reports of experts. Gibert v. Washington, etc., R. R., 33 Gratt. (Va.), 586, 613 (1880).

²Underlying mortgagees will be al-

lowed to commence foreclosure proceedings. Central T. Co. v. Wabash, etc., R'y, 23 Fed. Rep., 863 (1885). Where the general foreclosure is nearly complete, the court will not turn over a part of the system to the underlying mortgagees but will wait for a sale of the whole system. Central T. Co. v. Wabash, etc., R. R., 25 Fed. Rep., 693 (1885).

³ If there is an underlying mortgage on part of the road, the court will order that to be sold separately if it can be done without destroying the value of the whole property. This will enable such a mortgagee to protect himself. Campbell v. Texas, etc., R. R., 2 Woods, 263 (1872). See, also, Farmers' L. & T. Co. v. Newman, 127 U. S., 649 (1888). See, also, the preceding section.

4 Where a railroad construction contractor files a bill to establish a lien on the road and asks a foreclosure of a prior mortgage, and the trustee of the mortgage files a bill for foreclosure, the court may consolidate the suits and allow the latter to be sole complainant. American Loan & T. Co. v. East, etc., R. R., 37 Fed. Rep., 242 (1889); also, Wabash, etc., R'y v. Central T. Co., 23 Fed. Rep., 513 (1885). Although three different mortgages on the same property are being foreclosed in three suits, the suits will not be consolidated until they are ready for decree. Mercantile T. Co. v. Missouri, etc., R'y, 41 Fed. Rep., 8 (1889).

duce the amount of interest which the company has to pay. Bonds bearing a high rate of interest having been sold during the early existence of the corporation, the managers, after the company has become prosperous, desire to reduce the interest by paying off the old bonds and issuing new ones. Hence, in order to pay off the old ones they stop the payment of interest. The manipulation is generally successful. The court, however, does what it can to circumvent the scheme. It will put in a receiver to operate the business and apply the profits to the payment of the interest, or will, on the suit of a bondholder, decree that the trustee take possession of the road. But if the trustee is foreclosing in collusion with the company, an objecting bondholder must offer to pay such bonds as desire payment at par. Possibly the court may authorize a lease of the property to be made. Yet these remedies are dangerous, and rather than resort to them the bondholders

a foreclosure in order to pay off the debt before it is due, the court will put in a receiver to apply the income to the payment of the interest in default. "However burdensome this high rate of interest may be to the defendant, it has no legal right to demand a reduction, nor can it compel a foreclosure and payment of the mortgage debt before its maturity by refusing to pay the interest according to the obligation of its contract, and appropriating its income and earnings to its own use. It cannot thus take advantage of its own wrong." Dow v. Memphis, etc., R. R., 20 Fed. Rep., 260 (1884). Where a railroad in prosperous condition allows by collusion a judgment to be taken against it and a receiver to be appointed thereunder, all for the purpose of applying its income to improvements instead of to the payment of its debts and interest coupons, the court of its own motion will discharge the receiver. The railroad in this case desired foreclosure proceedings to be commenced in order to pay off its bonds bearing a high rate of interest. Sage v. Memphis, etc., R. R., 18 Fed. Rep., 571 (1883). A sale will not be ordered on terms materially different from those called for by the pleadings. Without the consent of the

If the mortgagor attempts to compel foreclosure in order to pay off the before it is due, the court will put a receiver to apply the income to the syment of the interest in default. However burdensome this high rate interest may be to the defendant, it as no legal right to demand a reduc-

² Where the company refuses to pay the coupons, although able to do so, its object being to compel the bondholders to take a lower rate of interest, a bondholder may file a bill in equity to compel the trustees of the mortgage to "take possession of the property for the purpose of foreclosure and manage it and apply the net earnings to payment of the interest on the bonds." First Nat'l Ins. Co. v. Salisbury, 130 Mass., 303 (1881).

³ A bondholder may intervene in a foreclosure suit and may prevent the foreclosure by proving that the foreclosure is a scheme to pay off the seven per cent bonds in order to enable the mortgagor to issue new bonds at a lower rate of interest. He must, however, stand ready to buy all bonds which are presented for payment. The trustee's suit to foreclose will then be stayed. Tillinghast v. Troy, etc., R. R., 48 Hun, 420 (1888); affirmed, 121 N. Y., 649.

e 4 See ch. XLVIII.

generally submit to a reduction of interest. The result is a loss to both sides — a partial loss of interest to the investor and a total loss of credit to the manipulator.

§ 839. Conflict between the federal and the state courts in foreclosure suits.— Although a foreclosure suit has been commenced in a state court, yet this does not prevent the commencement of an independent foreclosure suit on the same property in the federal court. Both suits may go on.¹

Although suit is pending in the federal court to foreclose a mortgage, yet a creditor may file a bill in the state court to have the mortgage declared illegal as having been given to stockholders without consideration.² But the federal court will not disturb a receiver who has been appointed by the state court before any receiver was appointed by the federal court, and vice versa, the rule being that the court which first takes possession may retain possession.³ The court which first obtains possession of the property

¹Beekman v. Hudson, etc., R'y, 35 Fed. Rep., 3 (1888); Weaver v. Field, 16 id., 22 (1883). A suit in a state court by a mortgagor to restrain the trustee from selling the property is no bar to a suit in the federal court to foreclose the mortgage. Pierce v. Feagans, 39 Fed. Rep., 587 (1889). sale of all the property of a railroad upon foreclosure proceedings does not prevent judgment creditors claiming a judgment lien on the property from continuing their proceedings in the state court. Blair v. Walker, 26 Fed. Rep., 73 (1886). A foreclosure suit and appointment of a receiver in a federal court does not oust a state court of jurisdiction in a pending suit for damages to land by reason of the construction of the road. Mercantile T. Co. v. Pittsburg, etc., R. R., 29 Fed. Rep., 732 (1887). In a suit by a corporate creditor to reach the equity of the corporation in its mortgaged property, a third person who claims part of the complainant's debt and is litigating the same in the state court will not be allowed to intervene. Coffin v. Chattanooga, etc., Co., 44 Fed. Rep., 533 (1891). Where a foreclosure suit is pending in one state court, another foreclosure suit on the same property cannot be commenced in another state court, both courts being in the same parish. Weymouth v. Roselius, 36 La. Ann., 527 (1884). The general principles governing this subject of priority of a similar suit in the *state court are discussed in Loving v. Marsh, 2 Cliff., 311 (1864), not, however, a corporation case. The United States courts will entertain a suit by bondholders for the foreclosure of a mortgage and the removal of the trustees for cause, although suit is pending in the state court brought by the trustees for foreclosure of the same mortgage. Brooks v. Vermont Central R. R., 14 Blatch., 463 (1878). See, also, § 827.

² Gay et al. v. Brierfield, etc., Co. et al., 11 S. Rep., 353 (Ala., 1891), carefully reviewing many cases.

³ Id. In the case Wilmer v. Atlanta, etc., R'y, 2 Woods, 409, 427 (1875), the court said: "The test 1 think is this: Not which action was first commenced, nor which cause of action has priority or superiority, but which court first acquired jurisdiction over the property. If the Fulton county court had the power to take possession when it did so, and did not invade the possession or jurisdiction of this court, its possession will not be interfered with by this court; the parties must either go to that court and pray for the removal of its hand, or,

through a receiver retains that possession until the end of the case in that court.¹

By comity it has been held that a state court will dismiss a bill of foreclosure where a bill for the same purpose has already been filed in the federal court.²

having procured an adjudication of their rights in this court, must wait until the action of that court has been brought to a close, and judicial possession has ceased. . . . The alleged collusion and fraud of the parties cannot alter the case. It is a question between the two courts: and we must respect the possession and jurisdiction of the sister court. We cannot take the property out its hands unless it has first wrongfully taken it out of our hands. This, as we have shown, has not been done. The application for a writ of assistance and for an attachment must be denied."

1 Although a foreclosure suit is pending in a state court, yet if a subsequent foreclosure suit against the same property is commenced in the federal court and a receiver is appointed first in the latter court, the latter court will retain possession of the property and allow the suit to continue. East Tenn., etc., R. R. v. Atlanta, etc., R. R., 49 Fed. Rep., 608 (1892). Where a federal court has taken possession of an interstate railway on foreclosure proceedings it will not turn over to the state courts a line which was acquired by purchase by the general company, even though that line is wholly within the state and its charter has been forfeited. Mercantile Trust Co. v. Missouri, etc., R'y, 48 Fed. Rep., 351 (1890). A suit by a stockholder in the federal court for a receiver and the application of all assets to the debts is not a bar to a suit in the state court by a creditor for a receiver and the application of the assets to the debts, even though a receiver appointed in the former action takes possession of little of the property and is discharged. Liggett v. Glenn, 51 Fed. Rep., 381 (1892).

² In the case of Keep v. Mich., etc., R. R., 6 Chic, Leg. News, 101 (U.S. Dis. Ct., 1873), the federal court appointed a receiver although a receiver was already in possession by appointment of the state court: but the state court, upon learning that the suit in the federal court had been commenced first, had dismissed the bill in the state court and disjuissed the receiver. Where the property is already in the hands of a federal receiver a state court will refuse to entertain a suit for the foreclosure of a mortgage subsequent to the one being foreclosed in the federal court, and the court said that the rule was the same even of a mortgage prior to the one already in process of foreclosure. Milwaukee, etc., R. R. v. Milwaukee, etc., R. R., 20 Wis., 165 (1865). In the case of May v. Printup, 59 Ga., 128, 130 (1877), the court said: "It is not the seizure of the property by the receiver that gives the court jurisdiction over it, but the commencement and service of the bill and process. The object of the seizure of the property is not to give jurisdiction, but only to enable the court to administer effectual and full justice under the jurisdiction it has acquired by virtue of the suit commenced. The contrary view would encourage collusion between parties and unseemly haste in the seizure of property by receivers. The case at bar affords a striking illustration of the propriety of the rule that the commencement of the suit and not the appointment of the receiver or seizure of the property gives jurisdiction over the subject-matter." Although a federal receiver has qualified, yet a state court will also appoint a receiver unless it is shown that the federal suit was instituted first. Texas, etc., R. R. v. State, 18 In order to commence foreclosure in the federal court it is of course necessary that the jurisdiction of the court be clear and be set forth in the bill. This jurisdiction almost always turns on the fact that the trustee or hondholder who forecloses is a citizen of a different state from that of the defendants.¹ Occasionally it is possible to remove the case from the state to the federal courts under some one of the acts of congress allowing removal.² The decree generally ends the jurisdiction of the court over the property.³

S. W. Rep., 199 (Tex., 1892). After the commencement of a suit in the federal court for foreclosure and a receiver, a subsequent bill filed in the state court does not deprive the federal court of the right to possession of the property, even though the state court appoints a receiver first. Union Trust Co. v. Rockford, etc., R. R., 6 Biss., 197 (1874). Where the federal court has appointed receivers in a foreclosure suit it may then acquire jurisdiction of a subsequent foreclosure suit, irrespective of the citizenship of the parties, the res being in the possession of the court. Carey v. Houston, etc., R'v, 52 Fed. Rep., 671 (1892).

¹ Although the trustees of the deed of trust in a suit brought by the bondholders are made defendants the federal court is not ousted of jurisdiction by reason of the fact that the complainants and the trustees are citizens of the same state. They are merely nominal parties. Barry v. Missouri, etc., R'y, 27 Fed. Rep., 1 (1886). A mortgagee may foreclose in the federal court, although neither he nor the mortgagor resides in the district where the property is and the suit is brought. Wheelwright v. St. Louis, etc., Co., 50 Fed. Rep., 709 (1892). Cf. § 827.

² A foreclosure suit in a state court involving separate severable controversies may be removed into the federal court as to one of the controversies and thereby drag the rest into the same court. Wabash, etc., R'y v. Central T. Co., 23 Fed. Rep., 513 (1885). As to the removal of a case to the federal courts by some of the defendants, see Foster

v. Chesapeake, etc., R'y, 47 Fed. Rep., 369 (1891). The court will consolidate two foreclosure suits brought to foreclose the same mortgage, one in the federal court and the other removed to the federal from the state court. Wabash, etc., R'y v. Central T. Co., 23 Fed. Rep., 513 (1885).

3 Where hy decree in a state court a railroad is sold under foreclosure the court ends its jurisdiction over the railroad. If the purchaser does not fulfill, a holder of receiver's certificates may file a bill in the federal court for another sale. The state court cannot then assume again jurisdiction over the property. Central Nat'l Bank v. Hazard. 49 Fed. Rep., 293 (1892). Although a railroad has been foreclosed and sold by suit in a state court, yet a bondholder may file a bill in the federal court to re-establish the lien of the mortgage on the ground that the foreclosure was collusive, fraudulent and void. He may sue to reach the stock for which the road was sold by the purchasers to a new corporation. He need not obtain a judgment at law on his bonds before resorting to this suit in equity. Mass., etc., Ins. Co. v. Chicago, etc., R. R., 13 Fed. Rep., 857 (1882). Where the federal court has foreclosed the second mortgage and made a sale subject to the first mortgage, the first mortgagee may then commence foreclosure proceedings in the same suit even though the purchaser at the first sale is a citizen of the same state as the first mortgagee. Farmers' L. & T. Co. v. Houston, etc., R'y, 44 Fed. Rep., 115 (1890).

The decree of foreclosure by a state court cuts off the lien of a judgment obtained in the federal court pending the suit, and is a bar to a suit commenced in the federal court by such judgment creditor attacking the mortgage as illegal. So also a decree obtained in the federal court prevents a subsequent suit in the state court.2

§ 840. Foreclosure of a mortgage on a railroad that runs into two or more states .- There has been great doubt whether a court sitting in one state could foreclose the whole of a railroad which extends from that state into an adjoining state. Ordinarily a court cannot foreclose a mortgage on land situated outside of the jurisdiction of the court. And this rule applies to the courts of a state in the foreclosure of an interstate railroad. The foreclosure is good for that part of the railroad which is located within the state where the court is sitting, but usually the courts of the other state will refuse to recognize the foreclosure so far as it applies to that part of the railroad which is in the latter state.3

¹ Stout v. Lve. 103 U. S., 66 (1880).

² Where in a foreclosure suit in the federal court by a consent decree the trustee is put in possession, and by a subsequent decree a sale is ordered and the trustee files a report of a sale baving been made, and then long subsequently the trustee forecloses the same mortgage in a state court, and the purchaser takes possession, the federal court will oust bim from possession and put in a receiver, on the application of a bondbolder, the trustee being charged with a misapplication of the funds. court is not bound by the foreclosure in the state court. Bill v. New Albany, etc., R. R., 2 Biss., 390 (1870). If the state court refuse to recognize the priority of jurisdiction acquired by the federal court the state proceeding should be brought before the supreme court by writ of error. Chittenden v. Brewster, 2 Wall., 191 (1864). Although the purchaser is bound to pay outstanding claims, yet the court will first pass upon them. It will enjoin a suit in the state court relative thereto. Jesup v. Wabash, etc., R'y, 44 Fed. Rep., 663 (1890).

3 Where a consolidated company of New York and Pennsylvania issues bonds in New York fictitiously, such (1887). The reason of the rule is that

bonds cannot be enforced in Pennsylvania, since they are void by its constitution. A foreclosure in New York of the mortgage securing the bonds may be set aside and the bonds declared void. Pittsburgh, etc., R. R. Co.'s Appeal, 4 Atl. Rep., 385 (Pa., 1886). In the case of Eaton, etc., R. R. v. Hunt, 20 Ind., 457 (1863), the Indiana court refused to recognize a judgment of an Obio court wherein the Ohio court foreclosed a consolidated railroad running into both states, so far as such judgment affected an underlying mortgage on the Indiana end of the road. It was so held although the Ohio court had personal jurisdiction over the trustee of this underlying mortgage. The court said that if the trustee had refused to sell, the court could not appoint a person to sell for The pendency of a foreclosure suit in the courts of another state is no bar. The courts of one state have no power to foreclose and cause a foreclosure sale of real estate in other states, even though such property consists of a telegraph system which runs into several states, including the one where the suit is brought. Farmers' L. & T. Co. v. Bankers', etc., Tel. Co., 44 Hun, 400 Where, however, the trustee of the mortgage is within the jurisdiction of the court, the court may compel him to exercise the power of sale given by the mortgage. In this way the whole property may be foreclosed at once.\(^1\) A different rule prevails in the federal courts. Where a railroad runs into two states and into two circuits of the United States courts, a suit to foreclose a mortgage on the whole line may be brought in one of those circuits and a foreclosure of the whole line will be decreed.\(^2\) An "ancillary"

the court cannot give possession after the foreclosure sale. Id. The court said: "The court of this state cannot by its decree, or by a sale made by an officer appointed by it, or by a conveyance executed by such officer, affect the title to property without the limits of the state, and, therefore, by a sale under the decree entered in this action by the referee therein named, no title could possibly be conveved to such of the mortgaged property as is situate in other states." A foreclosure in New York of a road running through New York and Pennsylvania was held by the Pennsylvania courts not to be binding so far as the Pennsylvania part of the railroad was concerned. Pittsburgh. etc., R. R. v. Rothschild, 4 Cent. Rep., 107 (1886). Where a mortgage covers a railroad running into New York, Pennsylvania and Ohio, and three suits of foreclosure are commenced, one in each state for the part in that state, the New York court in passing upon rollingstock contracts is not bound by the Ohio decision on the same question in the Ohio suit. Matter of U.S. Rolling Stock Co., 55 How. Pr., 286 (1878). The complaint was subsequently amended so as to make the New York case collateral or ancillary to that pending in Ohio. See Taylor v. Atlantic R. R., 57 How. Pr., 9 (1878). Yet the court held that this did not essentially modify the character of the New York suit. Matter of U. S. R. S. Co., id., 16. A branch line cannot be decreed not to be subject to a mortgage where the suit is brought in a county other than the county where the branch road is, and the bondholders are

not parties to the suit. Central T. Co.. 7. Florida, etc., Co., 43 Fed. Rep., 751 (1890).

1 Where the mortgaged property consists of telegraph lines running into various states, the courts of one of the. states will not foreclose and sell the part in that state, but will compel the trusteeto adopt a remedy whereby the whole system may be sold at one time. Farmers' L. & T. Co. v. Bankers', etc., Tel., Co., 44 Hun, 400 (1887). In McElrath v.: Pittsburg, etc., R. R., 55 Pa. St., 189 (1867), the court ordered the sale on foreclosure of the whole road, althougha part of it was in West Virginia, the trustee being within the jurisdiction. The court did by its decree, "operating" upon the trustee himself, authorize and compel him to sell and convey whatever. interest of the railroad company willi pass under the terms of the mortgage." Where foreclosure on a railroad! running into two states is commenced in one state and an ancillary bill is filed in the other state, intervening creditors or lienees may intervene in either one of the two suits. Fidelity, etc., Co. v. Shenandoah, etc., R. R., 9 S. E. Rep., 180 (W. Va., 1889). But in Central T. Co. v. East Tenn., etc., R. R., 30 Fed. Rep., 895 (1886), the court said the application should be made where the principal suit is being carried on.

² Muller v. Dows, 94 U. S., 444 (1876), "Of the propriety of a foreclosure in one court operating upon the entire property running through several states, and of the validity of a sale made in pursuance of that foreclosure, and the completeness of the title which will pass

bill" in the adjoining circuit is not proper. If foreclosure suit is instituted in both circuits, both bills should be original, independent bills. Accordingly the court in the circuit where the ancillary or the second bill is filed may remove the receivers appointed in the other circuit, so far as that part of the railroad which is in the second circuit is concerned.²

§ 841. State statutes relative to foreclosure may be but need not be followed by the federal courts.— Where the statutes of the state in which a railroad is located prescribe a period within which a mortgagor may redeem the property from foreclosure, they apply to a foreclosure in the federal courts.³ But the court has power to order the property sold free from the statutory right to redeem.⁴ A statute that the sale shall not take place until six months

hy such sale, there can he now no longer a question. In the case of Muller v. Dows, 94 U.S., 444, that question was put at rest." Central T. Co. v. Wabash, etc., R'y, 29 Fed. Rep., 618 (1886); Farmers' L. & T. Co. v. Chicago, etc., R'y, 27 Fed. Rep., 146 (1886). The United States court sitting in a district through which a railroad runs has no power to appoint a receiver of the entire road, although it runs into other districts and states, the mortgage being on the whole line. Wilmer v. Atlanta, etc., R'y, 2 Woods, 409, 419 (1875); Id., 453. The case of Muller v. Dows, 94 U.S., 444, was distinguished in Atkins v. Wabash, etc., R'y, 29 Fed. Rep., 161 (1886), the latter case being one where no foreclosure of the railroad in the adjoining state, but only a receiver thereof, was prayed for, and ancillary bills were filed in such adjoining state. The court refused to recognize the receiver appointed in the adjoining circuit so far as such receivership extended beyond that circuit. Although one circuit of a United States court is divided into two districts (northern New York and southern New York), yet a mortgage on a railroad running through hoth districts may be foreclosed by a bill filed in one of them. Beekman v. Hudson, etc., R'y, 35 Fed. Rep., 3 (1888). The United States court sitting in Pennsylvania may foreclose a railroad running through Pennsylvania and Maryland. Randolph v. Wilmington, etc., R. R., 11 Phil., 502 (1876).

¹In the foreclosure of an interstate railroad running into two circuits, an "ancillary bill" in one circuit, referring to the principal bill of foreclosure in the other circuit, is not allowable. If foreclosure is sought in both circuits, the bills in equity in each must be independent and complete. Mercantile Trust Co. v. Kanawha, etc., R'y, 39 Fed. Rep., 337 (1889).

² Atkins v. Wabash, etc., R'y, 29 Fed. Rep., 161 (1886). In the case of Ellis v. Boston, etc., R. R., 107 Mass., 1 (1871), a receiver appears to have been appointed of a road running into several states.

³ Brine v. Ins. Co., 96 U. S., 627 (1877); Singer Mfg. Co. v. McCollock, 24 Fed. Rep., 667 (1884). The length of time within which the mortgagor may redeem is determined by the law of the state in which the foreclosure is decreed. Jackson, etc., Co. v. Burlington, etc., R. R., 29 Fed. Rep., 474 (1887). See, also, Simmons v. Taylor, 38 Fed. Rep., 682 (1889). In Indiana the equity of redemption may be sold out by a judgment creditor. Coe v. McBrowu, 22 Ind., 252 (1864).

⁴ Hammock v. Loan & Trust Co., 105 U. S., 77 (1881). No redemption is allowed in foreclosure sales of railroads. The statute was not intended to apply to such property. Peoria, etc., R. v. after decree will be applied; 1 as also a state law authorizing ejectment as a remedy. 2 Upon payment of the amount found due in a foreclosure suit, the mortgagor is entitled to possession, and to have the receiver discharged.3

§ 842. Claim of title in opposition to the mortgagor's title cannot be tried in a foreclosure suit—Priority of liens may be tried.—This is a rule applicable to all foreclosure suits whether the mortgage was given by a corporation or an individual. But all conflicting rights as between co-defendants, their rights all arising from the mortgagor corporation's title, may be passed upon and decided. Hence, the priority of liens originating from or under the

Thompson, 103 Ill., 187 (1882). There is no redemption from the sale of railroad property under foreclosure proceedings in the federal courts. Turner v. Indianapolis, etc., R'y, 8 Biss., 380 (1878). The right of the mortgagor to redeem cannot be destroyed by a new law that the mortgage has been foreclosed or will be foreclosed if payment is not made within a year. Ashuelot R. R. v. Elliot, 52 N. H., 387 (1873).

¹A federal court in foreclosing a railroad in Kansas will apply the Kansas statute, which forbids a sale until six months after the decree of foreclosure. A receiver will be appointed to operate the road during these six months. Benedict v. St. Joseph, etc., R. R., 19 Fed. Rep., 173 (1883).

²The federal court foreclosing a railroad mortgage in Arkansas will follow Arkansas law. If the state law authorizes ejectment by the mortgagee upon default, the federal court will apply the same rule. Instead of ejectment, however, a suit in equity may be instituted and a receiver put in charge, where the property is real, personal and mixed, and the remedy at law is inadequate, inasmuch as ejectment does not lie for personalty, rolling stock, etc. Dow v. Memphis, etc., R. R., 20 Fed. Rep., 260 (1884).

³ Railroad Co. v. Soutter, 2 Wall., 510 (1864). If the road ruus into two states and the equity of redemption is sold on execution in one, the purchaser is enti-

tled to redeem the whole property in both states from a mortgage which covers the whole. Wood v. Goodwin, 49 Me., 260 (1861).

⁴ Farmers' L. & T. Co. v. Green Bay, etc., R. R., 6 Fed. Rep., 100 (1881). A contractor claiming title to part of the street railroad which is being foreclosed, the claim being based on the terms of the deed of that part from himself to the company, cannot litigate that question by filing a cross-bill in the foreclosure suit to which he is not a party. Adverse claims to the title cannot be adjudicated in a foreclosure suit. Farmers' L. & T. Co. v. San Diego, etc., Co., 40 Fed. Rep., 105 (1889). If, however, it is claimed that the adverse title is really subsequent to the title of the mortgagee, he may make the claimant a party and have the question litigated. The receiver is not the proper party to institute such a suit. If the claimant shows that his title is really adverse to the mortgagor's, then the bill is dismissed as to him. Harland v. Bankers', etc., Tel. Co., 33 Fed. Rep., 199 (1887).

⁵ Corcoran v. Chesapeake, etc., Co., 94 U. S., 741 (1876); Jerome v. McCarter, id., 734. Cf. Bronson v. Railroad, 2 Black, 524 (1862), where the court said that where each of two mortgagees claims priority, the question cannot be litigated in a foreclosure suit brought by one of them, the other one not being a party to such suit. same owner of the property may be litigated in a foreclosure suit on one of such liens.¹

§ 843. Parties complainant in a suit for foreclosure — Who may foreclose.— A suit in equity for the foreclosure of a corporation mortgage should be instituted by the trustees of the mortgage.² The trustees sue alone, and none of the bondholders need be joined either as parties complainant or defendant.³ If the trustees refuse to bring suit, any bondholder may bring it and make the trustees parties defendant.⁴

§ 844. Parties defendant in a suit for foreclosure.— The corporation itself that gave the mortgage is a necessary party defendant, unless it has parted with its entire interest, in which case it is a proper but not a necessary party.⁵ If the foreclosure is by the first mortgagee, a second mortgagee is a proper although not a necessary party defendant. It is culpable negligence on the part of the complainant's attorney, however, not to join the junior mortgagees in order to cut off their right to redeem.⁶

¹The priority of mortgages may be contested in a foreclosure suit, even though the question of title cannot. Board of Supervisors v. Mineral Point R. R., 24 Wis., 93 (1869). If there is any question as to which is the first and which is the second lien, the court will decide that question before the sale in order that the parties may know how much they will have to bid in order to protect their own lien. Campbell v. Texas, etc., R'y, 2 Woods, 263 (1872). Alleged titles and liens prior to a mortgage may be litigated in the foreclosure suit if the court so permits. Converse v. Michigan, etc., Co., 45 Fed. Rep., 18 (1891). See, also, ch. L, infra.

² See § 821, supra.

3 See § 821, supra.

⁴ See § 825, supra.

⁵ Jones on Mortgages (4th ed.), § 1402. In a foreclosure suit the grantor of the company that holds the legal title need not be made a party. Mercantile T. Co. v. Missouri, etc., R'y, 41 Fed. Rep., 8 (1889).

⁶ If they are made parties their rights are cut off. Chicago, etc., R. R. v. Fosdick, 106 U. S., 47, 68 (1882). After the commencement of a foreclosure suit by the first mortgagee, making the second

mortgagee a party defendant, the latter cannot institute an independent suit of Sutherland v. Lake Suforeclosure. perior, etc., Co., 1 Cent. L. J., 127 (U. S. C. C., 1874). If in a foreclosure suit by the first mortgagee the second mortgagee is not made a party, the second mortgagee may at any time foreclose and sell the equity of redemption subject to the first mortgage, and the purchaser at the sale will be entitled to possession and the right to redeem. Memphis, etc., R. R. v. State, 37 Ark., 632 (1881). Where subsequent incumbrancers are made parties defendant their rights are cut off even though the bill does not correctly state their interest. Benjamin v. Elmira, etc., R. R., 49 Barb., 491 (1867). If the second mortgagee is made a party but the decree fails to cut him off, he may redeem even after many years. Simmons v. Taylor, 38 Fed. Rep., 682 (1889). Where upon the foreclosure of the first mortgage the second mortgagee is not made a party to the suit, the second mortgagee's rights are not cut off, aud he may redeem the property by tendering the amount due on the first mortgage, and if only the interest is due may redeem by tendering that. But the second-mortgage bondholders in such a All subsequent grantees, lesses, judgment creditors claiming liens and lienors generally should be made parties defendant in order to cut off their interest in the property. If a junior mortgagee is foreclosing he should make all subsequent mortgagees, grantees, lessees, judgment creditors claiming liens and other lienors parties defendant in order to cut them off.

The foreclosing junior mortgage need not make the senior mortgage a party defendant unless he wishes to.³ But if the amount

case cannot enjoin the foreclosure sale, inasmuch as the second mortgagee is not a party to the suit. If a purchaser at an execution sale is in possession, however, the court will not disturb that possession by a receiver until such party in possession is made a party to the suit. Where a sale is made by the trustees of the first mortgage in accordance with the terms of the mortgage and of the statutes, the second mortgagees and all other parties are cut off. Searles v. Jacksonville, etc., R. R., 2 Woods, 621 (1873). Second mortgagees are not necessary parties. Brooks v. Vt. Central R. R., 14 Blatch., 463 (1878). Although a second mortgagee is made a party defendant, yet he may be dropped ont if the foreclosing first mortgagee desires so to do. Richards v. Chesapeake, etc., R. R., 1 Hughes, 28 (1876), where the jurisdiction was imperiled by the second mortgagee being a party. Yet the court in this case allowed the case to be dismissed because it was desirable to retain this party as a party defendant for other reasons.

¹Beekman v. Hudson, etc., R'y, 35 Fed. Rep., 3 (1888). In the foreclosure suit in Coe v. N. J. Mid. R'y, 31 N. J. Eq., 105 (1879), there were joined as parties defendant chattel mortgagees, judgment creditors, holders of liens for labor, etc., purchase-money mortgagees, vendor's lien holders, parties claiming specific performance of contracts and subordinate mortgagees. The lien of a judgment creditor is eliminated by foreclosure. Bronson v. La Crosse R. R., 2 Wall., 283 (1863). A grantee subsequent to the giving of the mortgage is a necessary party if his rights are to be cut

off. Terrell v. Allison, 21 Wall., 289 (1874). In foreclosing a mortgage given by a consolidated company it is not necessary to make the companies so consolidated parties to the suit. But where one of these companies is about to institute a suit in the state court to attack the validity of the consolidation and mortgage, the complainants in the foreclosure suit take a grave risk in not making the constituent companies parties defendant. Skiddy v. Atlantic, etc., R. R., 3 Hughes, 320, 360 (1879).

² But if the mortgagor company has parted with the equity of redemption it is not a necessary party. Skiddy v. Atlantic., etc., R. R., supra. Nor is a grantee of a part of the road a necessary party, the grant being subject to the first mortgage only. Bronson v. Railroad, 2 Black, 524 (1862).

³ Junior mortgagees may foreclose without making the prior mortgagees parties. The prior mortgagees can be made parties only by service of process or voluntary appearance. A general notice calling on them to present their claims is insufficient. Young v. Montgomery, etc., R. R., 2 Woods, 606 (1875). A general mortgagee instituting foreclosure proceedings need not join prior mortgagees as parties defendant. If he does make them parties the court will dismiss the bill as to them with costs. Wabash, etc., R'y v. Central T. Co., 22 Fed. Rep., 138 (1884). A prior mortgagee on part of the property coming into a foreclosure suit brought by the junior mortgagee on all the property is not entitled to be paid out of the funds realized by the sale. The prior mortof the first mortgage or of a prior lien is uncertain, the prior mortgagee may be made a party in order to ascertain that amount so that a purchaser may know what the prior debt is.¹

Ordinarily, however, the second mortgagee has no right to bring in the first mortgagee as a party. The first mortgagee if brought in may object and be relieved from the suit with costs.

General creditors are not proper parties to the suit,2 nor are the

gage remains and may be foreclosed. Prior mortgagees and lienees are not necessary parties. Woodworth v. Blair. 112 U. S., 8 (1884). In a foreclosure suit by a junior mortgagee it is not necessary to make the senior mortgagee a party. Jerome v. McCarter, 94 U.S., 734 (1876); Wabash, etc., R'v v. Central T. Co., 22 Fed. Rep., 138 (1884); Woodworth v. Blair, supra, the court holding also that a prior mortgagee of a part of the property caunot intervene and claim payment. Where the prior mortgage is on a part of the system it may be foreclosed separately, and application may be made to the court to have the receiver of the second mortgage give up possession of it. Central T. Co. v. Wabash, etc., R'y, 25 Fed. Rep., 693 (1885). To same effect, Olyphant v. St. Louis, etc., Co., 23 id., 465 (1885). The prior mortgagee need not notice the bill though made a party. He is not a necessary party, and may disregard the bill and file his own bill for foreclosure. Gihon v. Belleville, etc., Co., 7 N. J. Eq., 531 (1849).

¹ A junior mortgagee in his suit for foreclosure is at liberty to make the senior mortgagees parties defendant so as to have the amount secured by their mortgages ascertained and determined by the judgment that they might be paid out of the proceeds of the sale, and their lien discharged, or that the sale might be made subject to the known amount of their liens. Metropolitan T. Co. v. Tonawanda, etc., R. R., 43 Hun, 521 (1887). A second mortgagee may foreclose and make the first mortgagee a party where a receiver is appointed, but the income of the receiver goes to

the first mortgagee. Miltenberger v. Logansport R'v, 106 U.S., 286 (1882). Where there is doubt as to the exact amount owing on a prior mortgage, the trustees of that mortgage should be made parties for the purpose of ascertaining such amount. Otherwise a purchaser at the sale will not know how much to bid for the equity of redemption. Richards v. Chesapeake, etc., R. R., 1 Hughes, 28 (1876); Sutherland v. Lake Superior, etc., Co., 1 Cent. L. J., 127 (U. S. C. C., 1874), where there was also doubt as to the property covered by the various mortgages. A trustee in foreclosing may bring in lessees where the lease was recited in the mortgage and rent is still due. Jesup v. Ill. Cent. R. R., 43 Fed. Rep., 483 (1890). A contractor's lien prior in time to the issuing and recording of a mortgage is not cut off by the foreclosure of the mortgage unless the holder of the lien is made a party to the foreclosure suit. Pittsburgh, etc., R'y v. Marshall, 85 Pa. St., 187 (1877). But where the contractors having a prior lien are made parties to the mortgagee's foreclosure suit, and they do not defend, an independent proceeding by them eleven years later to enforce their lien will fail. Woods v. Pittsburgh, etc., R. R., 99 Pa. St., 101 (1881).

² General creditors not having any lien on the property need not be made parties defendant. McMurtry v. Montgomery, etc., Co., 86 Ky., 206 (1887). Unsecured creditors are not necessary or proper parties to an action of foreclosure and have no right to intervene therein, and any adjudication made against the mortgagor is binding upon

stockholders of the mortgagor corporation. The mortgagee of another piece of property is not a necessary party defendant, although he may be a proper party.

§ 845. Cross-bills.— A cross-bill may be filed by a defendant in the foreclosure suit, but only by leave of the court.³ The cross-bill may be by a senior mortgagee asking foreclosure,⁴ or may be filed to determine priority of liens,⁵ but not to determine matters which will be eliminated by the foreclosure,⁶ or to hold the trustee liable for negligence,⁷ nor in cases where other defendants have already filed

them. Nor is the temporary receiver in an action by the state to dissolve the corporation a necessary party defendant, nor is the state itself, but they may be allowed to come in. Herring v. N. Y., etc., R. R., 105 N. Y., 340 (1887). General creditors caunot intervene. Their remedy is by separate bill. Bronson v. Railroad, 2 Black, 524 (1862). They are bound by the decree if there is no fraud. Stout v. Lye, 103 U. S., 66 (1880).

¹ See § 659; Foster v. Mansfield, etc., R. R., 36 Fed. Rep., 627 (1888); Railroad v. Howard, 7 Wall., 392 (1868).

² A mortgagee of one property owned by a corporation is a proper party defendant to a foreclosure suit on another property owned by that company, but the former may institute separate foreclosure proceedings on his mortgage and may have a separate sale. Olvphant v. St. Louis, etc., Co., 23 Fed. Rep., 465 (1885). A mortgagee of one part of a railroad is not a necessary party to a foreclosure suit brought by a mortgagee of another part of the road. Bronson v. Railroad, 2 Black, 524 (1862).Where a party claims land which is not included in the foreclosure suit, he cannot come into the suit. Cutting v. Florida R'y, etc., 45 Fed. Rep., 444 (1891).

³ Bronson v. La Crosse, etc., R. R., 2 Wall., 283 (1863). A bill filed by a defendant, on leave, in order to a complete decree upon the whole matter in dispute, is properly styled a cross-bill; and where on the bill of the original complainant, possession of property has been taken by a circuit court of the United States, the jurisdiction of the court in passing upon such a cross-bill in the disposition of the property does not depend upon the citizenship of the parties. Morgan's, etc., Co. v. Texas, etc., R'y, 137 U. S., 172 (1890).

⁴ When the senior mortgagee is made a party defendant to the junior mortgagee's suit for foreclosure, such defendant may file a cross-bill to foreclose the senior mortgage. Metropolitan T. Co. v. Tonawanda, etc., R. R., 43 Hun, 521 (1887). See, also, American L. & T. Co. v. East, etc., R. R., 37 Fed. Rep., 242 (1889).

⁵ Where a judgment creditor files a bill to reach the equity of redemption and determine the validity of prior liens, the defendant bondholders may file crossbills against each other to determine priority. Morton v. N. O., etc., R'y, 79 Ala., 590 (1885).

⁶The defendant company will not be allowed to file a cross-bill for an accounting, cancellation of lease, etc., between it and another company, where such lease is second to the mortgage and will be wiped out by the foreclosure. Mercantile T. Co. v. Missouri, etc., R'y, 41 Fed. Rep., 8 (1889).

⁷In the case Fidelity, etc., Co. v. Mobile St. R'y Co., 53 Fed. Rep., 850 (1893), it is held that bondholders may intervene as *quasi*-parties, but cannot set up a new cause of action by way of crossbill. Hence, they cannot in the foreclosure suit hold the trustee liable for neglect of duty.

sufficient cross-bills. The court may dismiss the original bill and sustain the cross-bill.

§ 846. Miscellaneous defenses to the foreclosure - Validity of incorporation - Statute of limitations. - Where the corporation or its stockholders are contesting a foreclosure, their object being to force a compromise from the bondholders so that on the reorganization the stockholders shall still have an interest in the property. all kinds of defenses are set up. The defenses that the bonds were illegally issued or irregularly issued and that the mortgage was unauthorized or illegal or irregular and many other defenses have already been considered. In addition to all these many other defenses are set up. The courts are bound to give them a hearing, but are not inclined to sustain them unless clearly required by law and equity. Thus the defense that the corporation which executed the mortgage was not properly incorporated is not a good defense,3 nor that the consolidated company which gave the mortgage was not legally consolidated,4 nor that a construction company had agreed to pay the interest in default, nor that a lease of the road has been made.6 Although it is a general rule that a tender of the mortgage debt discharges the mortgage if not accepted, the debt, however, continuing to exist as an unsecured debt, yet the courts are inclined to allow excuses to be given for not accepting the tender and to enforce the mortgage.7 But the defense that the mortgagee as lessee has been paid the interest by rental is good if true.8 The statute of limitations or an equivalent delay in commencing a suit in equity is a bar, but the courts do not favor this defense.9

¹ But if entire relief may be obtained under the original bill and the answer, or under a cross-bill filed by other defendants, a new cross-bill will not be allowed. Gilman v. N. O., etc., R'y, 72 Ala., 566 (1882). If possible so to do and preserve all rights, the court will not allow cross-bills, petitions, etc., but will direct all claimants to file their claims and thereby become quasi-parties. Lehman v. Tallassee Mfg. Co., 64 Ala., 567, 601 (1879).

² Railroad v. Chamberlain, 6 Wall., 748 (1867), holding that the federal court, having jurisdiction of the original bill, thereby acquired jurisdiction to go on with the cross-bill.

³ See § 637, supra.

⁴ Coé v. N. J. Mid. R'y, 31 N. J. Eq., 105 (1879).

⁹ Fifteen years' delay in enforcing a railroad mortgage after the principal became due is, in Vermont, a bar to foreclosure; but a foreclosure commenced during that time preserves the

⁵ Foster v. Mansfield, etc., R. R., 36 Fed. Rep., 627 (1888).

⁶ Hale v. Nashua, etc., R. R., 60 N. H., 333 (1880), holding also that the mortgagee cannot prevent a lease being made.

⁷ Union, etc., Ins. Co. v. Union, etc., Co., 37 Fed. Rep., 286 (1889).

⁸ Where the owner of all the bonds is also lessee of the property under an agreement to apply all profits to the coupons, the company may set up that the profits have been sufficient to pay the coupons. Chamberlain v. Conn., etc., R. R., 54 Conn., 472 (1887).

§ 847. Evidence and proof in foreclosure suits — Defaults.— In a suit to foreclose a corporate mortgage, the complainant should prove the granting of the mortgage; the issuance of the bonds, including the number of bonds and the character of them; the default on the coupons; that the default has not been waived; and if the principal has been declared due and payable, the declaration as provided for in the mortgage.¹ Although the company defaults in putting in its answer, yet it will be allowed to put one in if it has a substantial defense.²

§ 848. Collusive foreclosures — Remedies of the various parties.— A court of equity will set aside a mortgage foreclosure which has been obtained by fraud. Generally this fraud consists of collusion between the directors of the company and the bondholders, by which the foreclosure is not contested although the bonds are more or less fraudulent. Sometimes the stockholders complain of the fraudulent foreclosure; sometimes a part of the bondholders; sometimes the corporation itself; sometimes other creditors of the corporation. Sometimes these various parties intervene during the pendency of the foreclosure suit; but often they become aware of the facts only after a decree has been entered and then their remedy is more difficult.

security for all bondholders although they are not parties to the suit. In re Chickering, 56 Vt., 82 (1883). Cf. Simmons v. Taylor, 38 Fed. Rep., 682 (1889). See, also, § 771, supra.

¹ Coe v. East, etc., Co. 52 Fed. Rep., 531, 559 (1892). Evidence in a fore-closure suit may be given of the issue and existence of more bonds than are alleged in the complaint. Peck v. New York, etc., R'y, 85 N. Y.. 246 (1881).

² Although the corporation has defaulted for a year and a half in the fore-closure suit, yet it may apply for leave to put in an answer. Central T. Co. v. Texas, etc., R'y, 23 Fed. Rep., 846 (1885). The corporation will not be permitted to file an answer setting up irrelevant defenses after default, and fifteen months after a receiver has been appointed, where the only excuse for the delay is that reorganization proceedings had been going on but had failed. Central T. Co. v. Texas, etc., R'y, 24 Fed. Rep., 151 (1885). Nor will a bondholder

under the same circumstances be allowed to intervene. Id., 153 (1885).

- ³ See § 659, supra. Also §§ 766, 767, on bonds issued below par, etc.
 - 4 See §§ 659 and 767, supra.
 - ⁵ See § 828, supra.
 - 6 See § 659.
 - 7 See § 767.

8 See § 659, etc. The usual and proper method of having a sale set aside for fraud is by motion or petition, and not by a separate and new suit. Terbell v. Lee, 40 Fed. Rep., 40 (1889). Although a foreclosure of a railroad is brought about by another railroad which desires and thereby obtains the former road through the foreclosure proceedings, and the directors, trustees in the trust deed, attorneys and stockholders' of the two companies are practically the same in interest, yet the proceedings will not be set aside in the absence of actual fraud. County of Leavenworth v. Chicago, etc., R. R., 25 Fed. Rep., 219 (1885). Where the trustees of a second An irregular judicial sale nevertheless passes to the purchaser all the rights of the mortgagee who caused the sale.¹

Although a foreclosure sale through a receiver was fraudulent, yet the company cannot regain possession by ejectment against a part of the property. The remedy is in equity to set aside the sale.² An injunction is not the proper remedy of the creditors.³ A foreclosure will not be set aside even for fraud unless the complaining party shows that the relief will be of some benefit to him.⁴ Laches may bar any relief.⁵

§ 849. The decree and consent decrees — Appeals.— The decree should declare the fact, nature and extent of the default, and the

mortgage allow a decree of foreclosure of the first mortgage to be entered by default, one or more of the second mortgage bondholders for themselves and others may file a bill to set aside the decree as fraudulent and unjust in not settling the priority of liens, and may enjoin the sale under the foreclosure, and may attack the foreclosure decree for various erroneous decisions. This is a bill of review with a bill for relief against a fraudulent decree. Another remedy is for the bondholder to intervene and become a party to the first suit. Campbell v. Railroad, 1 Woods, 368 (1871). A simple contract creditor cannot intervene in a foreclosure suit. Tompson v. Huron Lumber Co., 30 Pac. Rep., 741 (Wash., 1892).

¹ Brobst v. Brock, 10 Wall., 519 (1870). ² New Castle, etc., R'y Co. v. New Castle, etc., R. Co., 25 Atl. Rep., 173 (Pa., 1892).

³ A general creditor cannot enjoin a sale of the property and obtain a receivership on the general allegations that a conspiracy exists to have the property sold under the existing mortgage for the purpose of depriving the general creditors and stockholders of their rights, the sale being public and to the highest bidder. No allegation was made as to default on the bonds or of the conduct and facts relied on to show fraud. The stockholders and directors had voted to sell the property at public auction. Ft. Payne Furnace Co. v. Ft.

Payne, etc., Co. et al., 11 S. Rep., 439 (Ala., 1892).

⁴The supreme court of the United States, in the case Foster v. Mansfield, etc., R. R., 146 U. S., 88 (1892), held that the court would not interfere to set aside a foreclosure on the ground of fraud where the plaintiff does not show at least a probability of personal advantage to himself by its being done. The court said: "A court of equity is not called upon to do a vain thing. It will not entertain a bill simply to vindicate an abstract principle of justice or to compel the defendants to buy their peace, and if it appear that the parties really in interest are content that the decree shall stand, it should not be set aside at the suit of one who could not possibly obtain a benefit from such action,"

⁵In this case, Foster v. Mansfield, etc., R. R., 146 U. S., 88 (1892), the court held that where a stockholder does not complain of a fraudulent foreclosure until ten years after the sale he is presumed to be guilty of laches, He must not only have been ignorant of fraud, but must have used reasonable diligence to inform himself of the facts. Hence a stockholder who was a resident near the railroad and who might have examined all the proceedings in the suit at any time is chargeable with notice of acts of collusion and fraud which appeared on the face of the papers.

amount due, and should give a reasonable time for payment, and if not paid then that the sale take place. The decree also generally specifies a price which is the lowest price at which the court will allow the sale to be made; and should direct the bringing of the fund into court for distribution. It may allow the purchasers to turn in bonds in payment at their pro rata value.

Although a second mortgagee is made a party defendant, yet if the decree fails to foreclose its lien, it remains a lien and its bondholders may redeem the property. On the other hand, the decree cannot determine matters not involved in the pleadings or proof. A judgment for a deficiency is not proper, if not asked for in the bill and the defendant interposed no answer. A decree

¹Chicago, etc., R. R. v. Fosdick, 106 U.S., 47 (1882). The form of a decree of foreclosure and sale of a railroad is given in full in Blair v. St. Louis, etc., R. R., 25 Fed. Rep., 237. For an approved form of a final decree of foreclosure and sale, see 3 Hughes, 365-381. It is not necessary that the decree of sale fix the amount due on the bonds secured by the mortgage which is being foreclosed. McMurtry v. Montgomery, etc., Co., 86 Ky., 206 (1887). A sale will not be decreed before the time for redemption has elapsed, where the security is adequate. Jackson, etc., Co. v. Burlington, etc., R. R., 29 Fed. Rep., 474 (1887). Concerning the judgment, its form, etc., and that informalities are not fatal, and that the referee may make the deed, see Farmers', etc., Co. v. Bankers', etc., Co., 119 N. Y., 15. In regard to the mode of crediting the mortgagor with income, where a redemption is allowed, see Racine, etc., R. R. v. Farmers' L. & T. Co., 49 Ill., 331 (1868). Although by stipulation all the cases are heard together, and the same evidence is used, yet separate decrees may be made. Chicago, etc., Land Co. v. Peck, 112 Ill., 408 (1885).

²In the case of Blair v. St. Louis, etc., R. R., 25 Fed. Rep., 282 (1885), the court held that where a railroad is to be sold under a final decree in foreclosure proceedings the decree should name an upset price large enough to cover costs, and all allowances made by the court, receiver's certificates and interest, liens prior to the bonds, amounts diverted from the earnings, and all undetermined claims which will be settled before the confirmation and sale. The court held also that the statutory liens should be paid before the mortgage bonds, but that equitable liens must come in after the bonds.

³ The decree may direct that the fund received on the sale be brought into court subsequently for directions in regard to distribution. Chicago, etc., Land Co. v. Peck, 112 Ill., 408 (1885).

⁴See ch. LIL

⁵ Simmons v. Taylor, 38 Fed. Rep., 682 (1889). A second mortgage is not foreclosed and wiped out by a foreclosure of the first mortgage, even though the second mortgagee is a party defendant to the suit, where the orders and decree in the suit do not foreclose all rights under the second mortgage. Bondholders under the second mortgage may subsequently assert their rights under such second mortgage. Simmons v. Taylor, 23 Fed. Rep., 849 (1885).

⁶ A decree as to a railroad foreclosure cannot determine questions between one party defendant and another party defendant, there being nothing in the pleadings or proof justifying such a decree. Graham v. Railroad, 3 Wall., 704 (1865).

⁷Central R. R. v. Central Trust Co.,

by consent is not an adjudication. It amounts to a contract and nothing more, but will be enforced by the court between those agreeing to it the same as all contracts are enforced. The decree is final only after the sale is made and distribution ordered.²

An appeal lies from a decree which fixes the amount due and which orders a sale if such amount is not paid within a specified time.³ But the decree is not final and appealable if it lacks any of these elements.⁴ An appeal lies from the final decree confirming

133 U. S., 83 (1890). See, also, Chicago, etc., R. R. v. Fosdick, 106 U. S., 47, 82 (1882).

1 Parties who have withdrawn their answer and consented to a decree cannot afterwards ask to have proceedings on the decree suspended. If the sale by consent is suspended on certain conditions and the conditions are not complied with, the sale may go on under the consent. Anderson v. Jacksonville, etc., R. R., 2 Woods, 628 (1873). A decree by consent is binding on those who consent thereto or acquiesce therein during a long time while parties are acting on the decree. Having been executed it will not easily be disturbed. Vermont, etc., R. R. v. Vermont, etc., R. R., 50 Vt., 500, 557, 558 (1877). An appeal lies from a decree entered by consent, but errors which the consent has waived will not be considered. Pacific R. R. v. Ketchum, 101 U. S., 289 (1879). "In the absence of any real adjudication by the court, and by virtue of a consent decree, to which they [bondholders] were not parties, to have the property in which they are interested disposed of, . . . would seem to me not at all in accordance with the principles of equity." Hence the court refused to order a sale pending an appeal by bondholders. Farmers' L. & T. Co. v. Central R. R., 4 Dill., 533 (1877).

² A decree of railroad foreclosure is not final until sale is made and rights determined. Railroad v. Swasey, 23 Wall., 405 (1874). A decree of foreclosure is complete only upon the entry of a final decree confirming, etc., on proof of non-payment. Chicago, etc.,

R. R. v. Fosdick, 106 U. S., 47 (1882). In Railroad Co. v. Bradleys, 7 Wall., 575 (1868), the court held that a decree directing a sale according to the deed of trust and the bringing of the proceeds into court was a final decree. It will be noticed that this was not a suit of foreclosure in equity.

3 First Nat'l Bank v. Shedd, 121 U. S., 74 (1886), where the decree left open for future decision the question of priority of liens; Chicago, etc., R. R. v. Fosdick, 106 U.S., 47 (1882); Hinckley v. Gilman, etc., R. R., 94 U. S., 467 (1876), where a receiver appealed from a decree specifying the amount of money he must pay on the settlement of his accounts; Milwaukee, etc., R. R. v. Soutter, 2 Wall., 440 (1864); Blossom v. Milwaukee, etc., R. R., 1 Wall., 655 (1863), where the appeal was by the bidder at the sale; Bronson v. Railroad, 2 Black, 524 (1862). A decree for costs to a bondholder who sues in behalf of himself and others is final and appealable. Trustees v. Greenough, 105 U.S., 527 (1881). As regards the beginning of the time from which the right to appeal runs, the date of the decree for a sale governs, and not the date when the commissioner executes the Duncan v. Atlantic, etc., R. R., 4 Hughes, 125 (1881).

⁴Railroad v. Swasey, 23 Wall., 405 (1874), where the amount was not fixed nor the property defined. So, also, in Grant v. Phoenix Ins. Co., 106 U. S., 429 (1882); Parsons v. Robinson, 122 U. S., 112 (1887); Burlington, etc., R'y v. Simmons, 123 id., 54 (1887). A decree upon an intervening petition of a claim-

the sale.¹ A purchaser at foreclosure sale may appeal from orders entered subsequent to his purchase and affecting him.² As a rule the bondholders cannot prosecute an appeal, the trustee not considering an appeal to be advisable.³ The damages payable on the supersedeas bond where the appeal fails are only those which result from the delay in selling.⁴

§ 850. Sale—Remedies against the purchaser—Redemption— Tender of interest due.—The time of the sale is within the discretion of the court.⁵ This discretion is very broad, and the court has power to delay the sale to such a time as seems best for all interests.⁶ The marshal or person who makes the sale may adjourn it

ant of rolling stock is not a final decree. McGourkey v. Toledo, etc., R'y, 146 U. S., 536 (1892).

¹ Sage v. Railroad, 96 U.S., 712 (1977). ² Kneeland v. American L. & T. Co., 136 U.S., 89 (1890); Blossom v. Milwaukee, etc., R. R., 1 Wall., 655 (1863). The purchaser may appeal from subsequent adjudications that he pay certain claims. Louisville, etc., R. R. v. Wilson, 138 U.S., 501 (1891). A purchaser at foreclosure sale who purchases under an order providing that prior claims thereafter to be determined shall be paid by him cannot appeal from such subsequent adjudications. Central Trust Co. v. Grant, etc., Works, 135 U.S., 207 (1890). As to appeals from decisions on costs, see Trustees v. Greenough, 105 U.S., 527 (1881); Cowdrey v. Galveston, etc., R. R., 93 U.S., 352 (1876).

³ See § 817.

⁴ Supervisors v. Kennicott, 103 U. S., 554 (1880). See, also, Jerome v. McCarter, 21 Wall., 17 (1874). The bond may be approved at any time during or after the term when the final decree was made. Sage v. Railroad, 96 U. S., 712 (1877).

⁵ Chicago, etc., R. R. v. Fosdick, 106 U. S., 47 (1882).

⁶The court will delay the sale of a railroad a reasonable time in order to await better times, but will not wait for a prosperous state of earnings. Duncan v. Atlantic, etc., R. R., 4 Hughes, 125

(1880). Although the court has power, during the foreclosure proceedings, to order the sale to be made at once, vet where the final decree may not require a sale, and the validity of some of the bonds and mortgages is disputed, such sale will not be ordered. Penn. R. R. v. Allegheny, etc., R. R., 42 Fed. Rep., 82 (1890). The court may suspend the execution of an interlocutory order that the property be sold, the object being to enable the parties to reorganize if possible. There can be no appeal from this. Washington, etc., R. R. v. South, etc., R. R., 55 Md., 153 (1880). Persons who are not parties to the foreclosure suit cannot obtain a stay of the sale unless they are 'quasi-parties, such as creditors or bondholders whose trustee is a party. Anderson v. Jacksonville, etc., R. R., 2 Woods, 628 (1873). Where an appeal is pending on a foreclosure, and the trustee deems it best not to sell during such appeal, the court will not, on the application of a bondholder, order the trustee to proceed to a sale. Farmers' L. & T. Co. v. Central R. R., 4 Dill., 533 (1877). During foreclosure proceedings the court will not order a private sale of land subject to the mortgage but not used for railroad purposes. Bound v. South Carolina R'y, 46 Fed. Rep., 315 (1891). Although in a foreclosure suit by a trustee the court allowed certain bondholders to come in and contest other liens, yet the court may order the sale of the property at once and hold in order to enable the mortgagor to pay the debt, or for any other good cause shown.1

The purchaser is generally required to make a substantial deposit as a part payment at the time of the sale.2 The mortgagee or a stockholder may purchase at the sale,3 but a director, as a rule, cannot.4 Although the property is sold at a very small price, yet the court will not set the sale aside for inadequacy of price, unless there was fraud or want of fairness.⁵ The court may order a resale if the rights of third persons have not intervened.6

the proceeds to await such contest. First Nat'l Bank v. Shedd, 121 U.S., 74 (1887). The court has power to postpone a sale where an appeal is pending from the foreclosure decree settling the priority of liens, even though such appeal is without a supersedeas. postponement is granted because the result of the appeal might be disastrous to the purchaser, or, if the sale were incapable of being rescinded, would render nugatory a decision on the appeal. Bouns v. South Carolina, etc., Co., 55 Fed. Rep., 186 (S. C., 1893). A court will refuse to order a sale of the property, although there has been a default in interest, where the income has been applied to improvements at the request of most of the bondholders, and the prospects are that the property will soon prosper; but the court will order a part of the income to be applied to past-due coupons. Williamson v. New Albany, etc., R. R., 1 Biss., 198 (1857). Individual bondholders cannot compel the trustee to proceed to sell after foreclosure has been decreed. Farmers' L. & T. Co. v. Central R. R., 11 West. Jur., 428 (U. S. C. C., 1877).

¹ Blossom v. Railroad, 3 Wall., 196 (1865). For the form of an order of the court postponing a sale, see 4 Hughes, 128. A receiver has discretion whether to adjourn the sale or not. Mere inadequacy of price is no ground for refusing to confirm the sale. Confirmation will not be refused although a party offers to bid twenty-one per cent. more on a resale. Bethlehem Iron Co. v. Phil., etc., R'y, 23 Atl. Rep., 1077 (N. J., 1892). The court may order a sale by the receiver although the statutes prescribe that sale shall be made by the register of the court. Rome, etc., Co. v. Sibert, 12 S. Rep., 69 (Ala., 1893).

² If the railroad is a large and valuable one, the purchaser is generally required to make a deposit of \$50,000. Turner v. Indianapolis, etc., R. R., 8 Biss., 380 (1878).

3 It seems that a mortgagee may purchase at a foreclosure sale. Eastern n. German Am, Bank, 127 U.S., 532 (1888). At a public judicial sale either party, as a rule, may bid. Pewabic Min. Co. v. Mason, 145 U. S., 349 (1892). And the court will not readily set the sale aside on the ground that, after the property was struck off, some one offered a higher price. Id.

4 See § 653.

⁵ Inadequacy of price is not sufficient ground to set aside a judicial sale unless it is so great as to shock the conscience and excite the suspicion of the court. Fidelity, etc., Co. v. Mobile, etc., R'v. 54 Fed. Rep., 26 (1893). Inadequacy of price is not enough to cause the court to set aside the sale. A want of fair dealing and an honest purchase must be shown. Not only this, but the parties complaining must show that some responsible person is ready to bid more. Turner v. Indianapolis, etc., R. R., 8 Biss., 380 (1878). Foreclosure sales, etc., will not be set aside unless the price is inadequate to such an extent as to shock the conscience. Graffam v. Burgess, 117 U. S., 180 (1886).

6 Stuart v. Gay, 127 U.S., 518 (1888).

The remedies for a fraudulent foreclosure or sale are discussed elsewhere.1 The court may, in its order confirming the sale, reserve the right to make further orders respecting claims, rights or interests in or lieus on the property.2

The court will put the purchaser into possession by a writ of possession.3 If the purchaser at the foreclosure sale refuses to fulfill he is liable to attachment or for the deficiency arising on a second sale.4 and he may be required to pay interest.5 For failure to carry out a purchase at a foreclosure sale the purchaser's bondsmen may be held liable." The bidder at the sale becomes a sort of party to the suit and may appeal from decisions affecting him.7 He may contest a suit for foreclosure subsequently brought by persons who were supposed to be cut off.8 Various questions relative to the rights of the purchaser are considered elsewhere; so, also, are the questions relative to the right to redeem. 10 After

A resale will be ordered when consented to by all and a bond is given that a higher price will be bid. The bidder is not entitled to turn in in payment of his bid an alleged contract of purchase of the claims of various creditors, such contract being contested. If on a resale the bidder does not fulfill, the court will confirm the original sale and hold the bidder at the resale responsible for the difference in price. Mayhew v. West Va., etc., Co., 24 Fed. Rep., 205 (1885).

1 See §§ 828, 767, and ch. XXXIX.

² Farmers' L. & T. Co. v. Newman, 127 U. S., 649 (1888), reversing Farmers', etc., Co. v. Burlington, etc., R'y, 32 Fed. Rep., 805, where the court held that it was legal to order the property resold in order to pay a prior lien which had not been adjusted. See, also, Burnham v. Bowen, 111 U.S., 776, 782 (1884), where there was a strict foreclosure. A decree that the surplus, after paying such of the bondholders as were known, should be brought into court to be distributed under the direction of the court to such bondholders and lienors as were entitled to it, and reserving all questions not decided for consideration, is proper. Chicago, etc., Land Co. v. Peck, 112 Ill., 408 (1885). For the form of a decree confirming a sale, see 4 Hughes, 132. And see p. 148 for decree

directing payment to the complainants, and p. 153, distributing the surplus. Before delivering possession of the property to the purchasers at foreclosure sale, the court will require part payment, and also require them to comply with future orders of the court. Central T. Co. v. Wabash, etc., R'v, 29 Fed. Rep., 618 (1886). Where a foreclosure sale takes place subject to a subsequent determination of the claims of intervening parties, the party purchasing must be brought in as a party to the whole suit. Fitzgerald v. Evans, 49 Fed. Rep., 426 (1892).

³ Terrell v. Allison, 21 Wall., 289 (1874); Brooks v. Vermont Central R. R., 14 Blatch., 463 (1878).

4 Caniden v. Mayhew, 129 U. S., 73 (1889).

⁵ The purchaser who is at once put in possession must pay interest on the purchase price up to the time of payment. Haven v. Grand, etc., R. R., 109 Mass., 88 (1871). For the form of a deed to the purchaser, see 4 Hughes, 133.

⁶ Terbell v. Lee, 40 Fed. Rep., 40 (1889). ⁷ See § 849, supra.

⁸ Simmons v. Taylor, 38 Fed. Rep., 682 (1889).

9 See ch. LII.

10 See § 841, supra.

foreclosure has been commenced by the trustee of a railroad mortgage the court is not inclined to allow redemption except upon terms which will protect the bondholders from a further default and a second suit to foreclose.1 A junior mortgagee seeking to redeem will be given a reasonable time to do so.2

¹ In Fleming v. Soutter, 6 Wall., 747 (1867), the decree authorized the complainant, when further coupons should road company has delivered its road to become due and unpaid, to apply for an order of sale in that same suit. The mortgagor, or persons with whom it has contracted, cannot stop strict foreclosure by giving security for past-due interest. Payment in full of principal and interest must be made. Ellis v. Boston, etc., R. R., 107 Mass., 1, 37 (1871.) Where foreclosure is commenced for non-payment of interest, the trustees taking possession, the owners of the equity of redemption may stop the foreclosure by paying the interest due, but will not be allowed to take possession except upon paying or securing the 682 (1889).

whole debt not yet due. Wood v. Goodwin, 49 Me., 260 (1861). Where a railthe trustee of the deed of trust to operate for the purpose of paving back interest according to a compromise of the creditors, the company may obtain possession again upon tendering unpaid back interest. Union T. Co. v. Missouri. etc., R'v. 26 Fed. Rep., 485 (1880), A mistake by the company in regard to the place where the interest is deposited to pay the coupons is sufficient excuse to prevent foreclosure. Union, etc., Ins. Co. v. Union, etc., Co., 37 Fed. Rep., 286 (1889).

² Simmons v. Taylor, 38 Fed. Rep.,

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CHAPTER L

PRIORITY OF THE MORTGAGE LIEN OVER OTHER LIENS, MORT-GAGES, DEEDS, LEASES, CLAIMS, JUDGMENTS, DEBTS AND LIA-BILITIES.

§ 851. Conflict of claims.

852. What personal-property, contracts, etc., are covered by the mortgage - Effect on the personal property of the provision that after-acquired property shall be subject to the mortgage - Levy of attachment or execution by corporate creditors on such property.

853. Until the trustee or receiver takes

possession, all moneys, credits, rents, profits and debts due to the company may be levied upon by corporate creditors or reached by a bill in equity filed by judgment creditors.

854. Rolling stock subject to the mortgage — Rolling stock is generally held to be personalty - Recording the mortgage

as a chattel mortgage. 855. Rolling stock — Rights of the general mortgagee and other parties where there is a "car trust" lease, conditional sale or purchase-money chattel mortgage

on rolling stock.

856. Land and railroad extensions which are not covered by the mortgage — The words of the mortgage are strictly construed, and no land or property is in-cluded unless clearly within the meaning of the words of the mortgage - Condemned land and abandoned rights of way.

§ 857. After-acquired property may be covered by the mortgage — Construction of the words used — Prior mortgages on property so acquired - Acquiring property through a "dummy" corporation — Purchase-money mortgages are prior in right.

858. Creditors of the corporation are not allowed to levy an attachment or execution upon the railroad or parts of it, even subject to the mortgage.

859. Liens by statute, mechanics' liens and judgment liens as affecting mortgages and receivers.

860. Claims by contracts and contractors, contractor's lien by contract or possession—Taxes—Advances made to keep the company afloat - Damages to persons and property - General debts existing when foreclosure is commenced - How far the mortgage is affected as

to its priority.
861. The "six months rule" to the effect that labor and supply claims arising within six months prior to a receiver being appointed will be paid out of the income received by

the receiver.

§ 851. Conflict of claims.— The mortgage bondholders take a risk when they foreclose their mortgage and cause a receiver to be appointed. It is a risk which cannot be avoided, because if the mortgage is not foreclosed when the corporation becomes insolvent there very soon will be nothing to foreclose, and if a receiver is not appointed there very soon will be nothing to receive. often happens that the receivership and foreclosure consume the whole property, leaving nothing whatsoever for the bondholders.

The avenues through which the property is lost are multitudi-

nous. They include not only the expense of litigation and the losses due to the receiver's operation of the road, but to other liens, judgments, debts, liabilities, mortgages and claims which at the end of the litigation are often decided to be prior in right to the first mortgage itself. The law relative to these conflicting liens and claims is stated in the following sections of this chapter.

§ 852. What personal-property contracts, etc., are covered by the mortgage - Effect on the personal property of the provision that after-acquired property shall be subject to the mortgage — Levy of attachment or execution by corporate creditors on such property.— Where the mortgage expressly and explicitly covers personal property, all personal property enumerated and all personal property necessary and essential to the operation of the road are included in the mortgage. This does not prevent the company from selling free from the mortgage shares of stock in other corporations.1 But bonds and stocks held by a railroad company at the time when foreclosure is commenced and a receiver is put in possession are subject to the mortgage.2 The mortgage does not prevent the company from collecting and using subscriptions to stock,3 nor from receiving and selling municipal bonds given in aid of the railroad.4 A mortgage is frequently given on specific bonds and stocks which are specified in the mortgage itself and are delivered to the trustee.5

The usual railroad mortgage does not prevent the use, sale and replacing of supplies, etc., used in the business, ont even though

¹ Where a railroad company owns shares of stock in an elevator company, such stock is not subject to the general mortgage executed by the railroad company. Humphreys v. McKissock, 140 U. S., 304 (1891). Cf. Central T. Co. v. Kneeland, 138 U. S., 414 (1891).

² Herring v. New York, etc., R. R., 105 N. Y., 340 (1887). See, also, Whitney v. New York, etc., R. R., 32 Hun, 164 (1884).

³ A mortgage on the railroad and property pertaining to it and on the property, etc., of the railroad does not cover unpaid subscriptions. Dean v. Biggs, 25 Hun, 122 (1881). A mortgage on all the land, property and effects of the corporation does not include uncalled subscriptions. Pickering v. Ilfracombe R'y Co., 37 L. J. (C. P.), 118 (1868); Lishman's Claim, 23 L. T. Rep. (N. S.), 759 (1870); King v. Marshall, 33 Beav., 565 (1864). Cf. Re Marine M. Co.,

L. R., 4 Eq., 601 (1867); British Prov. L. Ins. Co., *In re*, 4 De G., J. & S., 407; Gardner v. London, etc., R'y, L. R., 2 Ch., 201, 215.

⁴ A mortgage on all property now owned or hereafter to be acquired, followed by a specification of the various kinds of property, does not cover municipal-aid bonds when they were not mentioned in such specifications. Smith v. McCullough, 104 U. S., 25 (1881). It does not cover municipal bonds given in payment of subscriptions. Morgan County v. Thomas, 76 Ill., 120 (1875).

⁵Such mortgages are rapidly coming into use. See § 777, supra.

⁶ A mortgage on a horse railroad and franchise of the company, "with all the rights, privileges and property pertaining thereto," does not cover miscellaneous personal property used in the business. Millard v. Burley, 13 Neb., 259

the mortgage is so drawn as to cover personal property subsequently acquired by the corporation mortgagor.1

The courts will not hold that personal property acquired after the mortgage was given is covered by it, unless there is a provision in the mortgage covering such after-acquired property.2

(1882): Marsh v. Burley, id., 261, the latter case holding also that the mortgage, though filed as a chattel mortgage, was not effectual as such, inasmuch as the mortgagor retained possession and there was no evidence of good faith, a rule peculiar to Nebraska. In Farmers' L. & T. Co. v. Commercial Bank (see 12 Wis., 653), it was held that the mortgage in that case did not cover iron purchased to fasten down the rails, nor rolling stock which was sold and replaced by new. See, also, Union T. Co. v. Morrison, 125 U. S., 609 (1888); § 854. infra.

¹ A mortgage not purporting to cover after-acquired materials, except as they became a part of the road, does not cover railroad chairs not yet attached to the road, but a subsequent mortgage may have the first lien on them, even though such second mortgage refers to and affirms the first mortgage, in terms broader than the first mortgage and broad enough to cover the materials. Farmers' L. & T. Co. v. Bank of Racine, 15 Wis., 424 (1862). A mortgage covering the personalty now in use or as hereafter "changed or removed" does not cover new machinery which did not replace old. Words of a general nature followed by the words "consisting among other things of the following, to wit," are construed to include only articles of the same nature and kind as those specifically named. Brainerd v. Peck, 34 Vt., 496 (1861). A mortgage covering property subsequently acquired by an extension does not cover wood subsequently acquired by the whole road. City of Bath v. Miller, 53 Me., 308 (1865). A mortgage covering personal property subsequently acquired does not cover fuel, office

til actual possession is taken or the mortgage is filed as a chattel mortgage with a detailed description of the personal property as required by statute. Hunt v. Bullock, 23 Ill., 320 (1860). mortgage covering personal property thereafter acquired, so far as the same "shall be used for operating" the road, does not cover railroad chairs which had not yet been used to fasten down the rails. Such a mortgage attaches to subsequently acquired personalty upon possession or a new instrument being given, but not to personalty not covered. Farmers' L. & T. Co. v. Commercial Bank, 11 Wis., 207 (1859). Where the company upon the completion of its road is to become eutitled to transferable "certificates" or "land warrants" or "scrip" from the state entitling the company to sixteen sections of land for every mile of road built, and the company before any road is built gives a mortgage on twelve out of every sixteen certificates, a bona fide purchaser of the certificates from the company is protected, even though be has purchased more than the extra four certificates for each mile. Campbell v. Texas, etc., R. R., 2 Woods, 263 (1872).

² Farmers' Loan & Trust Co. v. Commercial Bank, 15 Wis., 424 (1862); S. C., 11 id., 207, holding that courts will not give effect to an intention of the parties which is not expressed in a railway mortgage so as to include materials subsequently acquired. If the mortgage does not expressly cover after-acquired property the court will not extend its terms so as to cover slaves acquired subsequently. State v. New Orleans, etc.; R. R., 4 Rob. (La.), 231 (1843), nor rails. State v. Mexican, etc., R'y, 3 id., 513 (1843). In Pierce v. Emery, 32 N. H., 484 furniture, materials for light, etc., un- (1856), the court held that subsequently

The usual mortgage does not cover contracts by which third persons contract with the company, as, for instance, to pay off a part of a prior mortgage, or to take a lease of the road. But the mortgage may be so drawn as to cover wornout materials, also supplies, tools and materials, especially under the provision covering after-acquired property. The mortgage may also cover equitable assets.

acquired personal property, such as railroad iron, became subject to the mortgage as an accession, even though there was no clause covering such subsequently acquired personalty.

¹The purchaser at foreclosure sale on a second mortgage does not acquire the right of the mortgagor to enforce an agreement of a prior vendee of part of its property to pay off a portion of a prior first mortgage, where this contract right was not specified in the notice of sale or mentioned at the sale. The second mortgage covered "causes of action, demands and choses in action of whatever nature." Milwaukee, etc., R. R. v. Milwaukee, etc., R. R., 20 Wis., 174 (1865). A receiver cannot claim the advantage of a personal contract between the president and an outside party in regard to salary. Snow v. Russel, etc., Co., 58 Hun, 134 (1890). A mortgage covers the company's equitable as well as legal assets. Toledo, etc., R. R. v. Hamilton, 134 U.S., 296 (1890). A mortgagee takes only such contract rights as the mortgagor has in a contract of the latter to purchase another road. If the contract is forfeited the mortgagee can only sue within a reasonable time to set the forfeiture aside. Wright v. Kentucky, etc., R'y, 117 U.S., 72 (1886). As to leases, see Moran v. Pittsburgh, etc., R. R., 32 Fed. Rep., 878 (1887); St. Paul, etc., R. R. v. United States, 112 U.S., 733 (1885).

²A mortgage covering "present and future to be acquired property" covers cast-off iron, etc., as against judgment creditors, although under another clause of the mortgage they may be sold by the company. If the property is insufficient to pay the mortgage debt the sheriff is liable nominally only for failure to sell on execution, inasmuch as such sale would have had to be subject to the mortgage. Coopers v. Wolf, 15 Ohio St., 523 (1864). Cf. Union T. Co. v. Morrison, 125 U. S., 609 (1888), as to wornout or discarded rolling-stock. As against a mortgage covering after-acquired property an execution on old or new rails and chairs is not good, though they are not yet attached to the road. Covey v. Pittsburg, etc., R. R., 3 Phil., 173 (1858).

³ A mortgage covering the railroad and "other materials used thereon" covers wood purchased for the use of the road. Coe v. McBrown, 22 Ind., 252 (1864). Also office furniture. Raymond v. Clark, 46 Conn., 129 (1878). And personal property which the mortgagee has taken possession of. Buck v. Seymour, id., 156.

⁴ In the case Phil., etc., R. R. v. Woelpper, 64 Pa. St., 366 (1870), the court held that a mortgage on property, etc., "now held or hereafter to be acquired," covered after-acquired rolling-stock, furniture, tools and materials for support and repair of the road. Office furniture is covered by the after-acquired property clause, and execution may be enjoined where the security is inadequate. Ludlow v. Hurd, 1 Dis. (Ohio), 552 (1857). A mortgage covering property subsequently acquired by the company covers switches purchased by and delivered to the company, even though they are sold by the company before they are

⁵ Toledo, etc., R. R. v. Hamilton, 134 U. S., 296 (1890); Central T. Co. v. Kneeland, 138 U. S., 414 (1891).

The mortgage should of course be recorded as a chattel mortgage as well as a real-estate mortgage. As to property subsequently acquired the mortgage may expressly cover it. Such a mortgage is legal. If a corporate creditor levies upon such personal property the mortgagee may enjoin a sale, if the mortgagee's security is inadequate. But ordinarily a court of equity will not interfere. The sheriff will be allowed to sell, subject of course to prior rights.

In New York it is held that a mortgage covering after-acquired property does not cover after-acquired personal property as against the sheriff in possession on an execution before foreclosure is commenced.⁵

put into use. Little Rock, etc., R'v v. Page, 35 Ark., 304 (1880). Rails which have been laid are of course covered by the mortgage as a part of the realty. United States v. New O. R. R., 12 Wall., 362 (1870), unless of course there is some equity to the contrary. See § 854. to rails not yet laid, see Weetjen v. St. Paul, etc., R. R., 4 Hun, 529 (1875). By express contract the wires of a telegraph line may be considered as personalty and as not subject to a mortgage. Western U. T. Co. v. Burlington, etc., R. R., 11 Fed. Rep., 1 (1882); Boston, etc., Co. v. Bankers', etc., T. Co., 36 id., 288 (1888). 1 See § 811.

²See § 857; also cases in this section; Stevens v. Watson, 4 Abb. Ct. of App., 302 (1865), holding that a mortgage of after-acquired property is valid as against the mortgagors and those claiming under them except purchasers for value without notice. Although the vendor or mortgagor of personal property is left in charge to sell property. this is only presumptive and not conclusive evidence of fraud. Preston v. Southwick, 115 N. Y., 139 (1889). also, Brackett v. Harvey, 91 id., 214 (1883). An equitable assignment does not exist if the assignor has any control over the fund, any power to collect or any power of revocation. An agreement to pay is not an equitable assignment. Christmas v. Russell, 14 Wall., 69.

3 Where a judgment creditor has

levied upon personal property which is subject to the mortgage, and the security for the mortgage is inadequate the mortgagee may enjoin any further proceedings on the executions. judgment creditor's remedy is then in equity to have the mortgagor's equity sold or to have a receiver appointed. Lane v. Broughman, 17 Ohio St., 642 (1867). Although a foreclosure suit is pending in the federal court and an application has been made for a receiver, yet the corporate property is open to an attachment. The court did not pass upon the priority of rights. South Car. R. R. v. People's Sav. Inst., 64 Ga., 18 (1879). The corporation itself canuot enjoin an execution on the ground that it impairs the security of its mortgagee. Boyd v. Ches., etc., Canal Co., 17 Md., 195 (1860). If the company has power to mortgage it may include after-acquired property in the mortgage. It will attach to cars, wheels, firewood and coal as against judgment creditors, and equity will enjoin executions. Phillips v. Winslow, 18 B. Monr. (Ky.), 431 (1857).

⁴ Eels v. Johann, 27 Fed. Rep., 327 (1886). Where the sheriff levies on horse cars, etc., which are subject to a mortgage, and the mortgagee notifies the sheriff of that fact, the sheriff may sell subject to the mortgage. Brill v. West End R. R., 4 Week. N. of Cas., 139 (1877).

⁵ Farmers' L. & T. Co. v. Long Beach, etc., Co., 27 Hun, 89 (1882).

After the trustee or receiver takes possession, the supplies, wood, ties, etc., cannot be seized under levy of attachment or execution at the instance of corporate creditors.¹

§ 853. Until the trustee or receiver takes possession, all moneys, credits, rents, profits and debts due to the company may be levied upon by corporate creditors or reached by a bill in equity filed by judgment creditors.— This principle of law is an old and salutary one. It is based on the fact that such moneys, etc., were, in large part at least, earned or obtained by the funds or surplus furnished by unsecured creditors, and hence should be open to the payment of their debts.²

¹The trustee in possession may prevent the sale under execution of rails and bridge timbers for repairing the road. Palmer v. Forbes, 23 Ill., 301 (1860). But he cannot enjoin the sale of cord-wood under such levy. Hunt v. Bullock, id., 320 (1860). See, also, Fales v. Roberts, 54 Ill., 192 (1870). Cordwood so sold before the appointment of a receiver cannot be recovered back by him. McIlrath v. Suure, 22 Minn., 391 (1873). Where ties are sold, but title is to pass only after they are laid, a creditor of the company cannot sell them on execution before title has passed. Owens v. Hastings, 18 Kan., 446 (1877). In the case of Felton v. Potomac, etc., Ins. Co., 4 Del. Ch., 573 (1873), the trustees of the first mortgage enjoined bondholders under the second mortgage from selling on execution a locomotive, the trustees of the first mortgage being in possession and operation of the road. Although the words "all other personal property wbatsoever in any way belonging or appertaining to the said railroad of the said company" do not cover canal-boats, yet if the mortgagor delivers them to the trustee as being covered by the mortgage, the trustee may hold them as against the company, but not as against a chattel mortgagee. Parish v. Wheeler, 22 N. Y., 494 (1860).

² A judgment creditor may reach the net earnings of a railroad though earned during foreclosure proceedings, there

being no receiver. Gilman v. Illinois. etc., Tel. Co., 91 U. S., 603 (1875), A. judgment creditor by filing a bill in equity obtains a prior lien on cash in hand of the corporation, although a mortgage foreclosure is pending, if there is no receiver in such foreclosure pro-American Bridge Co. v. ceedings. Heidelbach, 94 U.S., 798 (1876). Unless the mortgagee takes possession or a receiver is appointed by the court during foreclosure proceedings, the income prior to the sale belongs to a mortgagor and may be attached or reached by general creditors. Freedman's Sav. Co. v. Shepherd, 127 U. S., 494 (1888). Moneys belonging to the mortgagor and levied upon before a receiver is appointed or possession taken by the trustees is subject to such levy. Merchants' Bank v. Petersburg, etc., R. R., 12 Phil., 482 (1877). Although the mortgage of a building company covers the "net income realized from said property as the rents thereof," yet this does not change the common-law rule that until possession is taken by the mortgagee or a receiver, the accrued rents are not covered by the mortgage. The purchaser under a foreclosure of the second mortgage need not pay over such rents. In re Life Assoc., 96 Mo., 632 (1888). Even though the mortgage covers tolls, income and earnings, yet an execution levied prior to the appointment of a receiver takes moneys and balances due in preference to the receiver. If the reUnless the mortgage so provides the mortgagee is not entitled to rents and profits during the time the receiver is in charge before

ceiver has used them for other purposes the court will direct him to refund them out of the income. Gibert v. Washington, etc., R. R., 33 Gratt. (Va.), 645 (1881). In the case of In re Tallassee, etc., Co., 64 Ala., 567, 596 (1879), the mortgage did not cover the income. A mortgage on "all the real and personal property now. or hereafter, belonging to the company" is legal. It covers income and profits. Kelley v. Trustees, etc., 58 Ala., 489 (1877).The mortgagor is entitled to the income from property until the mortgagee takes possession in person or a receiver is appointed. Assignments of credits prior thereto by the mortgagor pass title. Young v. Northern. etc., Iron Co., 13 Fed. Rep., 806 (1880). Although the mortgage covers "moneys," yet the company cannot be required to turn over to the receiver the money which it has on hand at the time when a receiver is appointed. Such is the law, and it is not changed by the provision in the mortgage. Dow v. Memphis, etc., R. R., 20 Fed. Rep., 768 (1884); reversed on other points, 124 U.S., 652. In the case of Frayser's Adm'r v. Richmond, etc., R. R., 81 Va., 388 (1886), the court held that an execution levied after the appointment of the receiver, but before he filed his hond, was a lien on the company's funds in bank, representing the earnings of the company, even though the mortgage covered tolls, income, etc. A receiver appointed in a suit to foreclose a railroad mortgage is not entitled to earnings earned prior to his appointment. Noves v. Rich. 52 Me., 115 (1862).

Where the state loans money to the company, and takes a mortgage therefor, and provides by statute that the income shall he applied to necessary expenses, a creditor cannot levy on money necessary for such necessary expenses in the future. Macalister's Adm'r v. Maryland, 114 U. S., 598 (1885). The

mortgagor of real estate need not turn over to the receiver rents collected before the receivership. Rider v. Vrooman, 12 Hun, 299 (1877); 84 N. Y., 461. So long as the mortgagor company remains in the use and management of the property an attachment may be had of its income. The mortgage does not attach. Smith v. Eastern R. R., 124 Mass., 154 (1878). The case of Dunham v. Isett. 15 Iowa, 284 (1863), is to the contrary. The case of Woodman v. York, etc., R. R., 45 Me., 207 (1858), to the same effect, is inconsistent with the cases of City of Bath v. Miller, 51 id., 341 (1863), where an attachment of wood was sustained as against the mortgagee: and Noves v. Rich, 52 id., 115 (1862). where a receiver's suit against the superintendent to recover income received before the receiver was appointed failed; and City of Bath v. Miller, 53 id., 308 (1865), sustaining the prior decision between the same parties, supra; and Emerson v. European, etc., R'v. 67 id., 387 (1877), holding that moneys earned by the company under a contract with an express company belong to the company so far as earned before the mortgagee took possession, even though not yet paid, and that an instalment due for work done partly before and partly after such possession was taken would be apportioned. In the case of Ellis v. Boston, etc., R. R., 107 Mass., 1, 30, the court held that "the lien of the mortgagees attaches to the income only from the time of thus taking possession of the corporate property and frauchises." All earnings after that date belong to the mortgagees. If the mortgagees take possession of the income earned before they took possession. a general creditor of the company may reach the money by garnishee or attachment process. De Graaf v. Thompson, 24 Minn., 452 (1878). Such income not yet paid may be garnished in the

a strict foreclosure is decreed.¹ A railroad may mortgage future net earnings to secure the interest upon its bonds.²

After the receiver is appointed it is contempt of court for the

hands of an express company. Mississippi Val., etc., R'v v. United States Express Co., 81 Ill., 534 (1876). though the court does not appoint a receiver, yet in foreclosure proceedings the property is in its control and it may enjoin the collection of executions on judgments. Bill v. New Albany, etc., R. R., 2 Biss., 390 (1870). In Pullan v. Cincinnati, etc., R. R., 4 Biss., 35 (1865), the court appointed a receiver, not to take the road, but to receive one-fourth of the net earnings for the bondholders. In the same case, 5 Biss., 237, 247 (1873), the court held that the mortgagees were entitled to the income of the road as soon as it came into existence as property, and that by contract the mortgage lien attached and impressed a trust upon it. An early decision in Iowa is to the effect that a judgment creditor cannot reach money in the company's hands, where there is an outstanding mortgage on the income, even though there has been no default in the mortgage. Jessup v. Bridge, 11 Iowa, 572 (1861). An attachment or garnishment of funds which pass into the hands of the receiver is not good as against the mortgagee. Newport, etc., Co. v. Douglass, 12 Bush, 673 (1877). The words "income and revenues" in a mortgage cover "earnings." Tompkins v. Little Rock, etc., R. R., 15 Fed. Rep., 6 (1882). In the case of Wilder v. Shea, 13 Bush (Ky.), 128 (1877), the judgment creditor garnished the officers of the company in order to reach the corporate funds in their hands. The court held that the proceedings would not lie, and that the remedy was by bill in equity for a discovery and order to pay or a receiver in lieu thereof. A mortgage may be made to cover book accounts although they are not yet due. Bloomer v. Union, etc., Co., L. R., 16 Eq., 383 (1873).

An unsecured creditor of a railroad. who, without procuring a judgment, alleges corporate insolvency and obtains a receiver, is entitled to the earnings during the receivership as against mortgagees who did not commence foreclosure during such receivership. Sage v. Memphis, etc., R. R., 125 U. S., 361 (1888). Garnishee process lies against another railroad that owes the mortgagor corporation for through tickets sold. There had been no default on the mortgage in this case. Parkhurst v. Northern, etc., R. R., 19 Md., 472 (1862). Where a company leases its property and then mortgages its remaining interest, including the rents, and the mortgage is foreclosed, the whole sum realized goes to the mortgagee without deduction for salaries of officers of the mortgagor. Rent coming due after the sale goes to the purchaser, although partly earned before the sale. Sheaff's Appeal, 55 Pa. St., 403 (1867). A general creditor caunot attach money in the hands of a ticket agent of the mortgagor corporation. Such an agent is 'not a third person, but is the same as the company itself. Fowler v. Pittsburgh, etc., R. R., 35 Pa. St., 22 (1859). So. also, as to the treasurer (Sprague v. Stickney, 52 Me., 592 - 1864) and station agent. Pettingill v. Androscoggin, etc., R. R., 51 id., 370 (1863). In Williamson v. New Albany, etc., R. R., 1 Biss., 198

¹ Ellis v. Boston, etc., R. R., 107 Mass., 1, 28 (1871).

 ² Jessup v. Bridge, 11 Iowa, 572 (1861);
 State v. Northern Central R'y Co., 18
 Md., 193 (1861); Dunham v. Isett, 15

Iowa, 284 (1863), holding, also, that attachment or execution upon earnings so pledged may be restrained by injunction.

officers to collect moneys and deposit them to the credit of the company. But such moneys do not go to the mortgagee. The court will administer them for the benefit of the creditors at large.

(1857), the court refused to appoint a receiver, and in this wav enabled and permitted the company to apply a part of the earnings in completing and operating the road. Money which before it has been earned is specifically set aside to pay interest cannot be attached. Hence, where the mortgagor company has appropriated to the payment of interest an income which has been guarantied by another road, that sum cannot be attached by general creditors. The mortgagees were in possession in this case. Galena, etc., R. R. v. Menzies. 26 Ill., 121 (1861). Where prior to the appointment of a receiver a dividend was legally declared and money deposited to pay it, and part of the stockholders were paid and then the remainder of the fund drawn out by the company, the stockholders not paid bave a prior lien on that money, and the court will order the receiver to pay them. Matter of Le Blanc, 14 Hun. 8 (1878); affirmed, 75 N. Y., 598. Where foreclosure suit is commenced in the federal court and a receiver is appointed and is then discontinued, the parties preferring to fereclose in the state court, the former suit does not start the right of the mortgagees to claim the rents and profits. Johnston v. Riddle, 70 Ala., 219 (1881). Garnishment does not lie against the treasurer of the company. His possession is the company's possession, and he is merely agent. A mortgage lien does not extend to the money in the treasury for the operation of the read. McGraw v. Memphis, etc., R. R., 5 Coldw. (Tenn.), 434 (1868). In Tennessee it is held that moneys in the treasurer's hands belong to the mortgagee and cannot be attached. See 4 Cent. L. J., 430 (Tenn., 1877). "Even though the mortgage may in terms give a lien upon the profits and income until possession of

the mortgaged premises is actually taken or something equivalent donc, the whole earnings belong to the company and are subject to its control." Fosdick v. Schall. 99 U. S., 235, 253 (1878); Galveston R. R. v. Cowdrev, 11 Wall., 459 (1870). But from the time that the trustees demand possession, the company must account for the income, and the commencement of a suit by them to obtain possession is such a demand. Dow v. Memphis, etc., R. R., 124 U. S., 652 (1888). The mortgagor is entitled to keep the income received prior to the demand. Dow v. Memphis, etc., R. R., 125 U. S., 361 (1888). "While the mortgage may in terms give a lien upon the income and earnings of the road, it is well settled that, until the mortgagee takes possession or a receiver is appointed, the income and earnings belong to the company, and any judgment creditor may subject the same to the payment of his judgment." Farmers' L. & T. Co. v. Kansas City, etc., R. R., 53 Fed. Rep., 182 (1892). In proceedings to wind up a corporation the receiver cannot take a fund which by contract had been placed by the company in a trustee's hands for a specific purpose. Matter of Home Ass'n, 129 N. Y., 288 (1891). The income may be attached before default occurs, and such attachment has priority. Clay v. East, etc., R. R., 6 Heisk. (Tenn.), 421 (1871).

American Con. Co. v. Jacksonville, etc., R'y, 52 Fed. Rep., 937 (1892). A deed of surrender to the trustee of the mortgage, the terms of the deed being the same as those used in the mortgage, which do not expressly cover income, does not prevent the company from subsequently assigning to a general creditor certain income which was earned prior to the deed of surrender. Farmers' L. & T. Co. v. Cary, 13 Wis., 110 (1860).

² Where the receiver is put in posses-

§ 854. Rolling stock subject to the mortgage — Rolling stock is generally held to be personalty — Recording the mortgage as a chattel mortgage.— There has been a vast amount of litigation over the question whether rolling stock is personalty or realty. Also whether, if it is personalty, it may be seized under levy of attachment or execution by corporate creditors; and also how far the mortgagee of a railroad company is protected in his lien on the rolling stock.

The various states differ on the question of whether rolling stock is personalty or realty. Some courts hold that it is one and some hold that it is the other.

Owing to the peculiar nature of railroad property, which requires that it shall at all times be in condition to transport passengers and freight, for which purpose the rolling stock, consisting of engines and cars, is as necessary as the track itself, the courts in construing mortgages have been inclined to hold that rolling stock is realty.¹

sion of all the corporate property, both that which is mortgaged and that which is not, and the latter is used to continue the business and is thereby turned into cash, the court will not cause such cash to be paid to the mortgagees but will preserve it for the general creditors, an equitable allowance to the mortgagee for the use of the mortgaged property being made. Lehman v. Tallassee Mfg. Co., 64 Ala., 567, 598 (1879). A mortgage covering tolls and income covers only the net income after possession has been taken. Arrears of expenses in the operation of the road must be paid first. The mortgagee seeks equity in asking for a receiver and hence must do equity. The order that the receiver must pay such arrears may be made at the time of appointment or subsequently. Poland v. Lamoille, etc., R. R., 52 Vt., 144, 177 (1879). See, also, Williamson's Adm'r v. Washington, etc., R. R., 33 Gratt. (Va.), 624 (1881), holding that if such income has been applied to the interest on the bonds, it is to be replaced from the price realized on the sale of the road. For a review of the decisions and situation prior to the decision in Fosdick v. Schall, see 4 Cent. L. J., 458 (1877).

¹ Palmer v. Forbes, 23 Ill., 301 (1860);

Hunt v. Bullock, 23 Ill., 320 (1860): Titus v. Ginheimer, 27 Ill., 462 (1861); Titus v. Maybee, 25 Ill., 257 (1861), holding. also, that rolling stock only becomes personal property when severed from the road by the owner. Neither the plaintiff in execution nor the officer can detach it. Pullan v. Cincinnati & Chi. Air Line R. R., 4 Biss., 35 (1865); Railroad v. James, 6 Wall., 750 (1867); Miller v. Rutland & W. R. R., 36 Vt., 452 (1863), where the statute makes rolling stock realty; Williamson v. New Jersey S. R. R., 28 N. J. Eq., 279 (1877), holding that as between mortgagees and execution creditors rolling stock is part of the realty. To same effect, Farmers' Loan & T. Co. v. Hendrickson, 25 Barb., 484 (1857); State v. Northern Central R'y Co., 18 Md., 193 (1861), holding that a mortgage upon the entire line with its tolls and revenues covers the rolling stock and fixtures necessary to the production of tolls and revenues; Phillips v. Winslow, 18 B. Mon., 431 (1857), in which cars, wheels, fire-wood for engines and coal for machine shops were held to be included in a mortgage upon a road "and all other personal property and interest therein," as being things incident to and indispensable to the use In some of the states statutory and even constitutional provisions have been enacted in order to settle this question.¹

Nearly all railroad mortgages specifically name the rolling stock as being included in the mortgage. Even if not specifically named, however, the rolling stock is included in a mortgage covering all property of a corporation.² Although the mortgage covers the rolling stock this does not prevent the company from selling old stock and replacing it by new.³ The mortgage may cover such rolling stock as belongs to a division of a railroad system.⁴

Where the mortgage covers not only the present property of the

and enjoyment of the property conveved; Farmers' Losn & Tr. Co. v. St. Joseph, etc., R'y Co., 3 Dill., 412 (1875), holding that where a mortgage upon a railroad, including rolling stock and property strictly appurtenant to the road, had been recorded as a mortgage of realty, it is not necessary to record it as a chattel mortgage. But see, contra, Hoyle v. Plattsburgh & M. R. R. Co., 54 N. Y., 314 (1873), where rolling stock was held to be personal property and not a part of the realty. To same effect, Randall v. Elwell, 52 N. Y., 521 (1873), where it was held that rolling stock may be seized and sold for taxes.

¹ For a detailed statement of such provisions in the various states, see Part VII, *infra*, and Jones on Corporate Bonds and Mortgages, §§ 128, etc.

² Where a mortgage covers the road and "all the revenue and 'tolls" it covers "all the rolling stock and fixtures. whether movable or immovable, essential to the production of tolls and revenues." State v. Northern, etc., R'y, 18 Md., 193, 218 (1861); also Pullan v. Cincinnati, etc., R. R., 4 Biss., 35 (1865); also in Tennessee, see 4 Cent. L. J., 430 (1877). Under a power to mortgage its franchises and rights, a company may give a mortgage on rolling stock now owned or hereafter acquired, and such mortgage has priority over executions. Phillips v. Winslow, 18 B. Monr. (Ky.), 431 (1857). The mortgage lien on rolling stock continues after a consolidation "to the same extent to which it embraces the railroad itself - the same proportion of the one as of the other," and covers new rolling stock acquired by the consolidated company. It attaches, however, subject to existing liens on the rolling stock, such liens being money paid therefor by the receiver. Meyer v. Johnston, 53 Ala., 237, 332, 352 (1875); Id., 64; Id., 603 (1879), holding that where the title never passed to the company the lien does not attach. A mortgage on the "road and its franchise" does not cover rolling stock. Miller v. Rutland, etc., R. R., 36 Vt, 452, 498 (1863).

³ Union Trust Co. v. Morrison, 125 U. S., 609 (1888).

⁴ Separate mortgages on separate parts of a railroad may be made to cover separate portions of the rolling stock, each mortgage covering that part of the rolling stock which is assigned to that part of the road which is covered by it. Minn. Co. v. St. Paul Co., 2 Wall., 609 (1864). If, however, the underlying divisional mortgage is general in its terms it covers all rolling stock on the whole system. Id., 6 Wall., 742 (1867). A covenant that a mortgage shall cover so much rolling stock as shall be assigned to a certain division of a railroad, and that a certain proportion shall be so assigned, is not sufficient except to the extent that rolling stock is actually assigned. Where rolling stock is assigned to a division and thereby becomes subject to a mortgage, the lien is not lost by subsequent obliterations of the designations. United States T. Co. v. Wabash R'y, 38 Fed. Rep., 891 (1889). company but also property acquired in the future, rolling stock as soon as it is purchased becomes subject to the mortgage. If the mortgage covers the rolling stock, the rolling stock remains subject to it in any and all states into which the rolling stock may be run.

In states where rolling stock is held to be personalty it is customary and safer to record the mortgage as a chattel mortgage as well as a real-estate mortgage. The supreme court of the United States have held, however, that even if the rolling stock be personalty, yet the mortgage need not be recorded as a chattel mortgage.³

Even if the rule were otherwise the peculiar character of rolling

¹ Shaw v. Bill, 95 U. S., 10 (1877); Central T. Co. v. Ohio, etc., R. R., 36 Fed. Rep., 520 (1888). A mortgage on property "including all cars, engines and furniture that have been or may be purchased for or by said company "covers after-acquired rolling stock, even though it be regarded as personalty, and such mortgage has priority over a mortgage given on such rolling stock specifically. Morrill v. Noves, 56 Me., 458, 468 (1863): Pullan v. Cincinnati, etc., R. R., 4 Biss., 35 (1865), holding that a mortgage of "all present and future-to-be-acquired property, including the right of way and all rails and other materials used thereon and purchased therefor," covers the rolling stock; Scott v. Clinton & S. R. R. Co., 6 Biss., 529 (1876), holding that the constitutional provision of Illinois that rolling stock shall be deemed personal property does not change the rule that a mortgage covering future-acquired property includes the rolling stock if obtained before rights of execution creditors attach; Railroad Co. v. James, 6 Wall., 750 (1867). See, also, cases in note 2, p. 1371, supra. A constitutional provision that rolling stock is personalty does not prevent a mortgage, having the after-acquired property clause, attaching to the rolling stock "as soon as it comes into existence and is in possession of the mortgagor, and the mortgagees, under such circumstances, have a prior equity to the claims of creditors obtaining judgments and executions after the property is thus acquired and placed in posses-

sion of the mortgagor." Scott v. Clinton, etc., R. R., 6 Biss., 529 (1876).

² Rolling stock in one state belonging to a railroad in another state and subject to a mortgage in the latter state is subject to the mortgage wherever it goes, Nichols v. Mase, 25 Hun, 640 (1881); aff'd, 94 N. Y., 160. Pending an application in Kentucky by the trustee for a receiver of a Kentucky road which is being foreclosed, a Kentuckian cannot go into the state of Ohio and obtain an attachment in Ohio on rolling stock in Ohio, but belonging to the Kentucky road and subject to the mortgage. Bank v. McLeod, 38 Ohio St., 174 (1882). Attachment does not lie against cars owned by a foreign corporation, such cars being run on to a connecting line which comes into the state, especially where they are covered by a mortgage in the other state. Mich., etc., R. R. v. Chicago, etc., R. R., 1 Bradw. (Ill.), 399 (1878). But rolling stock manufactured to be used on an Illinois railroad and sent there for that purpose is subject to the laws of Illinois on this point. Hervey v. R. L. Loc. Works, 93 U. S., 664 (1876). So also where a contract is made in Ohio concerning rolling stock to be used on a railroad in Kentucky, the law of Kentucky in regard to chattel mortgages must be complied with. Hart v. Barney, etc., Co., 7 Fed. Rep., 543 (1881).

³ Hammock v. Loan & T. Co., 105 U. S., 77 (1881). Rolling stock is realty to the extent that a mortgage upon the railroad and rolling stock need not be recorded as a chattel mortgage in order stock would not make the mortgage void under the chattel mortgage act, by reason of the mortgagor being left in possession. Moreover, until creditors obtain a specific lien on the rolling stock the unrecorded mortgage is a valid lien. In addition to all this, there are authorities to the effect that an attachment or execution cannot be levied upon rolling stock, and that the remedy of creditors is sequestration proceedings, the policy of the law being to pre-

to cover the rolling stock. If recorded as a real-estate mortgage this is sufficient. The rule is different in regard to coal oil, etc. Farmers', etc., T. Co. v. St. Jo., etc., R'v, 3 Dill., 412 (1875). To same effect as regards recording as a chattel mortgage, Cooper v. Corbin, 105 Ill., 224 (1883); Williamson v. N. J., etc., R'v. 28 N. J. Eq., 277 (1879); Coe v. N. J. Mid. R'y, 31 id., 105 (1879). In Illinois, prior to the constitutional provision to the contrary, rolling stock was held to be real estate and hence covered and protected against attaching creditors by recording the mortgage as a real-estate mortgage only. Mich., etc., R. R. v. Chicago, etc., R. R., 1 Bradw. (Ill.), 399 (1878). A mortgage on the rolling stock is good though not recorded as a chattel mortgage. After the trustee takes possession creditors cannot levy upon it by attachment. The mortgage covers not only the broad gauge rolling stock in use, but also the narrow gauge rolling stock which is being gathered together for use upon a change in the gauge. Hamlin v. Jerrard, 72 Me., 62 (1881). In the case of Vilas v. Page, 106 N. Y., 439 (1887), it was stated that an execution sale of rolling stock in 1854 had been adjudged to have been good as against the mortgage, the mortgage not having been recorded as a chattel mortgage. Where the rolling stock is held to be personalty, a mortgage covering it as well as the railroad must be filed as a chattel mortgage in all the towns and cities through which the road runs. If not so filed the rolling stock may be sold on execution. Hoyle v. Plattsburgh, etc., R. R., 54 N. Y., 314 (1873). On this question see, also, Jones on Corporate

Bonds 8 142, etc. It may be sold for taxes. Randall v. Elwell, 52 N. Y., 521 (1873). There are decisions, however, to the contrary. If the mortgage covers rolling stock it must be recorded as a chattel mortgage. Otherwise executions will come in ahead of it. Williamson v. N. J. South. R. R., 29 N. J. Eq., 311 (1878). rev'g 28 id., 277. In California by statute a mortgage covering rolling stock must be recorded as a chattel mortgage. If not, an attachment may be levied on it as though the mortgage did not exist. Union, etc., Co. v. Southern, etc., Co., 51 Fed. Rep., 840 (1892). See, also, concerning the recording of the mortgage, § 811. supra.

1 A mortgage of a railroad and its rolling stock is legal although the mortgagor retains possession. "The purpose of a railroad, the nature of its property, the necessity of possession to accomplish its purpose, and the powers conferred in this charter, leave no reason to doubt the validity of a mortgage, without delivery of possession, of those chattels which are necessary to carry out the object of incorporation. Though the body is private the object is public, and it is clothed with a portion of the sovereign power to accomplish this." Covey v. Pittsburg, etc., R. R., 3 Phil., 173 (1858); Hunt v. Bullock, 23 Ill., 320.

² An unrecorded chattel mortgage is not void under the statutes as regards general creditors who have not obtained a specific claim upon the property by attachment, execution or other lien. Lane v. Lutz, 1 Keyes (N. Y.), 203 (1864).

serve the property intact so that it may continue to be operated as a railroad!

The general rule, however, seems to be to the contrary, where the rolling stock is looked upon as personalty.²

§ 855. Rolling stock — Rights of the general mortgagee and other parties where there is a "car trust," lease, conditional sale or purchase-money chattel mortgage on rolling stock.— Where rolling stock is delivered to a railroad company on a contract whereby the railroad company is to acquire title only upon payment therefor being made thereafter as specified in the contract, great doubt arises whether such a transaction is a conditional sale or is an absolute sale with a chattel mortgage right in the vendor. The difference is important, since, if the latter construction is put upon the contract, the contract must be recorded as a chattel mortgage, whereas in the former case it need not be recorded. The courts of the various states differ in their construction of such contracts. The controversy over them generally arises under a levy of attach-

¹ Rolling stock, rails, etc., cannot be levied upon by execution. Public policy forbids and the company itself may enjoin it. Sequestration proceedings are the proper remedy of the creditor. Covey v. Pittsburg, etc., R. R., 3 Phil., 173 (1858); Londonslager v. Benton, 4 id., 382 (1861), holding that this rule applies where the company is insolvent. See, also, Jones on Corporate Bonds, § 142, etc. As a general rule rolling stock, especially when in use, cannot be taken upon common-law process. Pennock v. Coe. 23 How., 117 (1859), where an execution against rolling stock was enjoined at the instance of the trustees of a mortgage; Boston, C. & M. R. R. v. Gilmore, 37 N. H., 410 (1858), holding that locomotives and cars when not in use may be attached; Freeman v. Howe, 24 How., 450 (1860), reversing 14 Gray, 566, holding that a state sheriff cannot take property - in this case cars - out of the lawful possession of a United States marshal by virtue of a writ of replevin.

² Although a mortgage covers the rolling stock, yet "until the mortgage was enforced by entry or judicial claim, the personal property of the railroad company was subject to its disposal in

the ordinary course of business, and, as such, was liable to be seized and taken on execution for its debts. This is not only common law, but the positive law of Illinois." When execution is about to be levied on rolling stock and a third party gives a bond to stay the execution. and the rolling stock is thereby saved, and is subsequently sold under foreclosure proceedings, the bondsman should be protected from the fund in preference to the mortgage, especially where the receiver received enough net income to have indemnified the bondsman. Union Trust Co. v. Morrison, 125 U. S., 591 (1988). Where the execution is levied on the rolling stock, etc., before any foreclosure proceedings are commenced, the mortgagee cannot enjoin it unless he can show that the security is inadequate. Coe v. Knox, etc., Bank, 10 Ohio St., 412 (1859). In New Hampshire, as between the company and its creditors, execution may be levied on its rolling stock. Boston, etc., R. R. v. Gilmore, 37 Wis., 410 (1858). Rolling stock may be sold on execution. Hoyle u. Plattsburgh, etc., R. R., 54 N. Y., 314 (1873). Rolling stock is subject to execution. 4 Wait's Pr., 34.

ment or execution by a creditor of the corporation, or under a claim by the general mortgagee of the corporation that his mortgage covers rolling stock delivered under such a contract, even though the deferred payments have not been made to the vendor. The courts, in accordance with an old principle of law, favor the construction that the contract is a conditional sale and that the vendor is protected. So, also, where a lease of rolling stock is made by the owner to the company, the lease providing that upon certain

In Missouri a sale of rolling stock conditionally, the title not to pass until certain deferred payments are made, is legal, and such a contract of sale need not be recorded as a chattel mortgage. The contract recited that the company had "received" the rolling stock. Rogers Loco, Works v. Lewis, 4 Dill., 158 (1877). Where rolling stock is purchased by a railroad and the contract provides that the vendor shall have a lien thereon for the price, such lien is good as against a prior mortgage of the vendor though the lien is not recorded and the mortgage covered after-acquired property. United States v. New Orleans R. R., 12 Wall., 362 (1870); Fosdick v. Schall, 99 U. S., 235 (1878). Where a construction company places rolling stock on a railroad and marks the cars with the latter's name and aids in the sale of the railroad bonds, which bonds purport to be upon an equipped railroad, the rolling stock is subject to the railroad mortgage notwithstanding the papers between the two companies showed that the title was not intended to pass. Central Trust Co. v. Marietta, etc., R'y, 48 Fed. Rep., 850 (1891). But a party who owned the rolling stock and gave possession to the construction company, and who took no part in supplying the railroad company with the rolling stock so as to aid in the sale of the bonds, may insist upon his right to take back the rolling stock. Id., 864. So held in favor of a car-building company as against equipment bonds issued by the railroad company. The Georgia statute relative to recording such contracts is not applicable to sales made prior to its enactment. Id., 865. This statute does not give title to a prior mortgagee as against the car-builder and car-owner. It was intended only for the protection of subsequent purchasers and creditors. Id., 868. The court held also that a conditional sale of rolling stock does not pass title. Under the Kentucky statute requiring the recording of chattel mortgages, etc., a conditional sale of rolling stock, partial payments being made, and delivery made, but the vendor retaining title and the right to retake possession. is not good as against bona fide purchasers and attaching creditors of the vendee, where such contract of conditional sale is not recorded. Hart v. Barney, etc., Co., 7 Fed. Rep., 543 (1881). A contract of sale of cars to a railroad to be paid for in instalments and title to remain in the vendor until paid for is a protection to the vendor as regards a prior mortgage on all property then owned or subsequently acquired by the company. So held even in Illinois where a statute is hostile to such sales. Fosdick v. Schall, 99 U. S., 235 (1878). In Iowa, under the statutes, a conditional sale must be recorded. Taylor v. Burlington, etc., R. R., 11 West. Jur., 337 (U. S. C. C., 1877). Concerning rolling stock contracts in Virginia, see Fidelity, etc., Co. v. Shenandoah, etc., R. R. Co., 9 S. E. Rep., 759 (Va., 1889). A mortgage covering after-acquired property does not attach to rolling stock belonging to a third person and in use by the railroad. The rolling stock does not become a part of the realty. Hardesty v. Pyle, 15 Fed. Rep., 778 (1883).

rentals being paid the title shall pass to the company, the rentals being in reality partial payments for the rolling stock, the courts look at the substance of the contract and hold that the lessor is protected the same as though he had made a conditional sale. In some states, however, such a lease is held to be a sale, not conditional but absolute, and that the vendor has an informal chattel mortgage which he must record in order to be protected.²

Where the lease is a mere pretense, the money therefor having been charged to the company, the contract will be held to be a

¹The supreme court of the United States in speaking of car leases said: "These in form were leases, but in substance, and properly so adjudged, were contracts of purchase, reserving title in the vendors until after the payment of certain annual sums, called rents, and with the right to retake possession on default in payment." Kneeland v. American L. & T. Co., 136 U. S., 89 (1890). A conditional sale of cars does not render the cars subject to a railroad mertgage on after-acquired property. even under the Iowa statute. A lease with an option to the lessee to purchase has the same effect, though not recorded. Myer v. Car Co., 102 U. S., 1 (1880), giving the contract itself. In Hervey v. R. I. Locomotive Works, 93 U. S., 673 (1876), Justice Davis wrote: "It is true that the instrument of conveyance purports to be a lease, and the sums to be paid are for rent, but this form was used to cover the real transaction. . . . It was evidently not intended that this large sum should be paid as rent for the mere use of the engine for one year. If so, why agree to sell and convey the full title on payment of the last instalment?" Justice Strong, in Heryford v. Davis, 102 U.S., 244 (1880), said: "Though the contract industriously and repeatedly spoke of loaning the cars to the railroad company for hire, it is manifest that no mere bailment for hire was intended. . . . It is quite unmeaning for parties to a contract to say it shall not amount to a sale when it contains every element of a sale."

² A rolling stock contract, which is practically a conditional sale, but in form a lease must be recorded under the Illinois chattel mortgage act. judgment creditor of the railroad may sell the rolling stock on execution if the contract is not recorded. Hervey v. Rhode I., etc., Works, 93 U. S., 664 (1876). Where cars are rented to the railroad, but notes equal to an agreed purchase price are passed, and upon payment of the notes title is to pass, and if notes are not paid the lessor is to keep back payments and sell the cars and apply the same on the notes, a sale is the effect. Title is thereby passed at once and a chattel mortgage exists. The instrument must be recorded in order to obtain protection. Heryford v. Davis, 102 U.S., 235 (1880). A centract, in the form of a lease, whereby the owner of cars leases them to a railroad on an annual rental, equal to one-sixth of the cost thereof, such rental to be paid for ten years and then the cars to belong to the railroad, is not a lease nor a conditional sale, but is a mortgage with the seller as a mortgagee. Unless the instrument is acknowledged and recorded as a chattel mortgage according to the statute of the state wherein the cars are situated, the mortgage is void as against attaching and execution creditors, or bona fide purchasers, but takes precedence over a prior general mortgage covering after-acquired property. Frank v. Denver, etc., R'y, 23 Fed. Rep., 123 (1885).

sale. So also where the corporate officers took the title to cover advances made by them.2

A "car trust" is practically an agreement of several owners or a single owner of cars to place them in the hands of a trustee or agent to sell on the instalment plan, the agent being authorized and directed also to issue certificates representing the interests of the vendors in the instalments. These certificates are then used, bought and sold like shares of stock. Car manufacturing com-

¹Where property, though nominally leased by the railway company, is acquired under an arrangement which amounts in law to a purchase of it, the mortgagee or purchaser at the foreclosure sale may claim the property. McGourkey v. Toledo, etc., R'y, 146 U. S. 536 (1892). In this case the court held that the apparent lease was merely a mortgage where there was no provision for resuming title, but merely a provision for resuming possession for the purpose of sale.

² Where the title to rolling stock has not passed, but the officers advance the money to pay for it on the understanding that they take title until the company reimburses them, the mortgage has priority. Receivers of N. J., etc., R'y, 27 N. J. Eq., 658 (1876). "Contracts, by which railways insufficiently equipped with rolling stock of their own, lease or purchase, under the form of a conditional sale, such equipment from manufacturers, are not of uncommon occurrence, and, when entered into bona fide for the benefit of the road, have been universally respected by the courts. . . . If, however, such contracts are made by directors of the road with themselves, or with others with whom they stand in confidential relations, they are open to the suspicion which ordinarily attaches to transactions between a corporation and its directors; and, if they appear to have been made directly or indirectly for their own benefit, courts will refuse to give them effect." Thus where the rolling stock is purchased by the directors and in the name of a trustee of a car trust, he being merely a figure-head, payments being made from the funds provided for the building of the road under the construction contract, the court held that there was such a mingling of the funds and of the interests of the directors as directors with their interests as purchasers of the rolling stock that the title to the rolling stock passed to the company and the car trust was invalid. The court said: "Any arrangement by which the road is equipped with rolling stock belonging to another corporation should be distinct, unequivocal and above suspicion." McGourkey v. Toledo, etc., R'y, 146 U.S., 536 (1892).

³ In the case of Ricker v. American Loan & Trust Co., 140 Mass., 346 (1885), a car trust was described as being formed by an instrument in writing containing numerous articles, for the purpose of buying, selling and leasing railroad rolling stock, to be sold or leased to a certain railroad company. with provisions for admitting other persons to membership. The members of the association were to furnish money for the purchase of the rolling stock, and were to have certificates for the amounts so furnished. The principal sum contributed by each member was. to be repaid in ten annual instalments with interest. Both principal and interest were payable only out of the rentals received for the rolling stock. A plan was adopted by which the association delivered the property to a corporation as trustee, which issued the certificates to the members of the association, and also executed the leases to. the railroad company, with provisions:

panies often dispose of their cars under a contract similar to those described above.1

§ 856. Land and railroad extensions which are not covered by the mortgage — The words of the mortgage are strictly construed, and no land or property is included unless clearly within the meaning of the words of the mortgage — Condemned land and abandoned rights of way.— The courts are not inclined to give the mortgagee more security than his mortgage clearly calls for, especially so since

for a rental sufficient to meet the above payments of principal and interest, in addition to expenses, including taxes. At the end of ten years the rolling stock was to become the property of the railroad company. The original board of managers was named in the articles of association, but the shareholders were to have the power to remove them and elect others. At all meetings every shareholder was to have one vote for

each share of stock owned by him, and provision was made for the transfer of shares. The association was not to be dissolved by the death of members. Every owner of one or more shares was to be entitled to a proportional share of the rental received.

In an able address by Mr. Francis Rawle, before the American Bar Association in 1885, on the subject of "Car Trust Securities," the following clear

1 A car-trust certificate is in effect a mortgage bond with interest coupons attached. The form is given in this case at length. But where the cars are purchased by the railroad company and are then declared by it to be subject to the car trust, the latter is not protected. prior mortgage on all present and future property of the railroad company takes precedence of the car-trust lien. Central T. Co. v. Ohio C. R'y, 36 Fed. Rep., 520 A car trust was involved in Frank v. Denver, etc., R'y, 23 Fed. Rep., 123 (1885), and Humphreys v. St. Louis. etc., R'y, 37 id., 307 (1889). In the case Fidelity, etc., Co. v. Shenandoah, etc., R. R., 9 S. E. Rep., 759 (Va., 1889), the court said in regard to a car trust: "There was, in legal effect, a conditional sale of the equipment in question, with a retention of title as a security for the purchase-money. The written contract between the parties, it is true, purport to be leases, but the mere language used is by no means conclusive of the legal nature of the transaction." The car trust is entitled to reasonable rental from the receiver, but as to the rest the car trust may take the property back and present a claim as a general In the case McGourkey v. Toledo, etc., R'y, 146 U. S., 536 (1892), the court said: "The car-trust associations were not corporations or partnerships, nor legal entities of any description, but were simply car-trust certificates in the hands of various persons." If the trustees of a car trust make a contract which by its terms is to be binding only on the assenting certificate holders, the court will enforce the contract as 'written. said: "Whether the car trust is a partnership or a joint-stock association or a quasi-corporation is not of the least importance." Humphreys v. New York, etc., R. R., 121 N. Y., 435 (1890). It is legal for a railroad company to sell rolling stock to a party, and then to take a lease of the same rolling stock on the car-trust principle, the instalments of rent being equivalent to partial pay-A debenture holder cannot cause the transaction to be set aside. Re Eastern, etc., Co., 65 L. T. Rep., 668 (1891). Concerning car trusts, see, also, 2 Nat'l Corp. Rep., 347; North American Review, March, 1891.

everything added to the mortgage is generally added at the expense of general unsecured creditors who realize little or nothing on their claims. Hence a clause in the mortgage to the effect in general that it covers all property pertaining to the operation of the railroad is construed not to include land and property which may be

statement of the character of a "Car Trust Association," or a "Car Trust," is made:

"The articles of association fix the amount of the capital stock, and provide that those persons who sign the articles of association, and any others that may join it, or hold certificates of its stock, shall constitute its membership; that neither the death, insolvency or bankruptcy of any stockholder, nor the transfer of shares, nor the admission of new members into the association, shall work its dissolution: that when a member ceases to be a stockholder he ceases to be a member of the association, and shall not afterwards be liable on any contract, and any person purchasing a share shall thereby become a member of the association; that only the property of the association shall be liable for its debts, and all its contracts shall contain a provision that only its funds and property shall be liable for its debts, and that no member of the board of managers nor any stockholder shall be so liable personally; that its entire business shall be transacted and all contracts shall be made only by the board of managers, who are chosen from the stockholders and named in the articles, with a provision for filling vacancies in the board and for removing any of its members at a meeting of the stockholders called for that purpose; that upon payment of the stock subscribed the stockholder shall receive a certificate of his ownership; that the rolling stock, when built, shall be delivered to a trustee named in the articles. and that this trustee shall have power to contract for the association with (usually) a special railroad company to furnish it with rolling stock upon certain specified terms.

"The board of managers of the association then purchase the rolling stock and arrange to furnish it to the railroad company through the medium of a trustee. The latter takes the legal title to the property, executes the contract with the railroad company, receives and holds the company's obligation to pay for it, issues certificates to the persons entitled, usually in sums of a thousand dollars each, receives the periodical payments under the contract, and pays the amounts of principal and interest due to the certificate-holders until the rolling stock has been fully paid for, when it becomes the property of the railroad company under the terms of the contract.

"Formerly it was the practice to pay off the principal of the certificates by successive drawings, but now it has become more common to execute the certificates in series with a fixed maturity for each, usually running from one to ten years."

A car-trust company wherein the subscribers were to have certificates representing their interest, and the rolling stock owned by the company was to be rented at a certain rental, which was to go to the subscribers until their subscriptions were repaid, and then the rolling stock was to belong to the lessee, is a joint-stock company - a mere voluntary association. Ricker v. American Loan & Trust Co., 140 Mass., 346 (1885). See, also, Mills v. Hurd, 29 Fed. Rep., 410 (1887). The holders of car-trust certificates have been held to be merely bondholders subject to prior mortgages. Central, etc., Co. v. Ohio, etc., R. R., 36 Fed. Rep., 520 (1888). See, also, on the subject of "Car Trusts," Ray on Contracts, and North American Review. 1891.

sold and separated from the railroad without interfering with its regular operation. And, in general, the courts are not inclined to extend the meaning of the words used in the mortgage.¹

¹ In the case Walsh v. Barton, 24 Ohio St., 28 (1873), it was held that a mortgage covering all property, real or personal, "whether now owned or hereafter to be acquired, used or appropriated for the operating or maintaining the said road," does not cover land which has not been used or appropriated for operating or maintaining the road. To same effect. Boston, etc., R. R. v. Coffin, 50 Conn., 150 (1882). In the case Morgan v. Donovan, 58 Ala., 241 (1877). it was held that a mortgage covering lands in connection with the railroad covered only such land as was useful and necessary and employed in the construction, maintenance, operation, repair and preservation of the railroad, and did not include property bought of an opposition steamboat company to prevent competition. It was also held that property illegally acquired was not covered. A mortgage covering all property pertaining to the "main line" does not cover an extension which is built for use in connection with the main line. Randolph v. N. J. West Line R. R., 28 N. J. Eq., 49 (1877). A mortgage on all property pertaining to the main line of railroad does not cover lands acquired but not used for railroad purposes. Id. Where one corporation owns all the stock of another corporation, the property of the latter is not subject to a mortgage given by the former, but an independent first mortgage may be given by the latter company. Central T. Co. v. Kneeland, 138 U. S., 414 (1891). A mortgage covering the railroad and the lands upon which depots, etc., are erected and used for depot purposes does not cover woodlands lying seven miles from the railroad and purchased for the purpose of getting wood for fuel. Dinsmore v. Racine, etc., R. R., 12 Wis., 649 (1860). In the case Shamokin Valley R. R. v. Livermore, 47 Pa. St., 465 (1864), it was held that a mortgage covering the railroad "with its franchises and appurtenances" did not cover town lots which were not mentioned in the mortgage. "Road and appurte- . nances" cover everything that belonged to the road as a railroad. Kennebec. etc., R. R. v. Portland, etc., R. R., 59 Me., 9 (1871). The term "all other property" contained in a mortgage is construed to cover only the property used in and about the specific property described in the mortgage where there was a clear intent to exclude a large class of property. Alabama v. Montague. 117 U.S., 602 (1886). A hotel owned by a railroad is subject to its mortgage, although title is taken in the name of a trustee. United States T. Co. v. Wabash, etc., R'v, 32 Fed. Rep., 480 (1887). See, also, Boston, etc., R. R. v. Coffin, 50 Conn., 150 (1882). A mortgage on all property covers all land owned by the company, and a subsequent purchaser of the land takes subject to the mort-Wilson v. Boyce, 92 U. S., 320 (1875). A mortgage on the railroad and franchise, station-houses, engine-houses, etc., and other appendages, with all the lands thereto belonging and intended for the use and accommodation of said road, covers only such land as the company could have acquired compulsorily by power of eminent domain. Eldridge v. Smith, 34 Vt., 484 (1861).

Where a right of way is deeded to a company it passes under a foreclosure of a mortgage given by the company. Columbus, etc., R'y v. Braden, 110 Ind., 558 (1886). In Mississippi it has been held in the case of Miss. Val. Co. v. Chicago, etc., R. R., 58 Miss., 896 (1881), that a mortgage covering all land, property, etc., in use upon the railroad or attached or appurtenant to it, "intending hereby to include all its present real and personal estate and franchises now

Under "appurtenances," as used in mortgages of railways, is included all such property as is necessary for the use of the road and the enjoyment of its franchise. The mortgagee cannot convey a clear title to land which has been condemned and taken but not paid for, nor does it cover such part of the road as is built by another company for itself on an abandoned right of way belonging to the first company.²

owned or hereafter to be acquired, without any exception or reservation whatever." does not cover a hotel, storehouse, vacant lots and a farm. A mortgage on the "main line" of an Arkansas railroad does not cover real estate, depots, etc., in Tennessee. 4 Cent. L. J., 430 (Tenn., 1877). Although the corporation purchases land ultra vires, and it does not come under the mortgage, yet if the mortgagee forecloses and sells all the property, including this land, and the legislature validates the foreclosure, the purchaser at the foreclosure sale takes title. Youngman v. Elmira, etc., R. R., 65 Pa. St., 278 (1870). A mortgage by a Pennsylvania railroad corporation on all its railroad, etc., in Pennsylvania does not cover a right of way, road-bed, etc., owned by such corporation in the state of West Virginia. Chapman v. Pittsburg, etc., R. R., 26 W. Va., 299 (1885). The mortgage given before the construction of the road covers the road although there are variations from the original route as laid out. Meyer v. Johnston, 53 Ala., 237, 357 (1875). In the case of State v. Glenn, 18 Nev., 34 (1883), the court held that a conveyance of "all rights, privileges, franchises and property whatever, now belonging or hereafter to belong to or to be acquired by said party of the first part," covered only such property as was useful or necessary for the construction, maintenance, operation, preservation, repair or security of the railroad mortgaged, and did not include certain land sixty feet away from the railroad. Rails temporarily laid down do not become fixtures. Cavuga R'y v. Niles, 13 Hun, 170 (1878). In the case of Van Kleuren v. Central R. R.,

38 N. J. L. 165 (1875), the court held that where a railroad removed its tracks from a gravel pit which it had sold, it was a question for the jury to decide whether the tracks belonged to the land by being intended to remain there permanently, or was mere personalty by the intent to remove it. A mortgage on "all and singular the estate and property, real, personal and mixed," of the company covers lands, whether those lands are used with the railroad or not. Robinson v. Atlantic, etc., R. R., 66 Pa. St., 160 (1870). A mortgage may cover what equitable title a company has to land, even though it does not have the legal title. Augusta, etc., R. R. v. Kittel, 52 Fed. Rep., 63 (1892). For a case involving a mortgage covering a leasehold interest of the mortgagor, see Vermont, etc., R. R. v. Vermont Central R. R., 34 Vt., 1, 46 (1861).

¹ Seymour v. Canandaigua & N. F. R. R. Co., 25 Barb., 285 (1857), holding that land, with the erections thereon, which was essential to the use and enjoyment of a railroad, was subject to a mortgage upon the road, but that land not used by it for railroad purposes was not so subject; Eldridge v. Smith, 34 Vt., 484 (1861); Calhoun v. Paducah & M. R. R. Co., 9 Cent. L. J., 66 (1879 — U. S. Dist. Ct. W. D. Tenn.); Shamokin Valley, etc., R. R. v. Livermore, 47 Pa. St., 465 (1864); Parish v. Wheeler, 22 N. Y., 494 (1860), holding that canal-boats used and run in connection with a road beyond its terminus were not included.

²Where a company gives a mortgage on its whole line, but constructs only the middle section, and then another company constructs the two ends on a § 857. After-acquired property may be covered by the mortgage—Construction of the words used—Prior mortgages on property so acquired—Acquiring property through a "dummy" corporation—Purchase-money mortgages are prior in right.—A corporation mortgage may cover property which is acquired by the corporation after the mortgage is given. This is now the well-established rule. It seems to be contrary to the common law, or at least is a wide extension of the common-law rules. It is due, however, to the necessity or public policy of preserving intact and holding together the whole of a railroad or system of railroads and other quasi-public properties. If the mortgage by its express terms covers not only the personal property, but also all property acquired in the future by the corporation, the courts hold that such a mortgage becomes a lien on subsequently-acquired property the moment it is acquired by the mortgagor corporation.

right of way procured by such latter company, the mortgage does not cover the two ends. On a foreclosure the court will not order a sale of the middle section alone, but of the whole, in order to preserve the system. Chicago, etc., R'y v. Loewenthal, 93 Ill., 433 (1879). Where under the statute a railroad company condemns the whole of a canal and appropriates it for its road-bed, a mortgagee of the canal must bring suit to set the condemnation aside within the time fixed by the statute of limitations or his rights will be barred, even though he charges fraud and that the railroad company controlled the canal company. Carpenter v. Canal Co., 35 Ohio St., 307 (1880). Damages due to the owner of land from a railroad company which has taken the land for railroad purposes must be paid, and the foreclosure of an existing mortgage on the railroad gives no rights in such land except subject to such obligation to pay. Western Pa. R. R. v. Johnson, 59 Pa. St., 290 (1868). If a reorganized company uses such land it is liable for such damages. Pfeifer v. Sheboygan, etc., R. R., 18 Wis., 155 (1864). If the right of way is granted conditionally the mortgage is subject of course to the condition. Ingalls v. Byers, 94 Ind., 134 (1883). But where the company condemning the

land gives a bond, the owner must resort to the bond and cannot pursue the purchaser upon foreclosure. Southern Penn. R. R., 85 Pa. St., 73 (1877). Where a railroad seizes land for its use and does not pay for it, damages recovered therefor are prior in right of payment to a prior mortgage covering after-acquired property. Buffalo, etc., R. R. v. Harvey, 107 Pa. St., 319 (1884). Damages obtained by abutting property owners against a railroad must be paid before the mortgage bonds, even though the mortgage was executed before the damages were ascertained. Penn. Mut. etc., Co. v. Heiss, 31 N. E. Rep., 138 (Ill., 1892). A receiver may be ordered to pay damages assessed against the company for the condemnation of land. Rome, etc., Co. v. Sibert, 12 S. Rep., 69 (Ala., 1893).

¹A mortgage may by its terms cover after-acquired property. Although the railroad company with such a mortgage out gives a special lien on the rents and profits of new road to be constructed by parties, yet such special lien held by such parties is second to the old general mortgage. Thompson v. White, etc., R. R., 132 U. S., 68 (1889); Pennock v. Coe, 23 How., 117 (1859); Dunham v. Cincinnati, P., etc., R'y Co., 1 Wall., 254 (1863); Galveston R. R. v. Cowdrey, 11

If the mortgage does not expressly cover subsequently-acquired property it does not attach thereto except as such property becomes fixtures of the property actually mortgaged.¹ A mortgage

Wall., 459, 480 (1870): United States v. New Orleans R. R., 12 Wall., 362 (1870); Shaw v. Bill. 95 U. S., 11, 15 (1877): Parker v. New Orleans, etc., R. R., 33 Fed. Rep., 693 (1888); Williamson v. New Albany, etc., R. R., 1 Biss., 198 (1857); Morrill v. Noyes, 56 Me., 458 (1863); Seymour v. Canandaigua, etc., R. R. Co., 25 Barb., 284 (1857): Stevens v. Buffalo & N. Y. R. R. Co., 31 Barb., 590, 596 (1858): Raymond v. Clark, 46 Conn., 129 (1878); Buck v. Seymour, id., 156: Nichols v. Mase, 94 N. Y., 160 (1883); Philadelphia, W. & D. R. R. Co. v. Woelpper, 64 Pa, St., 366 (1870); Phillips v. Winslow, 18 B. Mon., 431 (1857): Myer v. Johnston, 53 Ala., 324 (1875); Ludlow v. Hurd, 1 Disney (Ohio), 552 (1857); Coe v. Mc-Brown, 22 Ind., 252 (1864). See, also, State v. Northern Central R'y Co., 18 Md., 193 (1861); Pierce v. Emery, 32 N. H., 484 (1856); Howe v. Freeman, 14 Gray, 566 (1860); Coe v. Columbus, P. & I. R. R. Co., 10 Ohio St., 372 (1847). But see Brainerd v. Peck, 34 Vt., 496 (1861); and for the law under the Louisiana code, State v. Mexican Gulf R. R., 3 Rob. (La.), 513 (1843); Dunham v. Earl (U.S. Cir. Dist. of Mich.), noted in Redfield on Railways, vol. 2, p. 506; Hodder v. Kentucky, etc., R'y Co., 7 Fed. Rep., 793 (1881), holding, also, that the directors have the power to mortgage, and that the president may acknowledge the mortgage out of the state; Coopers v. Wolf, 15 Ohio St., 524 (1864), where the mortgage included also worn-out material. The mortgage has priority over a subsequent mortgage specifically on rents and profits. Thompson v. White, etc., R. R., 132 U. S., 68 (1889). A railroad mortgage may cover future property of the company. A subsequent mortgage is subordinate thereto. Pennock v. Coe, supra; Whiting v. N. Y., etc., R. R., 32 Hun, 164 (1884), where stocks. etc., were involved. The clause covering

after-acquired property makes the mortgage "a lien upon all property subsequently acquired by it [company] which comes within the description in the mortgage." It covers property of which the company acquires either the legal or equitable title. Central T. Co. v. Kneeland, 138 U.S., 414 (1891). After-acquired property may be covered by the mortgage. Brady v. Johnson, 26 Atl. Rep., 49 (Md., 1893): Stevens v. Watson, 4 Abb. Ct. of App. Dec. (1865); Benjamin v. Elmira, etc., R. R., 49 Barb., 441 (1867); aff'd, 54 N. Y., 675 (1873); Boston, etc., Co. v. Bankers', etc., Tel. Co., 36 Fed. Rep., 288 (1888). After-acquired property may be included in a telegraph mortgage. United, etc., Co. v. Boston. etc., Co., 147 U. S. Rep., 431 (1893). Power to mortgage gives power to mortgage subsequently-acquired property. etc., R. R. v. Woelpper, 64 Pa. St., 366 (1870). A mortgage may be made to cover "future to be acquired property." It will take precedence over executions. Butler v. Rahm, 46 Md., 541 (1877). That the mortgage is legal, see, also, Jessup v. Bridge, 11 Iowa, 573 (1861); Whitehead v. Vineyard, 50 Mo., 30 (1872). In Louisiana by statute a mortgage cannot cover after-acquired property except such property as becomes part of the mortgaged line. A subsequent government land-grant is not covered by it. New Orleans, etc., R'v v. Union T. Co., 41 Fed. Rep., 717 (1890). But compare Id. v. Parker, 143 U.S., 42 (1892); also Bell v. Chicago, etc., R. R., 34 La. Ann., 785 (1882).

¹ Davidson v. Westchester, etc., Co., 99 N. Y., 558 (1885). Cf. Pierce v. Winslow, 32 N. H., 484 (1856), holding that railroad iron was covered as an accession. See, also, Shamokin Valley R. R. v. Livermore, 47 Pa. St., 469 (1864); Phillips v. Winslow, 18 B. Mon., 431 (1857). Although a mortgage does not by its on a railroad executed prior to the completion of the road covers it, although the route differs from that which was originally laid out.¹ A provision in a mortgage that it shall cover subsequently-acquired property will make subject to the mortgage new branch lines, additions and extensions of the railroad; also new roads built and other lines of railroad purchased by the mortgagor corporation, and also depots and terminals.²

A right of way subsequently acquired is also covered by the mortgage. Land subsequently acquired by the company is covered

terms cover property subsequently acquired, yet it covers subsequent improvements, extensions, additions, etc., these being considered by the court as fixtures added to the property. Wood v. Whelan, 93 Ill., 153 (1879). In the case Miss. Val. Co. v. Chicago, etc., R. R., 58 Miss., 896 (1881), the court said that a mortgage of "all property" now owned is valid, but a mortgage of "all property" hereafter acquired is void for uncertainty.

1 Meyer v. Johnston, 53 Ala., 237, 331 (1875); Elwell v. Grand St., etc., R. R., 67 Barb., 83 (1874). In the case Willink v. Morris Canal, etc., Co., 4 N. J. Eq., 377 (1843), the court held that a mortgage on a canal, the route of which had been laid out but the land not yet fully acquired, covered land and property subsequently acquired and used for the canal, although the mortgage did not expressly cover property subsequently acquired.

² A mortgage covers the depots, termini, etc., as well as the track between the termini. A terminal mortgage, subsequent in time, is subject to it. Where the railroad furnishes the money to a "dummy" to purchase property, its mortgage attaches to that property. The scheme in this instance to place the terminal mortgage ahead of the prior general mortgage failed. Central T. Co. v. Kneeland, 138 U. S., 414 (1891). A mortgage covering after-acquired property covers the subsequently constructed railroad as fast as work is put upon it. Though a subsequent mortgagee furnishes the money that builds the latter part of the railroad, vet the prior mortgagee has a first lien. Galveston R. R. v. Cowdrey, 11 Wall., 459 (1870). A mortgage which covers afteracquired property covers a railroad which is subsequently purchased by the mortgagor, and which is used as a part of its charter route. Branch v. Jesup. 106 U.S., 468, 485 (1882). It is a question whether a mortgage on after-acquired property attaches to a railroad subsequently acquired without the consent of the stockholders as required by the charter. Hodder v. Kentucky, etc., R'y, 7 Fed. Rep., 793 (1881). In the case Alexandria, etc., R'y v. Graham, 31 Gratt. (Va.), 769 (1879), the court held that a mortgage covering all property. real and personal, "acquired, or which may be acquired, constructed, or to be constructed, of every species, nature and kind whatsoever," did not cover an extension built under the charter as amended. A subsequently constructed branch line is covered by the mortgage even as against the contractor who built it. Seymour v. Canandaigua, etc., R. R., 25 Barb., 284 (1857). A branch line constructed under a different charter and with different stockholders is not covered. Meyer v. Johnston, 53 Ala., 237, 331 (1875). A mortgage covering after-acquired real estate of a railroad "and other appurtenances thereto helonging" covers a hotel erected by the company adjacent to the depot. Omaha, etc., R'y v. Wabash, etc., R'y, 18 S. W. Rep., 1101 (Mo., 1892).

³ Under the clause in a mortgage covering after-acquired property, the right

by the mortgage, but in regard to this class of property the courts will not give a liberal construction to the words of the mortgage. Hence if the mortgage refers to property used for railroad purposes, land not so used is not covered. And in general the court will not subject outside lands to the mortgage unless the terms of the mortgage clearly cover them.¹ A lease of a railroad to the

of a railroad subsequently acquired from a city to build tracks on certain streets is covered by the mortgage. Quincy v. Chicago, etc., R. R., 94 Ill., 537 (1880). A decree of foreclosure of an irrigation canal does not prevent the mortgagor from selling pendente lite to a party the right to construct another canal. The latter is not covered by the foreclosure of the former. Even the clause that after-acquired property shall be covered by the mortgage was held not to apply to such a case as this. Mitchell v. Amador, etc., Co., 75 Cal., 464 (1888). It is difficult to reconcile this last case with the law.

¹ A mortgage on present property and property subsequently acquired attaches to land subsequently acquired in preference to second mortgagees and subsequent judgment creditors. The covenant for further assurance operates as an equitable lien on property subsequently acquired. Stevens v. Watson, 4 Abb. App. Dec., 302 (1865). A mortgage covering after-acquired lands, "appurtenant or necessary" to the operation of the railroad, does not cover a congressional land-grant to the company (reviewing the cases). New Orleans, etc., R'y v. Parker, 143 U.S., 42 (1892), reversing Parker v. New Orleans, etc., R. R., 33 Fed. Rep., 693 (1888). The lower court held also that a forfeiture of the land by the government did not affect the mortgage. A mortgage covers property "acquired and to be acquired;" it attaches to real estate thereafter acquired, and is prior in right to judgments rendered against the company after the mortgage was given. Bell v. Chicago, etc., R. R., 34 La. Ann., 785 (1882). In Calhoun v. Memphis, etc., R. R., 2 Flip., 442 (1879), the court beld that a clause covering after-acquired property "belonging or appertaining to the said railroad" does not cover lands not used for railroad purposes; and the court proceeded to say that the afteracquired property clause, though legal as regards property subsequently acquired for railroad purposes, yet will not be enforced as regards other property, but judgment creditors may levy upon and sell it. The company's contract right to purchase certain land is covered by a previous mortgage on present and subsequently acquired property. The mortgagee may complete the contract by paying for and taking the land. Farmers' L. & T. Co. v. Fisher, 17 Wis., 114 (1862). A mortgage covering property subsequently acquired attaches to a land contract by which the company agrees to purchase certain land. Even though a consolidated road completes the purchase and improves the land, it is subject to the mortgage. Hamlin v. European, etc., R'v. 72 Me., 83 (1881), referring to a prior decision, in which it was held that such a clause covered a subsequently-acquired leasehold. A railway mortgage on afteracquired property does not attach to property purchased ultra vires of an opposition steamship line, in order to prevent competition. Morgan v. Donovan, 58 Ala., 241 (1877). A mortgage covering such after-acquired property as is "used or appropriated for the operating or maintaining" of the road does not attach to real estate acquired but not used for those purposes. Walsh v. Barton, 24 Ohio St., 28 (1873). The provision is liberally construed. Little Rock, etc., R'y v. Page, 35 Ark., 304 (1880); Buffalo, N. Y. & E. R. R. Co. v. Lampson, 47 Barb., 533 (1867), where land mortgagor railroad after the mortgage is made comes under this clause, and the mortgagee may carry out the lease or not, as he desires 1

Where there are liens existing upon property at the time when it is acquired by a corporation which has given a mortgage on all its present and subsequently-acquired property, those liens are prior in right to the lien of the mortgage of the purchasing company.² But where one corporation is merely a "dummy" of an-

in the name of a director being declared in trust for the corporation was held to be subject to a mortgage previously placed upon its property. Where the company, upon the completion of its road, is to become entitled to transferable "certificates" or "land warrants" or "scrip" from the state, entitling the company to sixteen sections of land for every mile of road built, and the company before any road is built gives a mortgage on twelve out of every sixteen certificates, a bona fide purchaser of the certificates from the company is protected even though he bas purchased more than the extra four certificates for each mile. Campbell v. Texas, etc., R. R., 2 Woods, 263 (1872). Where the terms of the mortgage specify property used and occupied for railway purposes, it does not cover lands subsequently acquired but not used for such Seymour v. Canandaigua, purposes. etc., R. R., 25 Barb., 284 (1857). A mortgage on lands used with the railroad does not cover woodland seven miles away. Dinsmore v. Racine, etc., R. R., 13 Wis., 649 (1860).

1 See § 852.

² "The future-acquired property clause of a railway mortgage attaches only to such property as the company owns or may thereafter acquire, subject to any liens under which it comes into the possession of the company." McGourkey v. Toledo, etc., R'y, 146 U. S., 536 (1892); United States v. New Orleans R. R., 12 Wall., 362 (1870). Any liens or mortgages which are upon property subsequently acquired by the company have priority over a mortgage

covering after-acquired property. Williamson v. N. J. South, R. R., 29 N. J. Eq., 311 (1878); aff'g, on this point, 28 id., 277; Rand v. Wilmington, etc., R. R., 11 Phil., 502 (U. S. C. C., 1876); Branch v. Jesup, 106 U.S., 468, 486 (1882). This question has arisen often in connection with cars sold or delivered conditionally to the company. Concerning these cases see § 855. In regard to the claims of contractors, see § 860. In general, see, also, Boston, etc., T. Co. v. Bankers', etc., Tel. Co., 36 Fed. Rep., 288 (1888); Western, etc., Tel. Co. v. Burlington, etc., R'v. 11 id., 1 (1882); Willink v. Morris Canal & B. Co., 4 N. J. Eq., 377 (1843); Branch v. Atlantic, etc., R. R., 3 Woods, 481 (1879); Galveston R. R. v. Cowdrey, 11 Wall., 459 (1870); Fox v. Seal, 22 Wall., 424 (1874), involving a contractor's lien for construction; Pierce v. Emery, 32 N. H., 484 (1856), involving a government lien for duties upon rails; Williamson v. New Jersey Southern R. R. Co., 29 N. J. Eq., 311 (1878), holding also that a vendor to a corporation may avoid the sale for fraud as against the corporation and purchasers or mortgagees unless they be such bona fide and for a valuable consideration; Vermont, etc., R. R. Co. v. Vermont Central R. R. Co., 34 Vt., 1 (1861), holding the mortgage to be subject to the company's liability for rent on a railroad leased to it. The mortgagee cannot object to the validity of the lease. The bonded debt of a road consolidated with another may take precedence over a mortgage given by the consolidated road. Compton v. Wabash, etc., R'y, 15 N. E. Rep., 110 (Ohio, 1888).

other corporation, a mortgage on the property of the latter attaches to property of the former, even in priority to a new mortgage on the property of the former.\(^1\) Where one corporation owns all the stock of another corporation, the property of the latter is not subject to a mortgage given by the former, but an independent first mortgage may be given by the latter company.\(^2\) A purchase-money mortgage has priority over a previous mortgage given by the purchasing company, even though such previous mortgage covered after-acquired property.\(^3\) If the property was fraudulently acquired the vendor may rescind even as against the mortgage.\(^4\) The questions, of when and to what extent a mortgage covering

¹ Central T. Co. v. Kneeland, 138 U. S., 414 (1891). Where the mortgagor company constructs a branch road in the name of another company and then takes a lease of the property, the mortgagee acquires the leasehold right by reason of the clause covering afteracquired property. But a contract made by such lessor company with another company with the consent of the mortgagor lessee company, by which contract the third company had certain track privileges, is binding on the mortgagee. Coe v. Del., L. & W. R. R., 34 N. J. Eq., 266 (1881).

²Central T. Co. v. Kneeland, 138 U. S., 414 (1891).

³ United States v. New Orleans R. R., 12 Wall., 362 (1870), holding, however, that rails when laid are subject to the general mortgage. A railroad mortgage covering after-acquired property does not, in regard to land purchased by the company, give a lien prior in right to the vendor's purchase-money mortgage or lien. The latter has priority. As to after-acquired property the general mortgagee is not a purchaser for value. The purchaser at a foreclosure sale takes subject to such purchase-money lien. The fact that the suit therefor in the state court was abandoned and proceedings taken in the federal court is no waiver. Loomis v. Davenport, etc., R. R., 17 Fed. Rep., 301 (1882). A mortgage covering after-acquired property does not take precedence over a purchasemoney chattel mortgage, although the latter is not recorded as required by statute. Frank v. Denver, etc., R'y, 23 Fed. Rep., 123 (1885). In Pierce v. St. Paul, etc., R. R., 24 Wis., 551 (1869), the court held that a grantor of a road-bed to the mortgagor could not set up a vendor's lien for purchase-money as against bona fide purchasers at foreclosure sale where he did not intervene in the foreclosure The clause in the mortgage covering subsequently-acquired property took precedence. In Taylor v. Burlington, etc., R'y, 11 West. Jur. 337 (U.S. C. C., 1877), the court held that a mortgage covering after-acquired property attached to rolling stock ahead of an unwritten and unrecorded contract by which the vendor was to retain title until he was paid, such a contract being void under the statutes of Iowa. See. also, Fisk v. Potter, 2 Abb. Ct. of App., 138 (1865), where an agent of a corporation who had sold land to it was held to have waived his vendor's lien as against prior mortgagees. A purchase-money mortgage is good against a consolidation into which the purchasing company has been merged. North Car. R. R. v. Drew. 3 Woods, 692 (1879).

⁴Where rolling stock is acquired by fraudulent representations as to the bonds which are issued in payment therefor, the vendor may rescind and his rights are superior to those of a mortgage covering after-acquired property. Williamson v. N. J. South. R. R., 29 N. J. Eq., 311 (1878); aff'g, on this point, 28 id., 277.

after-acquired property attaches to rolling stock, personal property, income, etc., are considered elsewhere.

§ 858. Creditors of the corporation are not allowed to levy an attachment or execution upon the railroad or parts of it, even subject to the mortgage.— This rule is due to public policy. A railroad is valuable to the public when it is operated as a whole. It would lose this value if it was divided into many parts, as it would be if it could be levied upon in portions under executions or attachments. Moreover, even if the execution were levied upon the whole, the question would arise as to who should operate the road after the levy and before the sale. Public policy requires that railroads should not be subject to executions. The creditors of the corporation, after judgment and execution returned unsatisfied, should be required to file a bill in equity for sequestration, if they desire to have the railroad or the equity of redemption sold.²

In some states, however, a contrary view of the law is taken, and in still other states the statutes provide that a railroad or the company's equity of redemption therein may be sold under levy of execution ³

¹See §§ 852, 854.

² See ch. LIII, infra. Where the tolls of a bridge are sold under levy of execution, a court of equity will appoint a receiver to collect them and take possession of the bridge until the judgment is paid. Covington, etc., Co. v. Shepherd. 21 How., 112 (1858). Judgment creditors of an insolvent cable railroad company may file a bill in equity to have the property sold and the proceeds applied to the judgments. If the suit is in behalf of all who may come in, all share proportionately. Suit might have been for the complainant alone. George v. St. Louis, etc., R'y, 44 Fed. Rep., 117 (1890). See, also, James v. Railroad, 6 Wall., 752 (1867); Loder v. N. Y., etc., R. R., 4 Hun, 22 (1875); Whitney v. N. Y., etc., R. R., 32 Hun, 164 (1884). In Virginia a court of equity will at the instance of judgment creditors cause the road to be leased for a period long enough to pay the judgments. If the road is in the possession of another company which is made a party and does not object, its rights, if it has any, are disregarded. Winchester, etc., R. R. v. Colfelt, 27 Gratt. (Va.), 648 (1876). The sale of a railroad under execution is a sale subject to existing mortgages. Galveston R. R. v. Cowdrey, 11 Wall., 459 (1870).

³ In Georgia under the code a railroad may be sold under a judgment at law without resorting to a suit in equity. The road must be sold as a whole, however. City of Atlanta v. Grant. 57 Ga.. 340 (1876). In Mississippi by statute the judgment creditor now files a bill to have the equity of redemption sold. He is not confined to a receiver to operate the road. Vicksburg, etc., R. R. v. Mc-Cutchen, 52 Miss., 645 (1876). A judgment creditor may cause to be sold under the levy a tract of land owned by a railroad company subject to its use by the company for tracks, etc. Oakland R'y v. Keenan, 56 Pa. St., 198 (1867). Where executions are levied on various parts of the road and it is in danger of being sold in parcels and rendered valueless, the insolvent company may file a bill to enjoin the executions and to have one sale of the whole. Mortgagees may be brought in and all claimants compelled to file their claims or lose them. After the sale a bill of Similar questions concerning personal property are considered elsewhere.¹

§ 859. Liens by statute, mechanics' liens and judgment liens as affecting mortgages and receivers.— The next source of danger and loss to railroad bondbolders is the statutory lien law of the state in which the railroad is situated. The fact that railroad bonds to the full amount of the value of the railroad are generally issued in the inception of the enterprise, and the fact that these bonds are generally largely "water," being issued at less than par, have caused the legislatures to enact statutes giving lien rights for labor, supplies, construction work and damages.

The ordinary mechanic's lien statute does not apply to railroads unless the statute expressly states that it shall,² and the courts are not inclined to extend the application of lien statutes by a liberal construction ³

Inasmuch as the liens now under consideration are created entirely by statute, and the statutes of each state are different from those of the other states, very few general rules can be deduced. Cases in which many of such lien statutes have been construed are given in the notes below. Liens created by statute are subject to

foreclosure by a bondholder who had been the receiver fails. Macon v. Western R. R., 9 Ga., 377 (1851). Where the property of the company is worth less than the amount of its mortgages and the sheriff refuses to levy an execution thereon, only nominal damages can be recovered against him therefor. Coopers v. Wolf, 15 Ohio St., 524 (1864). The purchaser of a part of the road on an execution sale may redeem the whole road from a foreclosure that is going on. Wood v. Goodwin, 49 Me., 260 (1861). Where a receiver is in possession for the mortgagee, a judgment creditor will be allowed to sue out and execute a fi. fa. and an elegit, but he does so "subject to the rights and interests of the receiver," and the right of the public to have the canal operated. rule in England grew out of the fact that the mortgagee and receiver had no interest in the land but only in the right to take possession and operate and take the tolls. Potts v. Warwick, etc., Canal Co., Kay, 142 (1853).

¹ See § 855.

² Buncombe, etc., Com'rs *v.* Tommey, 115 U. S., 122 (1885).

³ Seventh, etc., Bank v. Shenandoah, etc., Co., 35 Fed. Rep., 436 (1887). A statutory lien for material, supplies and labor does not give any lien for money loaned to pay for them. Statutory liens are not assignable at law. The enforcement of a statutory lien cannot be in a court of law. It must be in a court of equity. Cairo, etc., R. R. v. Fackney, 78 Ill., 116 (1875).

⁴ In Central T. Co. v. Texas, etc., R'y, 27 Fed. Rep., 178 (1886), the court held that trucks, scales, etc., were not included in the word "materials" as used in the railroad lien law giving a lien. The court said: "The word 'material,' in the railroad lien law, has no broader or other signification than in ordinary lien laws, and in them it is unquestioned that it includes only those things which pass into permanent structure." There is no equitable lien on the personal property which has passed into the hands of the receiver and been sold. In Missouri the lien attaches if the ma-

prior mortgages on the property, unless the statute provides otherwise. A statute creating a lien for laborers' wages cannot make

terials are furnished under an open and current account if the last item of the account accrued subsequently to the time within which a lien could be filed. If a party is entitled to a lien on property in the hands of a receiver, he need not take the steps prescribed by statute. but may apply to the court appointing the receiver. Central T. Co. v. Texas, etc., R'v. 23 Fed. Rep., 673 (1885). An employee's lien under the New Jersey statute does not take precedence over a prior mortgage, Hinkle v. Camden, etc., Co., 21 Atl. Rep., 861 (N. J., 1890); nor over other liens. Wright v. Wynockie. etc., Co., id., 862 (1891). A laborer is entitled to his lien under the statute although the contractor was to take payment in bonds. It is sufficient to file the lien in one county. A mortgage given before construction, and for the purpose of constructing a railroad, is second to labor liens incurred in the construction. Farmers', etc., T. Co. v. Canada, etc., R'y, 26 N. E. Rep., 784 (Ind., 1891). The Illinois statute giving a lien on railroads renders a lien for rails good. Such lien is not waived by a special contract for a lien. A subsequent mortgage is subject to the lien. Chicago, etc., R. R. v. Union, etc., Co., 109 U.S., 702 (1884). A contractor's lien under the Iowa statute is not waived by an agreement of the railroad to pay him out of certain municipal subscriptions. Meyer v. Construction Co., 100 U. S., 457 (1879). A statutory preference to servants and employees

gives no preference to the secretary. Wells v. Southern, etc., R'y, 1 Fed. Rep., 270 (1880). See in regard to this point. § 861, supra. A contractor's lien on a railroad under the Iowa statute will be upheld in accordance with the Iowa decisions. Brooks v. Railway, 101 U. S., 443 (1879); Meyer v. Hornby, id., 729 (1879). A contractor's and workman's lien, under the Pennsylvania statute. against subsequent mortgages of a railroad continues indefinitely irrespective of sales, etc., of the railroad. It is not merged in a judgment obtained by the lienor. Fox v. Seal, 22 How., 424 (1874). A contractor is not an "employee" entitled to a lien under the Indiana stat-Vane v. Newcombe, 132 U.S., 220 The North Carolina lien law (1889).(Battle's Rev., ch. 65), giving a lien on "any kind of property" for labor, etc., was held not to sustain a lien on a railroad. A mortgage takes precedence although made and recorded after the contractors' debts were incurred. Tommey v. Spartanburg, etc., R. R., 7 Fed. Rep., 429 (1881). Where a contractor has filed one lien under the Missouri statute he cannot file successive liens for the same labor and materials. must abide by the first lien. Battle v. McArthur, 44 Fed. Rep., 715 (1891). A person entitled to a statutory mechanic's lien in Iowa on a railroad does not waive his right by taking security therefor, not even though the security be bonds secured by a mortgage on a part of the railroad. The purchaser of a

¹ A mechanic's lien is second to a prior mortgage upon the property. To-ledo, etc., R. R. v. Hamilton, 134 U. S., 296 (1890). An employee's lien under the New Jersey statute does not take precedence over a prior mortgage, Hinkle v. Camden, etc., Co., 21 Atl. Rep., 861 (N. J., 1890); nor over other liens, Wright v. Wynockie, etc., Co., id., 862 (1891). Concerning a lien filed after a

mortgage is recorded, but before subsequently-acquired property is actually acquired by the company, and whether the mortgage or lien prevails, see Nelson v. Iowa, etc., R. R., 8 Am. R'y Rep., 82 (Iowa, 1875). See, also, cases supra. The legislature may subordinate future railroad mortgages to judgments for injuries, etc. East Tenn., etc., R'y v. Frazier, 139 U. S., 288 (1891).

such lien prior in right to a mortgage existing when the statute was passed. A lience may pay off a prior lien and succeed to the

railroad at foreclosure sale is not affected by a mechanic's lien which is not filed until after the sale has taken place. Hale v. Burlington, etc., R. R., 13 Fed. Rep., 203 (1881). In Pennsylvania a railroad contractor has a lien by statute on the property. Newcastle, etc., R'v v. Simpson, 26 Fed. Rep., 133 (1886). Under the Arkansas statute laborers, etc., material-men and persons having claims for loss or damage, not over a year old, are prior in right to mortgages, trusts, leases, etc. Central T. Co. v. St. Louis, etc., R'y, 41 Fed. Rep., 551 (1890). Concerning the Indiana lien law making the lien good, even though not yet filed, the time given by statute not having expired, see Aurora Nat'l Bank v. Black, 29 N. E. Rep., 396 (Ind., 1891). In Mississippi, by statute, no mortgage on the income of a railroad shall have precedence over debts contracted in carrying on the business. Under the six months' rule moneys advanced for necessary betterment before the receiver went in, but within the six months, are entitled to a preference. Farmers' L. & T. Co. v. Vicksburg, etc., R. R., 33 Fed. Rep., 778 (1888). The Virginia statutory lien does not protect mercantile creditors nor the president of the company. The time within which the lien must be filed is not suspended by the appointment of a receiver, but is suspended by a decree of reference to take an account of debts. Seventh, etc., Bank v. Shenandoah, etc., Co., 35 Fed. Rep., 436 (1887). The Iowa statute that a judgment for an injury to person or property shall be a lien prior to any mortgage is constitutional as regards mortgages made after the statute was enacted. Central Trust Co. v. Sloan, 65 Iowa, 655 (1885).

Where live-stock is killed just before the receiver is discharged and directed to turn over the property to the corporation. the corporation is liable under the Kansas statute making companies liable where they did not fence. Kansas Pac. R'y v. Wood, 24 Kan., 619 (1880). A statute that employees of railroads may recover damages due to co-employees does not apply to employees of a receiver. Henderson v. Walker, 55 Ga., 481 (1875). Illuminating and lubricating oils are not "material" entitled to a lien under the Missouri statute, nor are they entitled to an equitable lien prior to the mortgages, except so far as they were purchased after the company defaulted in its interest. Central T. Co. v. Texas, etc., R'y, 23 Fed. Rep., 703 (1885). Concerning the Iowa mechanic's lien law, see, also, Taylor v. Burlington, etc., R. R., 11 West. Jur., 337 (U. S. C. C., The lien law of Oregon on "structures" applies to railroads. Giant P. Co. v. Oregon, etc., R'y, 42 Fed. Rep., 470 (1890). The Alabama mechanic's lien statute authorizing a lien for an "improvement on land "gives a lien on coal cars and the coal mine for coal cars furnished to such mine. Central Trust Co. v. Sheffield, etc., R'y, 42 Fed. Rep., 106 (1890). A lien for day labor on a Kentucky railroad is given by the act of March 27, 1888, but not of March 20. Where the lienor intervenes in the foreclosure suit he cannot obtain a personal judgment against the company. Tod v. Kentucky, etc., R'y Co., 52 Fed. Rep., 241 (1892). The laborer's lien is good although he worked for a contractor and the company has paid the contractor in full. Indiana, etc., R. R. v. Larrew, 30 N. E. Rep., 517 (Ind., 1892). See, also, as to the Indiana statute, Midland R'y v. Wilcox, 23 N. E. Rep., 506 (Ind., 1890). As to the Texas lien law applicable to railroads, see St. Louis. etc., R'y v. Matthews, 12 S. W. Rep.,

¹ Williamson v. N. J. South. R'y, 28 N. J. Eq., 277, 300 (1877); Coe v. N. J. Mid. R'y, 31 id., 105, 128 (1879).

latter's rights.¹ If a foreclosure is going on the lienee may have his rights determined in that suit.² The mortgagee may redeem from a sale under a lien.³

976 (Tex., 1889). Nebraska mechanic's lien law is applicable to railroads. Stewart. etc., Co. v. Missouri, etc., Co., 44 N. W. Rep., 47 (Neb., 1889). A mechanic's lien cannot be levied on property necessary to the operation of the property of a quasi-public corporation. Guest v. Lower, etc., Co., 21 Atl. Rep., 1001 (Pa., 1891). Concerning liens on railroads by reason of mechanic's lien laws, see, also, 8 Lawyer's Rep., 700, note. A corporation is a "person" within the meaning of a lien law giving a lien to "persons." Gaskell v. Beard, 58 Hun, 101 (1890). A mechanic's lien statute is applicable to electric light companies. Badger Lumber Co. v. Marion, etc., Co., 30 Pac, Rep., 117 (Kan., 1892). The Kentucky statute giving a lien for labor and materials upon a railroad does not protect one who furnishes labor or materials under a contract with a subcontractor. Central Trust Co. v. Richmond, etc., Co., 54 Fed. Rep., 723 (Ky., 1892). In regard to the application of the mechanic's lien law in Missouri to work done in instalments, see Central, etc., Co. of N. Y. v. Chicago, etc., Co., 54 Fed. Rep., 598 (Mo., 1893). In foreclosing the lien after the receiver is appointed the receiver is the only necessary defendant. Id. The lien law in West Virginia does not apply to subcontractors. Richardson v. Norfolk, etc., Co., 17 S. E. Rep., 195 (W. Va., 1893). A mechanic's lien on a railroad in Missouri is lost if it is assigned before the account is filed. O'Connor v. Current, etc., Co., 20 S. W. Rep., 16 (Mo., 1892). The statute in Georgia giving a lien to contractors does not protect subcontractors. Carter et al. v. Rome, etc.,

Co. et al., 15 S. E. Rep., 36 (Ga., 1892). Under the New Jersey statute the receiver must pay the rent due from the insolvent company, not exceeding one year's rent. Wood v. McCardel, etc., Co., 24 Atl. Rep., 228 (N. J., 1892). Concerning the lien law in Michigan giving a preference to labor claims, see In re Clark, 52 N. W. Rep., 637 (Mich., 1892). As to the statutory provision in North Carolina giving a prior lien to labor claims, etc., see Traders', etc., Bank v. Lawrence, etc., Co., 96 N. C., 298 (1887).

¹A subsequent lience may pay off a prior lien and will be entitled to subrogation. Chicago, etc., Land Co. v. Peck, 112 Ill., 408 (1885).

² Where a person is entitled to a statutory llen he may present it by petition in the foreclosure suit without complying with statutory requisites. If such liens exist in one state, claimants in other states having no lien law may present their claims and be entitled to a similar lien. Blair v. St. Louis, etc., R. R., 19 Fed. Rep., 861 (1884). A person claiming a lien prior to a mortgage that is being foreclosed in the federal court may file a bill in that court to establish his rights, even though neither the complainant nor defendant is a resident of that district, and even though citizens of the same state appear as complainants and defendants. McBee v. Marietta, etc., R'y, 48 Fed. Rep., 243 (1891). The trustee of the mortgage need not be joined in a lienbolder's suit, where all the bondholders are before the court and the lien of the trust deed is not affected, and to join the trustee would oust jurisdiction. Holly Mfg. Co. v.

The lienor is merely a creditor for the unpaid balance. The mortgage prevails. Porter v. Pittsburg, etc., Co., 122 U. S., 267 (1887); id., 120 id., 649.

³ Where, under the Indiana lien law, judgment is obtained and part of the railroad sold therefor, but at a figure below the debt, a redemption of such sale by a mortgagee destroys the lien.

If the lien is foreclosed in a state court and the mortgage is foreclosed in the federal court the latter court will not recognize the lien foreclosure; 1 but this does not prevent the state court enforcing its decree after the federal court has released its hold on the property.2

Judgments also by statutory enactments may be and often are made liens upon property.3

New Chester, etc., Co., 48 Fed. Rep., 879 (1891). A contractor's lien, prior in right and time to the issuing and recording of a mortgage, is not cut off by the foreclosure of the mortgage, unless the holder of the lien is made a party to the foreclosure suit. Pittsburgh, etc., R'v v. Marshall, 85 Pa. St., 187 (1877). Pending suit the parties may agree that, if the lien which a party claims is sustained, the same shall be paid from the proceeds of the sale. Vilas v. Page, 106 N. Y., 439 (1887). Where the receiver is authorized by the court to settle or purchase an outstanding lien on a part of the road, and he agrees that the lien shall be paid from the proceeds arising from the sale of that part, and the foreclosure sale is made, not in parts but as a whole, the court should order a resale unless the lien is paid. Farmers', etc., T. Co. v. Newman, 127 U.S., 649 (1888). The purchaser at a foreclosure sale subject to such liens as shall thereafter be decided cannot contest such liens after they have been decided. Swann v. Wright's Ex'r, 110 U.S., 590 (1884). lien is to be satisfied by a sale of the property in parcels in the inverse order of their alienation by the debtor. Savings Bank v. Creswell, 100 U.S., 630 (1879).

¹ If a creditor is prosecuting a lien in a state court where a suit is brought in the federal court for foreclosure, and a receiver is appointed by the latter court, and the creditor proceeds irrespective of the latter suit and obtains a lien, his lien will not be recognized by the federal court. Blair v. St. Louis, etc., R. R., 25 Fed. Rep., 2 (1885). A judgment in a state court for money, part of which by

statute has a lien in preference to a prior mortgage, cannot be paid out of funds from a subsequent foreclosure sale in the federal courts, the trustee not having been a party to the state judgment. The judgment cannot be allowed beyond the amount entitled to the lien. Hassall v. Wilcox, 130 U. S., 493 (1889). See Ames v. Chicago, etc... R'y Co., 39 Fed. Rep., 881 (1889), as to the jurisdiction of the federal courts in the enforcement of a subcontractor's lien on a railroad.

² Blair v. Walker, 26 Fed. Rep., 735 (1886). But see § 839.

3 A judgment creditor of a railroad in: a receiver's hands on a foreclosure suit. will be allowed to intervene and file his claim of a lien, although technically his time to do so has passed by. Central T.. Co. v. Wabash, etc., R'y, 27 Fed. Rep.,. 175 (1886). Where judgments are liens. the elder judgment creditor may by bill in equity have the railroad sold without making the junior judgment creditor a party. The latter's right is to redeem. Howard v. Railway Co., 101 U.S., 837 (1879). It seems that a docketed judgment in Georgia has a lien prior to a previous mortgage. Gunn v. Plant, 94 U.S., 664 (1876). A judgment creditor claiming a prior lien need not file a cross-bill but may set up his facts by answer. Chicago, etc., Land Co. v. Peck. 112 Ill., 408 (1885). Under the reorganization statutes of Ohio, a judgment lien may take precedence of a prior mortgage of the reorganized company. Farmers', etc., Co. v. Cincinnati, etc., R. R. Co., 5 R'y & Corp. L. J., 380 (Cin. Sup. Ct., 1889). A sale by decree of a court of equity under a judgment lien

§ 860. Claims by contracts and contractors—Contractor's lien by contract or possession—Taxes—Advances made to keep the company afloat—Damages to persons and property—General debts existing when foreclosure is commenced—How far the mortgage is affected as to its priority.—When foreclosure of a railroad mortgage is commenced the unsecured creditors seek at once by every means to obtain payment in preference to the mortgage bondholders, inasmuch as the property is generally insufficient to pay the latter and the former get nothing. Hence the books are full of cases where the general creditors have sought to obtain payment. They have almost uniformly failed.

Taxes form an exception to this rule. They are held to be a lien ahead of all other liens, except judicial costs. This rule, however, does not apply to paving assessments and bonds to cities.²

The contractor who constructs the road has no lien on the road as a matter of right. The fact that he has possession does not give him a lien. The statutes may give him a lien as shown above. Or the company itself may by contract give him a lien, and so long as he continues in possession under it, this lien is good as against subsequent mortgages, but is not good as against mortgages prior to such contract. There has been a great deal of litigation on these rights of a contractor.³

created by statute in Wisconsin passes title. Railroad v. James, 6 Wall., 750 (1867). Where judgments are liens the one prior in time is prior in right. When enforced in equity without making the latter a party, the latter judgment creditor may redeem. An execution sale on the second judgment gave no priority over the first judgment. Howard v. Milwaukee, etc., R'y, 7 Biss., 73 (1875). A judgment, as a lien, becomes such only when judgment is obtained before foreclosure. Burlington, etc., R. R. v. Verry, 48 Iowa, 458 (1878); White v. Keokuk, etc., R. R., 52 Iowa, 97 (1879).

¹The lien of the state for taxes is ahead of all other liens, except those for judicial costs. The court will not allow a sale of parts of the property for taxes, but will see to it that on the final distribution the taxes are paid first. Georgia v. Atlantic, etc., R. R., 3 Woods, 434 (1879). The court will order the receiver to pay the taxes upon the property

in the receiver's hands. Central T. Co. v. N. Y., etc., R. R., 110 N. Y., 250 (1888); State v. R. R. Com'rs, 41 N. J. L., 235 (1879).

² Where a street railway is being foreclosed the city has no lien for the expense of grading and macadamizing between the rails, and the receiver will not be ordered to pay it. Union L. & T. Co. v. Southern Cal., etc., Co., 49 Fed. Rep., 267 (1892). A bond given by a street railroad to the city in regard to damages is not a lien, and upon foreclosure of a mortgage on the road the city will not be allowed to become a party. Farmers' L. & T. Co. v. New Rochelle, etc., R'y, 57 Hun, 376 (1890).

³ Dunham v. Cincinnati, ctc., R'y. 1 Wall., 254 (1863); Galveston R. R. v. Cowdrey, 11 Wall., 459, 480 (1870). A provision in a mortgage that the proceeds from the bonds shall be expended only upon the assent of one of the trustees does not give a construction contractor a lien upon such proceeds,

The creditors of a railroad corporation have no claim to come in ahead of the bondholders after foreclosure is commenced, even

although the trustee assented to the contract. Dillon v. Barnard, 21 Wall., 430 (1874). A contractor's lien for construction work does not exist merely because he still has possession of the work. Ambiguous words in the contract, such as entitled to the earnings "during construction" and "until accepted," give no Wright v. Kentucky, etc., R'v. 117 U.S., 72 (1886). Where a contractor is in possession of a railroad and holding it until paid therefor, and is forcibly ejected by the company, he may recover possession by action of forcible entry and detainer. Iron Mountain, etc., R. R. v. Johnson, 119 U.S., 608 (1887). "Whatever is the rule applicable to locomotives and cars, and loose property susceptible of separate ownership and of separate liens, and to real estate not used for railroad purposes, as to their being unaffected by a prior mortgage given by a railroad company covering after-acquired property, it is well settled, in the decisions of this court, that rails and other articles which become affixed to and a part of a railroad covered by a prior mortgage will be held by the lien of such mortgage in favor of bona fide creditors, as against any contract between the furnisher of the property and the railroad company." A mortgage takes precedence over a contract giving a lien on a bridge. Porter v. Pittsburg Steel Co., 122 U.S., 267 (1887); Porter v. Pittsburg Steel Co., 120 U.S., 649 (1887). There is no lien for construction work done for a water-works company. Wood v. Guarantee, etc., Co., 128 U. S., 416 (1888). The special lien of contractors is subordinate to an old general mortgage covering after-acquired property. Thompson v. White, etc., R. R., 132 U.S., 68 (1889). By claiming a mechanic's lien under the statute a person waives any common-law lien. Giving up possession gives up any common-law There can be no common-law lien.

lien on real estate. Vane v. Newcombe, 132 U.S., 220 (1889). After a mortgage has been recorded, the corporation cannot by contract give to a contractor a lien prior to the mortgage on property upon which such contractor thereafter constructs a wharf. Contractors cannot obtain a prior lien even though they retain possession. Toledo, etc., R. R. v. Hamilton, 134 U.S., 296 (1890). A contractor and constructor of a railroad is given no lien in priority to the mortgage on the theory that he gave value to the mortgage and created the property. Id. Contractors and creditors whose debts were created for money, labor or materials used in the improvement acquire no legal or equitable claim to displace or subordinate the lien of the mortgage for their protection. Hollister v. Stewart. 111 N. Y., 644, 663 (1889). A contractor cannot claim a lien as against a mortgage duly made before the contract. Reed's Appeal, 16 Atl. Rep., 100 (Pa., 1888). contractor's right of possession of the road by contract and of the profits until the road is completed is waived in favor of a mortgage subsequent in time where the contractor has taken and sold many of the bonds secured by it and the mortgage provides for possession by the trustee in case of default. Allen v. Dallas, etc., R. R., 3 Woods, 316 (1878). contractor constructing a telegraph line has no lien thereon although he retains possession. A contractor has no lien under the Indiana statute giving a lien to employees. Bankers', etc., Tel. Co. v. Bankers', etc., Tel. Co., 27 Fed. Rep., 536 (1886). Although a receiver has been directed to carry out unfulfilled contracts of the corporation, yet this does not give the contractor a lien on the corporate assets for the part of the contract that is already fulfilled. Olyphant v. St. Louis, etc., Co., 28 Fed. Rep., 169 (1884). A provision that the moneys received from the sale of the bonds shall

though such creditors advanced the money which enabled the company to continue business.1

The mortgage is not affected by contracts of the mortgagor made after the mortgage was given. This is necessarily the rule. Otherwise the mortgagor would be in a position to barter away all the rights of the mortgagee. The mortgagee is not bound by subsequent contracts of the mortgagor, whether those contracts are leases, sales, mortgages, guaranties, traffic contracts or debts.² Nor

be disbursed only on the consent of one of the trustees does not give a contractor a lien on the fund, his contract not providing for any such lien. Dillon v. Barnard, 1 Holmes, 386 (1874). A subcontractor has no lien on the bonds with which the contractor was to be paid. Coe v. East, etc., R. R., 52 Fed. Rep., 531 (1892). Where a contractor taking stock and bonds in payment for work subcontracts the work for the stock and then forecloses the mortgage and buys the property in, the subcontractor cannot hold him liable for the stock. McLane v. King, 144 U.S., 260 (1892). See, also, 2 Central L. J., 111, 729, 739, 772, 838; 3 Woods, 441. A coustruction company in possession of a road and operating it may give a mortgage on the rolling stock before turning the road over to the railroad company. Hardin v. Iowa, etc., Co., 43 N. W. Rep., 543 (Iowa, 1889). The mortgagee of a corporation is not chargeable with knowledge of facts appearing on its records in regard to the title to the property. Blair v. St. Louis, etc., R. R., 25 Rep., 684 (1885). Contractors' claims for work performed, whether performed before or after the mortgage was given, are second to the mortgage. Tommey v. Spartanburg, etc., R. R., 4 Hughes, 640 (1881); S. C., 7 Fed. Rep., 429. A railroad contractor may enforce his construction contract with a railroad corporation, although he made it with the president and the board of directors did not pass upon it, where the contractor proceeded to perform. The contractor was justified in stopping work when he was not paid according to the

contract. Cunningham v. Massena, etc., R. R., 63 Hun, 439 (1892).

1 A city which has loaned funds to a railroad in order to complete it cannot claim payment in preference to mortgage bondholders. Farmers' L. & T. Co. v, L. C., etc., R'y, 4 Fed. Rep., 184 (1880). The mere fact that money loaned to a railroad corporatiou was expended in payment of interest on its first-mortgage bonds or of operating expenses does not entitle the lender to preference over the first-mortgage bonds by way of subrogation, or on the ground of superior equities. Morgan's, etc., Co. v. Texas, etc., R'y, 137 U.S., 172 (1890). Where a bank loans a large sum of money to a railroad just before the latter is foreclosed, the bank comes in as a general creditor only. Penn v. Calhoun, 121 U. S., 251 (1887); In re Kelly v. Receiver, 5 Fed. Rep., 846 (1881). But a surety who enables the receiver to preserve the property will be paid before the bondholders. Union T. Co. v. Morrison, 125 U. S., 591 (1888). A person advancing money to keep the company affoat has no priority. In re Regents', etc., Co., L. R., 3 Ch. D., 411 (1875).

²The mortgagee coming in by superior title takes the subject of his mortgage clear of all obligations contracted by the mortgagor, whether personal to himself or relating to his management of the property. Ellis v. Boston, etc., R. R., 107 Mass., 136 (1871). A contract whereby a mortgagor company guaranties a certain income to a bridge company does not bind the mortgagee, the guaranty having been made after the mortgage was given. Nor does it

is the mortgage subject to the contracts existing prior to the mortgage, except in cases where the mortgage is in fraud of creditors or is taken with notice of prior liens, or is a mortgage given upon one corporation buying out another.¹

bind a mortgagee whose mortgage was subsequent to the date when the guaranty was made. Newport, etc., Co. v. Douglass, 12 Bush (Kv.), 673, 712 (1877). The mortgagee does not by failing to commence foreclosure as soon as there is default, thereby enable all debts incurred after such default to come in ahead of the mortgage. Blair v. St. Louis, etc., R. R., 22 Fed. Rep., 471 (1884). Damages for breach of a contract by a railroad to continue a switch does not take precedence of a mortgage. Central T. Co. v. Wabash, etc., R'v. 32 Fed. Rep., 566 (1887). Where a receiver has gone into possession, an employee having a long-time contract of employment is entitled to damages, and the amount will be ascertained by the court's directing an issue to be tried. Spader v. Mural, etc., Co., 20 Atl. Rep., 378 (N. J., 1890). A traffic contract containing a provision that for a breach thereof the other party shall have a lien for damages on the railroad, its equipment and income is not a lien running with the land. It is good as between the parties, but does not bind third persons into whose hands the property has passed, mortgagee or lessee. It does not convey any title or secure any particular sum of money. Des Moines, etc., R. R. v. Wabash, etc., R'y, 135 U. S., 576 An agreement of a railroad with an express company to do certain things, for which the latter loans the former a sum of money, gives no precedent lien over a mortgage. Express Co. v. Railroad, 99 U.S., 191 (1878). The contract price of steel, part of which had been delivered when the receiver was appointed, has no priority. Olyphant v. St. Louis, etc., Co., 28 Fed. Rep., 729 To same effect on breach of contract in regard to a switch-line, Central T. Co. v. Wabash, etc., R'y, 32

id., 566 (1887). See, also, ch. LII. A lease of the railroad by the mortgagor subsequently to the mortgage does not prevent foreclosure of the equity of redemption and of the leasehold interest. Hale v. Nashua, etc., R. R., 60 N. H., 333 (1880). In Elmira, etc., Co. v. Erie R'y, 26 N. J. Eq., 284 (1875), the receiver cut off the contract right of another company to run its cars over the receiver's tracks, such company being in arrears of rent and having been notified of the receiver's intention.

1 Mortgagees of a railroad are chargeable with notice of contracts which the deed of the road to the railroad company expressly refers to and is subject Central T. Co. v. Wabash, etc., R'y, 29 Fed. Rep., 546 (1886). A creditor of a corporation owning an uncompleted railroad cannot claim a lien thereon prior to that of the mortgage of a subsequent corporation which purchased the road, when there never was any record evidence of any lien and the subsequent corporation had no actual notice of the claim. Blair v. St Louis. etc., R. R., 27 Fed. Rep., 176 (1886). A covenant in a lease that damages for a breach thereof, etc., shall be a lien upon the railroad is not a lien or obligation running with the land. Des Moines, etc., Co. v. Wabash R'y. 135 U.S., 576 (1890). A claim against one company, which is assumed by another company upon the latter company buying out the former, is not to be paid out of the assets of the latter company in preference to a mortgage upon all of its property. Fogg v. Blair, 133 U.S., 534 (1890). Concerning this last principle of law, see ch. XL, supra. Rails laid down under an agreement that title should not pass until they are paid for belong to the vendor until such payment is made, even as against a subsequent mortgage

The mortgagee cannot collect by action or distress the rental on a lease made subsequently to the mortgage.¹

Damages for injuries to freight or persons prior to the trustee or receiver taking possession cannot be collected prior to the payment of the bonds, if not collected before such possession is taken.²

§ 861. The "six-months rule" to the effect that labor and supply claims arising within six months prior to a receiver being appointed will be paid out of the income received by the receiver.—When a receiver of a railroad is appointed he commences at once to take the income from the operation of the road. This income at first is due largely to supplies furnished and labor done prior to the receivership. Accordingly it is but just that such claims, for a reasonable length of time prior to the receivership, should be paid out of the income received by him, especially as that income would have been used by the company for that purpose if the court had refused to appoint a receiver. Six months have been fixed upon by the courts as the proper limit of past time during which labor and supply claims enter into the income received by the receiver. It is true

where the trustee of the mortgage knew of the agreement. Haven v. Emery, 33 N. H., 66 (1856). A vendor's lien may be retained by contract on pumping machinery purchased by a contractor for a corporation, and if the corporation had notice thereof it takes subject thereto, although its stock was issued in payment therefor to the contractor. A mortgage given by the company does not take precedence over such lien. New Chester Water Co. v. Holly Mfg. Co., 53 Fed. Rep., 19 (1892).

¹ Teal v. Walker, 111 U. S., 242 (1884). ²The court will not authorize suit against the receiver for injuries incurred prior to the receivership. Finance Co. v. Charleston, etc., R. R., 46 Fed. Rep., 508 (1891); In re Dexterville, etc., v. Receiver, 4 id., 873 (1880). Claims for damages for the loss of grain three years prior to the receivership has no priority over the mortgages, although negotiations for a settlement had been going on continuously. Central T. Co. v. Wabash, etc., R'y, 28 Fed. Rep., 871 (1886). A claim for loss of freight prior to a receivership in a foreclosure suit is not allowed to be paid before the mortgage bondholders are paid. Easton v.

Houston, etc., R'y, 38 Fed. Rep., 12 (1889). Damages due to fire from the locomotives causing timber, etc., to be burned, such fire having occurred after default in a mortgage but before foreclosure was commenced, cannot be paid out of earnings in the hands of the receiver. Hiles v. Case, 14 Fed. Rep., 141 (1880). For an injury occurring before the receiver is appointed it is proper to bring an action against the receiver as such, upon leave of the court, in order to ascertain the amount due. The collection of the amount, however, will follow the same course as other claims of the same class. Combs v. Smith, 78 Mo., 32 (1883). A judgment commenced and recovered against the company after a receiver is appointed but for injuries before he was appointed is not enforceable against the receiver. Hopkins v. Connel, 2 Tenn. Ch., 323 (1875). Damages recovered in an action for injuries incurred prior to the receivership are not entitled to payment out of income, in preference to the payment of the mortgage bondholders. Central T. Co. v. East Tenn., etc., R. R., 30 Fed. Rep., 895 (1886). Concerning this last case, see next section.

that from a strictly legal and equitable standpoint this payment of back claims out of future income is an extraordinary exercise of judicial power, but it is justified and legalized on the ground that, unless the mortgagee consents to giving the receiver the power to pay these back claims, the court will refuse to appoint any receiver at all, the receivership being always a matter of discretion with the court. Such payments, however, are allowed from the income

¹ Quincy, etc., R. R. v. Humphreys, 145 U. S., 82, 103 (1892).

The rule and reason of the six-months rule laid down in Fosdick v. Schall has been stated as follows:

" As I understand the current of cases which began with Fosdick v. Schall, 99 U. S., 235 (1878), the rule is this: When holders of railroad bonds, secured by mortgage, come into a court of equity and ask, not only the foreclosure of the mortgage, but also the appointment of a receiver, into whose hands the corporation shall be compelled to deliver all its property, the court, as a coudition precedent to granting this last request, can impose terms in reference to the payment from the income during the receivership of such outstanding claims as address themselves peculiarly to the. protection of the court,"

"This is not a right vested in emplovees or in equity administered in their favor. It is a personal protection given to them by the court ex gratia, moved thereto by the fact that this class depend upon their daily labor for their daily food. Afterwards, when the court has assumed the administration of the property, and it appearing that there are certain outstanding claims in the hands of persons who furnished equipment materials, supplies, or anything which was necessary to keep the railroad a going concern, then the court administers an equity, and the benefits of this equity inure as well to the original parties keeping up the road as to their assignees."

Finance Co. v. Charleston, etc., R. R., 49 Fed. Rep., 693 (1892). See, also, Burnham v. Bowen, 111 U. S., 776 (1884);

Miltenberger v. Logansport, etc., R'y, 106 id., 286 (1882); Union T. Co. v. Ill. Mid. R'y, 117 id., 434 (1886); Taylor v. Phil., etc., R. R., 7 Fed. Rep., 377 (1880).

Upon appointing a receiver a court may impose such terms as it sees fit in regard to the application of the income to labor, supplies, improvements, etc. Union T. Co. v. Souther, 107 U.S., 591 (1882). An order for the payment of prior claims by the receiver should be made when he is appointed, but if not so made, may be made thereafter. Central T. Co. v. St. Louis, etc., R'v. 41 Fed. Rep., 551 (1890). These six-months claims may be ordered paid by an order entered after the receiver is appointed. Blair v. St. Louis, etc., R. R., 22 Fed. Rep., 471 (1884). Certain car-supply debts incurred within two months prior to the receivership may be paid by the receiver. Hale v. Frost, 99 U. S., 389 (1878). Persons furnishing rails which are necessary to keep the road running have an equitable lien upon the income of the road in priority to second mortgagees who have caused a receiver to be appointed. Bound v. South Car. R'v. 47 Fed. Rep., 30 (1891). The wages of street-car employees for sixty days prior to the commencement of foreclosure will be paid before any payment is made to the mortgage bondholders. Litzenberg v. Jarvis, etc., 28 Pac. Rep., 871 (Utah, 1892). Gas equipment and supplies, although apparently furnished a long time prior to the receivership, were allowed to be paid from income only. United S. T. Co. v. N. Y., etc., R'y, 25 Fed. Rep., 797 (1885). The rule that "back claims" for materials, labor and supplies may be oralone. If the operation of the road costs the receiver more than the income, he will not be ordered to pay the back claims. The

dered by the court to be paid out of the income received by the receiver and sometimes out of the proceeds of the sale was reviewed, explained and affirmed in Turner v. Indianapolis, etc., R'v, 8 Biss., 315 (1878), on the ground that the court exacted this concession as a condition of appointing a receiver at all, and on the ground that work and supplies lately done and furnished were the source of the immediate income of the receiver. Hence claims running back as far as the state statute for 'liens for supplies and labor are allowed, such a rule by analogy being just. The decision in Skiddy v. Atlantic, etc., R. R., 3 Hughes, 320 (1878), refusing payment of past-due wages, and of steel rails and supplies, was reversed in Duncan, etc., v. Atlantic, etc., R. R., 4 Hughes, 125, 151 (1880). Admissions contained in the books of the corporation may be sufficient proof of a claim where there is no contest. Blair v. St. Louis, etc., R. R., 22 Fed. Rep., 471 (1884). In the case Dow v. Memphis, etc., R. R., 20 Fed. Rep., 260, (1884), the court appointed a receiver subject to the following terms, which the mortgagee was compelled to assent to: That the debts, if any, due from the railroad company for ticket and freight balances; and for work and labor performed by its employees and laborers; and for supplies and materials furnished for equipping, operating, repairing or improving the road; and all obligations incurred in the transportation of passengers and freight, or for injuries to person or property, which have accrued within six months last past, shall be paid by the receiver out of the earnings of the road. Construction work done more than six months prior to the appointment of a receiver does not entitle the contractor to priority in payment over the bondholders. In re Kelly, 5 Fed. Rep., 846 (1881). The vendor of a locomotive to the company more than

six months prior to the receivership has no priority. Manchester, etc., Works v. Truesdale, 46 N. W. Rep., 301 (Minn., 1890). Ordinarily no claim older than six months prior to the appointment of the receiver will be paid in preference to the mortgage. Blair v. St. Louis. etc., R'v. 22 Fed. Rep., 471 (1884). The court will not order to be paid out of the property damages for injuries, although such injuries occurred within the six months. It being uncertain whether the income will suffice for other prior claims, the court ordered an ascertainment of the damages and authorized an application thereafter. Farmers' L. & T. Co. v. Green Bay, etc., R'y, 45 Fed. Rep., 664 (1891). The six-months rule does not apply and protect a merchant who supplies rations to the employees and obtains his pay from the company. Finance Co. v. Charleston, etc., R. R., 49 Fed. Rep., 693 (1892), Supplies for bridges, side-tracks and repairs furnished after default in payment of interest are entitled to payment out of earnings before the mortgages although two years intervened before foreclosure. Blair v. St. Louis, etc., R'v, 23 Fed. Rep., 704 (1885); Id., 22 id., 769 (1885). The assignee of those claims which are payable by a receiver may collect. Union T. Co. v. Walker, 107 U. S., 596 (1882): Burnham v. Bowen, 111 id., 776 (1884).

An attorney cannot claim payment from the income of the receiver on a bill due to such attorney a year and a half prior to the receivership. But an attorney whose salary came due a short time prior to the receivership may obtain payment from the receiver. A person paying a judgment against the company a short time prior to the receivership under an agreement of the company to repay to him the amount has no right to payment from the receiver's funds. Blair v. St. Louis, etc., R. R., 23 Fed. Rep., 521 (1885). Nor is a surety

money received upon the foreclosure of the property will not be used to pay such back claims, except to the extent that the receiver

on an appeal bond given to allow an appeal by the company. Id., 523. As to the attorney's fees compare S. C., 20 Fed. Rep., 351 (1884). Douglass v. Cline, etc., 12 Bush, 609 (1877), seems to have been the first of the cases laying down the six-months rule. A claim for damages to freight incurred three years prior to the receivership are not collectible from the receivers, although negotiations for a settlement have been pending during all that time. Central T. Co. v. Wabash. etc., R'v, 28 Fed. Rep., 871 (1886). Damages for breach of contract do not come within the rule. Id., 32 id., 566 Judgment creditors of a rail-(1887).road which was sold to the mortgagor corporation have no equitable claim on the receiver's assets. Hervey v. Illinois Mid. R'y, 28 id., 169 (1884). Concerning claims for breach of contract generally in such cases as these, see § 860. The six-months rule was applied in Farmers' L. & T. Co. v. Vicksburg, etc., R. R., 33 id., 778 (1888). A lawyer employed by the company before the foreclosure has no lien ahead of the bonds, but if he is employed on a salary he may be paid like other employees for ninety days' time prior to foreclosure. Finance Co., etc., v. Charleston, etc., R. R., 52 Fed. Legal services ren-Rep., 526 (1892). dered two years prior to the receivership will not be paid in preference to bonds. Finance Co., etc., v. Charleston, etc., R. R., 52 Fed. Rep., 678 (1892). The attorneys for a railroad company which is resisting foreclosure on the ground that the bonds are invalid will not be allowed compensation out of the receiver's funds. Union L. & T. Co. v. Southern, etc., Co., 51 Fed. Rep., 106 (1892). Unless the attorney obtains decree or judgment or succeeds in bringing a fund into court, he has no lien and the court cannot order payment to him. Lehman v. Tallassee Mfg. Co., 64 Ala., 567, 602 (1879). The court in the case of Farmers' L. & T. Co. v. Kansas City, etc., R. R., 53 Fed. Rep., 182 (1892), refused to appoint a receiver until the trustee assented that the payment of all debts for work, labor and materials, machinery, fixtures and supplies, incurred in the building, equipping and operating the road, also debts for ticket and freight balances, also liabilities incurred in transporting freight passengers, including damages, should be paid in preference to the mortgage debt, including all such claims and debts from the time of the execution of the mortgage, January 2, 1888, to the date of the appointment of the receiver, March, 1890. The court also required the express assent of the trust company as well as the assent of coun-The court said: "Preferential debts, it is commonly said, are those which have aided to conserve the property, and have been contracted within some reasonable period. But just what debts aid to conserve the property, and what length of time will bar them, is not very clear upon the authorities and depends largely upon the circumstances of each particularlar case. There is no fixed rule barring preferential debts contracted more than six months before the appointment of the receiver. There is no 'six months' rule." Reviewing the cases. The court also said: And it is an error to suppose that such debts can only be given priority where there has been a diversion of the income of the road; nor is it true that they can only be paid out of the earnings of the road, and cannot be made a charge on the corpus of the property. A diversion of the income is not essential to give them priority, and they may be made a charge on the corpus of the estate if the earnings are not sufficient to pay them. . . . "Nor is it essential that the order for the payment of preferential debts should be made at the time, and as a condition of appointing a receiver. The has used the income for the improvement of the mortgaged property so sold.1

A recent case has intimated, however, that the six-months rule will be applied irrespective of the income, and that it should be applied whether a receiver is appointed or not. Such an intimation, however, cannot be commended.² The six-months rule applies to

better practice is to do so, but if such an order is not then made, it may be made afterwards."

¹ In regard to certain debts to be paid in priority to mortgage bondholders. "The rule governing in all these cases was stated by Chief Justice Waite, in Burnham v. Bowen, 111 U.S., 776, 783, as follows: 'That if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use.' There has been no departure from this rule in any of the cases cited; it has been adhered to and re-affirmed in them all." St. Louis, etc., R. R. v. Cleveland, etc., R'y, 125 U. S., 658, 673 (1888); Union T. Co. v. Ill. Mid. R'v. 117 id., 434 (1886). The six-months rule does not allow payment out of the corpus of the property for materials used in the construction of the road more than six months prior to the receivership, there being no proof of a diversion of the income. American L, & T. Co. v. East, etc., R. R., 46 Fed. Rep., 101 (1891). In the case of United States T. Co. v. N. Y., etc., R'y, 25 Fed. Rep., 800 (1885), the court refused to allow payment of claims for more than three months prior to the receivership, it being shown that the running expenses of the company exceeded the receipts. Labor claims incurred prior to the appointment of a receiver in foreclosure are not entitled to payment before the mortgage bondholders. Metropolitan Trust Co. v. Tonawanda, etc., R. R., 103 N. Y., 245 (1886), reversing 40 Hun, 80. It is an extraordinary case that will make any of the six-months claims a lien upon the corpus of the

property. Ordinarily they are to be paid from the income. Blair v. St. Louis, etc., R. R., 22 Fed. Rep., 471 (1884); Id., 25 id., Counsel of the company 232 (1885). prior to the receivership will be allowed pay as a "labor claim." Railroad ties furnished prior to the receivership cannot be paid for out of the corpus of the estate. Bayliss v. Lafayette, etc., R. R., 9 Biss., 90 (1879). Claimants for labor. supplies and materials within months prior to the commencement of foreclosure may be paid out of the income prior to payment to the houdholders, where such labor, etc., was necessary to keep the road running, and may be paid out of the property itself to the extent that the past six months' earnings have been paid to the bondholders, or in making permanent improvements. Finance Co. v. Charleston. etc., R. R., 48 Fed. Rep., 188 (1891); Calhoun v. St. Louis, etc., R'y, 14 id., 9 (1880). An appeal will lie from an order directing the receiver to pay certain sums out of the proceeds of the sale. Rome, etc., Co. v. Sibert, 12 S. Rep., 69 (Ala., 1893). In 1864 Judge Drummond. in Denniston v. Chicago, etc., R. R., 4 Biss., 414, refused to order the payment of claims for supplies out of the fund realized at the sale.

² In the case of Farmers' L. & T. Co. v. Kansas City, etc., R. R., 53 Fed. Rep., 182 (1892), the court said in a dictum: "It is not to be implied from what is here said that a mortgagee of a railroad can escape the payment of preferential debts by a foreclosure of his mortgage without asking for a receiver. Liabilities of a railroad company which fall within the definition of preferential debts have priority over a mortgage on its road, without regard to the question

railroads only. It does not apply to manufacturing and other companies.1

of receivership;" the court saying also that the supreme court of the United States, "in numerous later cases for the foreclosure of railroad mortgages, has recognized the justice and necessity of modifying the common-law rule as to the priority of liens, and adopted to a limited extent, as applicable to suits for the foreclosure of railroad mortgages, some of the principles of the maritime law."

¹The rule that claims arising within six months prior to the receivership may be paid by the receiver is not applicable to manufacturing corporations. Fidelity Ins., etc., Co. v. Shenandoah, etc., Co., 42 Fed. Rep., 372 (1889). The principle that six months' back wages, etc., will be paid before mortgage bondholders of a railroad are paid does not apply to manufacturing corporations. Seventh, etc., Bank v. Shenandoah, etc., R. R., 35 Fed. Rep., 436 (1887). The six-months rule applies to railroads only. It does not apply to steamship lines. Bound v. South Car. R'y, 50 Fed. Rep., 312 (1892).

Material furnished for construction of works are not paid for upon foreclosure of a mortgage in preference to the mortgage. The six-months rule applies only to operating material. So held as regards meters for a gas plant which was afterwards foreclosed. Revburn v. Consumers', etc., Co., 29 Fed. Rep., 561 (1887). In the foreclosure of a mortgage given by any corporation, even though not a railroad, the court may order the receiver to pay employees in full for services rendered within six months prior to his appointment. Olyphant v. St. Louis, etc., Co., 22 Fed. Rep., 179 (1884). The six-months rule cannot be applied to a hotel company. Raht v. Attrill, 106 N. Y., 423 (1887). In the case of Wood v. Guarantee, etc., Deposit Co., 128 U.S., 416 (1888), the court held that no claims arising against a water-works company prior to a receivership had any claim upon the income in his hands, and the court intimated that the six-months rule applied to railroads only.

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CHAPTER LI.

RECEIVERS

- A. APPOINTMENT OF RECEIVER EFFECT AS TO TITLE TO THE PROPERTY.
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 - 864. Who will be selected for receiver.
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 - 881. Distribution by the receiver.
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- A. APPOINTMENT OF RECEIVER EFFECT AS TO TITLE TO THE PROP-ERTY.
- § 862. When a receiver will be appointed in behalf of a foreclosing mortgagee.— Where the mortgage of a corporation is being foreclosed by suit in equity, the court will appoint a receiver if the

mortgagor is insolvent and if the mortgage covers income and profits, inasmuch as otherwise the income and profits will go to the mortgagor. A receiver will be appointed in behalf of a foreclosing mortgagee where there is danger that executions will be levied on the mortgaged property and thus dismember it, subject to the mortgage. A receiver will also be appointed where the mortgagor is insolvent and the mortgaged property is insufficient to pay the mortgage debt, and there is danger of loss unless a receiver is appointed. So also where the trustee of the mortgage is by its

See § 853 to the effect that until foreclosure the rents go to the mortgagor. Where the mortgage covers the income and profits and foreclosure has been commenced for default in interest, this is sufficient for the appointment of a receiver, in order to secure the future income and profits, even though it is not shown that the security is inadequate or in jeopardy or the company insolvent. Allen v. Dallas, etc., R. R., 3 Woods, 316 (1878). In the case Wilmer v. Atlanta, etc., R'v. 2 Woods, 409 (1875), Judge Woods held that where the mortgage covered the income and the trustee was entitled to take possession after default but refused to do so, and the company is being managed in the interest of another railroad company, the court will appoint a receiver "independent of any probable deficiency of the trust property to pay the debts secured by the deed of trust. The application for a receiver in such a case is simply a demand by the beneficiaries of the deed that the trust be executed according to its terms." Where the mortgage covers the income, rents and profits, and the mortgagor is insolvent and foreclosure is commenced, a receiver will be appointed as of course, even though the corporation denies the validity of the bonds and mortgage. Des Moines, etc., Co. v. West, 44 Iowa, 23 (1876).To same effect, American Bridge Co. v. Heidelbach, 94 U.S., 798 (1867), a dictum. See, also, Mercantile T. Co. v. Missouri, etc., R'y, 36 Fed. Rep., 221 (1888). · Although the mortgage covers the income, yet a receiver

is not a matter of right during the foreclosure suit. The court may compel the company to pay the profits into court without a receiver being appointed. "Unquestionably there may be a right to foreclose without the right to appoint a receiver, or change the possession of the property. This latter depends upon the danger of ultimate loss to the bondholders by permitting the property to remain in the possession of its owners until the final decree and sale, if one is to be made." Mr. Justice Miller refused the application in this case. Union T. Co. v. St. Louis, etc., R. R., 4 Dill., 114 (1877). In the case Dow v. Memphis, etc., R. R., 20 Fed. Rep., 260 (1884), a receiver was appointed, the mortgage covering the income and earnings, and the company being insolvent. For an approved form of an order appointing a receiver and granting an injunction, see 3 Hughes, 334-

² A receiver will be appointed where the company is insolvent and has parted with all its bills receivable and available assets, and there is imminent danger that executions will be levied on the property piecemeal. Matter of South. Car. R. R., 11 Chic. Leg. News, 8 (1878). See, also, Sage v. Little, etc., R. R., 125 U. S., 361 (1888), where a judgment creditor applied.

³Where the mortgagor company is insolvent and interest is in arrears and the property is an insufficient security and foreclosure has been commenced, the court will appoint a receiver. Keep v. Mich., L. S., etc. R. R., 6 Chic. Leg.

terms authorized to take possession of the property upon default, but he refuses to do so, the court upon a foreclosure suit will appoint a receiver.¹

News, 101 (U. S. C. C., 1873), holding also that the receiver may take the property from a lessee of the mortgagor, the lessee being made a party, and the lease being subject to the mortgage. Where the company is insolvent and there are arrears of interest, and the property is insufficient to pay the debt. and the equity of redemption has been sold, and the purchaser is in possession and the mortgage covered the rents and profits, a clear case for a receiver is made out. Kelly v. Trustees, 58 Ala., 489 (1877). Even though the mortgage does not cover rents and profits, vet "when a mortgagor in possession has made default in the payment of the mortgage debt and is insolvent, the mortgage not being an adequate security for the payment of the debt, or there is imminent danger of waste or destruction of the property, the mortgagee, instituting a suit in equity for a

foreclosure, may obtain the appointment of a receiver to take possession and secure the rents and profits; and in this way fasten a specific lien upon the rents to méet any deficiency of the mortgage debt." Lehman v. Tallassee Mfg. Co., 64 Ala., 567, 597 (1879). Ordinarily the question of whether a receiver shall be appointed is one upon which there is no appeal from the decision of the court below. Milwankee. etc., R. R. v. Soutter, 2 Wall., 510 (1864). In the case Pullan v. Cincinnati, etc., R. R., 4 Biss., 35 (1865), the court said: "The power of courts of chancery to appoint receivers is a discretionary power, to be exercised with great caution. To dispossess the owner of property of its possession before a final hearing is a strong measure, not to be adopted but in a strong case. I think it should never be done unless without it the complainant would be in danger of

¹ Warner v. Rising, etc., Co., 3 Woods, 514 (1878). See, also, § 822. By the statutes of Minnesota a mortgage of real property is not to be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure. Hence ejectment by the mortgagee does not lie even after default. But when the special charter allows the company to give its mortgagee the right of possession on common-law conditions, and the company does so, the trustees may maintain ejectment and obtain posses-Hence, this power to take possession existing, the court will not appoint a receiver in a suit in equity by the trustees for foreclosure, there being no allegation that possession to the trustees Rice v. St. Paul, etc., R. R., 24 Minn., 464 (1878). A receiver may be appointed pending a bondholder's bill to have a strict foreclosure decreed.

Ellis v. Boston, etc., R. R., 107 Mass., 1, 28 (1871). The fact that the trustee has power to take possession, but does not do so, is no bar to the appointment of a receiver. A receiver is not appointed as a matter of course upon a foreclosure for the non-payment of interest. though the company, instead of paying the coupons, uses the income for improvements, the court will not appoint a receiver. If a receiver had been in charge the same thing would have been ordered. A court will refuse to order a sale of the property, although there has been a default in interest, where the income has been applied to improvements at the request of most of the bondholders, and the prospects are that the property will soon prosper, but the court will order a part of the income to be applied to past-due coupons, Williamson v. New Albany, etc., R. R., 1 Biss., 198 (1857).

In extreme cases, and where delay in the appointment of a receiver will be dangerous, the court will appoint a receiver before a

suffering irreparable loss." The court refused to appoint a receiver where, although there had been ten years' default, the bill failed to allege that the mortgaged property was not a sufficient security for the debt. But the court appointed a receiver to examine the books and affairs of the road, and ascertain the net earnings and receive a specified proportion thereof, for the bondholders, and the court ordered the company to comply with those directions. Although a suit is pending by a stockholder to obtain a receiver, vet the mortgage bondholders upon default may institute a foreclosure suit and have a receiver appointed in such suit. The court will not stay the latter suit at the instance of the stockholder who brought the first suit. Pennsylvania Co., etc., v. Jacksonville, etc., Co., 55 Fed. Rep., 134 (1893).

Mr. Justice Bradlev said in Vose v. Reed, 1 Woods, 647 (1871), that the appointment of a receiver was discretionary and that the court would appoint one where the complainant had an equitable interest and the defendant, being in possession, was wasting or removing the property. But he refused the application of bondholders for a receiver where the property was in the hands of state officials who indorsed the bonds in behalf of the state. Every other remedy against them - injunction suit for damages and a suit to follow the fund -should be exhausted before a receiver is appointed in such a Justice Harlan, in Tysen v. Wabash R'y, 8 Biss., 247 (1878), said that the appointment of a receiver "has depended largely upon the peculiar circumstances of each case," and he refused to appoint a receiver where the mortgage did not cover the rents and profits, and a large majority of the bondholders were opposed to it on the ground that it would interfere with a proposed

reorganization, and where the appointment would disrupt the system of roads and would destroy any possibility of the second-mortgage bondholders, who instituted this suit and application, from realizing anything on their bonds. "The appointment of a receiver rests in the sound discretion of the court: mere insolvency may or may not call for such action." A motion for a receiver will be deferred when the necessity is not clear. Farmers' L. & T. Co. v. Chicago. etc., R'y, 27 Fed, Rep., 146 (1886). A federal court to which a case has been removed after an ex parte appointment of a receiver will remove him where the property is not in jeopardy and no particular occasion therefor exists. Mc-Henry v. N. Y., etc., R. R., 25 Fed. Rep., 114 (1885). In a bondholder's suit for foreclosure for non-payment of coupons a receiver will be appointed where the company is seriously embarrassed, and the road in dangerous physical condition, and the rolling stock is insufficient and current expenses are not met. except by personal guaranties. defense that the bonds were fraudulent and without consideration is insufficient to prevent the receivership. Heinsheimer v. Dayton, etc., R. R., 3 R'v & Corp. L. J., 268 (O. Com. Pl., 1888). The inadequacy of the security must be clearly made out. Burlingame v. Parce. 12 Hun, 144 (1877), not, however, a corporation case. A receiver will be appointed where it is necessary in order to save the property from going to absolute destruction. Wallace v. Loomis, 97 U. S., 146 (1877). A receiver will be appointed to take the receipts for the time between the decree of foreclosure and the sale itself. Benedict v. St. P., etc., R. R., 19 Fed. Rep., 173 (1883). "In equity actions applications for the appointment of receivers are not uncommon, and in actions to foreclose realestate mortgages, where the security is

default has occurred and before foreclosure has been commenced. Yet there is a limit beyond which the court will not go in regard to appointing receivers. A strong case must be made out to deprive the mortgagor of possession before foreclosure is complete.

weak or inadequate, the court may appoint a receiver of the income and profits of the property covered by the mortgage, in anticipation of the judgment and sale, and such appointments are made on general principles of equity independent of all statutes." U.S. Trust Co. v. N. Y. & W. S. R'v, 35 Hun, 341 "After foreclosure is commenced the plaintiff may, if the security is in jeopardy, intercept, through the aid of a receiver, the rents or emblements, or both, upon the theory that the whole estate is pledged as security for the debt, and that the creditor is immediately entitled to his money or the property pledged." Hamilton v. Austin, 36 Hun. 138 (1885). In the case of Mercantile Trust Co. v. Missouri. etc., R'y Co., 36 Fed. Rep., 221 (1888), where the interest was in default and insolvency inevitable, the court appointed a receiver, and said: "The right to foreclose does not carry with it the right to a receiver. There are many considerations which bear upon that question. Every case, of course, stands on its own merits. It is difficult to formulate any rule which, briefly stated, will control in all cases. It should appear that there is some danger to the property; that its protection, its preservation, the interests of the various holders, require possession by the court before a receiver should be appointed. It does not go as a matter of course, and yet it is not a matter that a court can refuse simply because it is an annoyance. If, looking at the situation of the litigating parties and of the property, with the prospects of the future, it should appear to a court that they would be benefited, that their interests would be subserved by the appointment of a receiver, why, no court - although a matter resting, as it is said, in its discretion — could refuse to make the appointment."

1 Where the mortgagor railroad company has become insolvent and is unable to meet its floating debt or the coupons which are about to become due, and is unable to borrow money. and its business is liable to be broken up and destroyed, and the company admits all this, a mortgage bondholder may before default file a bill for a receiver and an injunction. " Although as a rule a mortgagee cannot ask for relief until his mortgage debt has become due, he can go into a court of equity before that time has arrived, and ask for an injunction and a receiver to prevent the subject-matter of his mortgage from being impaired and wasted." It is immaterial that the company desires the application to succeed. Brassey v. N. Y., etc., R. R., 19 Fed. Rep., 663 (1884). A receiver will be appointed when there is a larger deficit in interest, business is decreasing, repairs are needed, the bondholders are not in harmony and a foreclosure is probable, and no other way of applying profits to debts. A receiver over the part located in another circuit was denied, the right being doubtful. Mercantile T. Co. v. Missouri, etc., R'y, 36 Fed. Rep., 221 (1888). A bill in equity to foreclose a mortgage given by a water-works corporation showed that its assets were insufficient to pay its mortgage debts, that it was in a failing condition, and would not be able to continue its business or carry out its contracts; that while a default had not taken place under the 'mortgage, it was certain to occur very soon; that many of its creditors, without liens, had attached and levied upon mortgaged property, and had garnished debts due the corporation, which debts were also covered by such mortgage; that it was imWith railroads the rule has been relaxed because foreclosure there generally means great loss to the bondholders anyway, and because the public will be served better by a receiver than by the insolvent mortgagor corporation. The receivership is never a matter of right, and conditions may be imposed relative to the "sixmonths" rule.

In Michigan, by statute, the courts are not allowed to appoint a receiver on the ground that the security is inadequate

possible for it to collect its revenues: that it was without resources to carry on its business, and that its property was in imminent danger of waste and The bill prayed for the appointment of a receiver. All persons interested were made parties to the suit. The corporation, by its president, gave written consent to the appointment of a receiver. Held, that such bill was improperly dismissed on demurrer of defendants who were attaching creditors of the corporation. Thompson et al. v. Natchez Water & Sewer Co. et al., 9 S. Rep., 821, 822 (Miss., 1891). A receiver of rents and profits of land will not be appointed when the right to sell has not yet accrued and part of the debt is not yet due. Hollenbeck v. Donnell, 94 N. Y., 342 (1884); reversing 29 Hun. 94.

A court will not appoint a receiver as a matter of course in the foreclosure of a railroad mortgage. Fraud, incompetency, preservation of the property or some other sufficient reason must be given. Blair v. St. Louis, etc., R. R., 20 Fed. Rep., 348 (1884). The court may deny the receivership but require the company to make stated reports to the court pending a bondholder's suit to foreclose. Williamson v. New Albany, etc., R. R., 1 Biss., 198 (1857). In Central T. Co. v. Wabash, etc., R. R., 25 Fed. Rep., 693 (1885), the court refused to appoint a receiver because negotiations were pending to adjust the whole matter. In the case of Cheever v. Rutland, etc., R. R., 39 Vt., 653 (1863), the court refused to appoint a receiver on the application of the first-mortgage

bondholders, who had filed a bill to foreclose and to obtain possession, or to have a receiver appointed, although the second mortgagees were in possession and the interest on the first-mortgage bonds had not been paid. The management of the second mortgagees was capable and honest, and the court refused to disturb it. No receiver will be appointed where the mortgage provides that the mortgagor's possession shall not be disturbed for default due to a failure of business, and the default was due to that. But the court will retain the suit to require quarterly reports from the company and to take action thereafter as may be deemed best. Stewart v. Chesapeake, etc., Canal Co., 4 Hughes, 47 (1881); American, etc., T. Co. v. Toledo, etc., R'y, 29 Fed. Rep., 416 (1886). In the case of Meyer v. Johnston, 53 Ala., 237, 335, 336, 349, 350 (1875), strict rules in regard to the appointment of a receiver are laid down, but yet the appointment of a receiver in that case was upheld. A receiver will not be appointed unless the suitor has a clear right and this extraordinary remedy is necessary to prevent loss or great danger and there is no other mode of protection. Overton v. Memphis, etc., R. R., 10 Fed. Rep., 866 (1882).

² The appointment of a receiver "is not a matter of right, but rests in the sound discretion of the court, and is a power to be exercised sparingly and with great caution." Farmers' L. & T. Co. v. Kansas City, etc., R. R., 53 Fed. Rep., 182 (1892).

3 See § 861.

during foreclosure of a mortgage that does not cover rents and profits.1

In England the railroad mortgage covers the income and earnings only, and hence no foreclosures are possible. If the company does not pay the interest on the mortgage, however, the court will appoint a receiver to operate the road for the benefit of the mortgagee.²

§ 863. Receivers upon the application of judgment creditors, general creditors, the state, the corporation itself, stockholders, and in other cases — Procedure in making the appointment.— A judgment creditor of a corporation, who has caused execution to be issued, may, after the execution is returned unsatisfied, file a bill in equity to cause the corporate assets to be applied to his debt, and may have a receiver appointed. Especially is this the case with railroad corporations, inasmuch as the railroad itself or the company's equity therein cannot be sold on execution. Where,

¹ Under the statutes of Michigan the courts are not allowed to appoint a receiver of farm lands during the fore-closure suit where the mortgage does not cover rents and profits. Wagar v. Stone, 36 Mich., 364 (1877). The federal court in Michigan will follow the state statute to the effect that the mortgagee cannot take possession until the fore-closure sale is confirmed, and hence will not appoint a receiver on the ground of the inadequacy of the security. Union, etc., Ins. Co. v. Union, etc., Co. 37 Fed. Rep., 286 (1884).

² Bowen v. Brecon R'y, L. R., 3 Eq., 541 (1876). In 1876 the court of chancery in England decided (Gardner v. London, etc., R'y, L. R., 2 Ch., 201) that a mortgage on the "undertaking" and tolls, but not on the railway itself, was such that the court had no inherent power to appoint a manager of the railroad upon default in the mortgage, but had power only to appoint a receiver of the tolls from the company itself. Thereupon parliament, in the Railway Companies Act of 1867, conferred such power on the courts. Under this act the English courts may appoint a manager as well as receiver. Re Manchester & M. R'y, L. R., 14 Ch. D., 645 (1880). A receiver of the docks owned by a dock company

may be appointed by the court at the instance and suit of a mortgagee to manage the docks and pay any surplus profits into the court. Ames v. Trustees, etc., 20 Beav., 332 (1855). "It is the ordinary remedy of a mortgagee of tolls to come here for a receiver. That is one of the oldest remedies in this court." Hopkins v. Worcester, etc., Canal, L. R., 6 Eq., 437 (1868). In the early case of Fripp v. Chard R'y, 21 Eng. L. & Eq. Rep., 53 (1853), the court appointed a receiver to operate a railroad for the benefit of mortgagees where the company was hopelessly insolvent and interest and principal were in arrears. Concerning receiverships in England, see, also, Hodges on Railways.

³ A receiver of a railroad may be appointed at the instance of judgment creditors. Hervey v. Ill. Mid. R'y, 28 Fed. Rep., 169 (1884); S. C. on appeal, sub nom. Union T. Co. v. Ill., etc., R'y, 117 U. S., 434 (1886); Sage v. Memphis, etc., R. R., 125 U. S., 361 (1888), the court holding, also, that the failure to have an execution returned unsatisfied is not fatal to the application if the debtor does not object. Upon the return of an execution against a corporation unsatisfied, a court of equity has inherent power to appoint a receiver of the cor-

however, the receivership is obtained merely to delay other creditors, the court will discharge the receiver, even though the judgment is a valid one.

poration. Palmer v. Clark, 4 Abb. N. C., 25 (1877). Judgment creditors in England, by the Railway Companies Act of 1867, cannot levy execution, but they may have a receiver appointed. Manchester & M. R'v. L. R., 14 Ch. D., 645 (1880). An execution creditor cannot have a receiver appointed as against a mortgagee in possession, even though collusion be charged. An injunction requiring the mortgagee to apply the rents and profits to the mortgage will be granted. United States v. Masich, 44 Fed. Rep., 10 (1890). "The power to declare a forfeiture of corporate franchises was originally in England vested in the courts of law, and was exercised in a proceeding brought by the attorneygeneral in the name of the sovereign. The court of chancery never assumed jurisdiction in such cases until it was conferred by act of parliament. It declined, until the power was conferred by statute, to sequestrate corporate property through the medium of a receiver, or to dissolve corporate bodies, or to restrain the usurpation of corporate powers." Decker v. Gardner, 124 N. Y., 334 (1890). Where, under levy of execution, the tolls of a bridge company are sold, a court of equity will appoint a receiver to collect the tolls and apply them on the judgment. Covington, etc., Co. v. Shepherd, 21 How., 112 (1858). A judgment creditor need not sue out execution upon his judgment and have a return nulla bona, in order to file a bill in equity for a receiver and other relief, if such execution would be an idle ceremony. The court has power, but is not bound, to appoint a receiver at the instance of a single judgment creditor suing for himself alone. The net income received by the receiver goes to such creditor and not to a mortgagee who did not become a party thereto. Other and later creditors who come in are not

entitled to anything until after the original complainant is paid. It is immaterial that the judgment creditor obtained judgment by confession of the defendant. Sage v. Memphis, etc., R. R. Co., 125 U. S., 361 (1888). Where a corporation is insolvent and owns valuable properties widely scattered, and by consent upon the filing of a creditor's bill a receiver is appointed and has possession for nine months, it cannot then attack the receivership on the ground that the creditor's actions were not based on judgments, etc. Brown v. Lake Superior Iron Co., 134 U. S., 530 (1890).

¹ In the case In re Receivers of Phil. & R. R. R., 14 Phil., 501 (1881), the circuit court of the United States said: "The modern practice prevailing to some extent, elsewhere, of transferring corporate property to the custody of the courts, to be thus held and managed for an indefinite period of years, to suit the convenience of parties, whereby general creditors and stockholders are kept at bay, I regard as a mischievous innovation." Where a judgment creditor for \$16,000 has had a receiver in possession for four years and has realized only \$1,000, and has not pursued any other remedy, and the security is ample, and the lien of the judgment creditor is of doubtful validity, the court will discharge the receiver. Howard v. La Crosse, etc., R. R., Woolw., 49 (1864). Where by previous agreement with the officers of the company a judgment creditor applies for and obtains a receiver by consent, and this receiver for nine mouths receives the income and applies it all to improvements, no effort being made to pay the judgment, the object being to delay all creditors and to apply all profits to improvements and to pay off a bonded debt before it is due, it is an abuse of the process of the court and the reA general creditor of a corporation cannot obtain a receiver. A few cases hold to the contrary, but the general rule is that until he obtains judgment, and execution is returned unsatisfied, he will not be given the extraordinary and disastrous remedy of a receivership. The mortgagor corporation itself may in certain extreme

ceiver will be discharged. Sage v. Memphis, etc., R. R., 5 McCrarv. 643 (1883): S. C., 18 Fed. Rep., 571, and 125 U. S., 361 (1888). See, also, Moran v. Alvas, etc., Co., N. Y. L. J., Dec. 1891, where the court refused to appoint a receiver and said: "The power of the court to appoint a receiver to preserve the assets of a corporation, foreign or domestic, it seems to me does not apply where the corporation is a solvent and going concern, and where it is perfectly apparent that the only purpose of the application for the appointment of a receiver is to prevent creditors enforcing their claims by the ordinary and due process of law against such solvent corporation." East Tenu., etc., R. R. v. Atlanta, etc., R. R., 49 Fed. Rep., 608 (1892), where the federal court appointed a receiver because the state court on a prior bill was about to appoint one to merely nurse the property. But see p. 1415, infra.

1 In the federal court, following as it does the English practice on its equity side, a corporation will not be placed in a receiver's hands at the instance of a general creditor who has not obtained judgment and had execution returned unsatisfied. Yet it is too late for the corporation to raise this objection when proceedings have gone on and are ready for a decree. Brown v. Lake Superior Iron Co., 134 U. S., 530 (1890). Mortgagees in trust cannot be compolled to yield to receivers representing creditors at large. Matter of Home Assoc., 129 N. Y., 288 (1891). The courts have no power to appoint a receiver of the property of any corporation, whether domestic or foreign, upon the filing of a bill by a creditor-at-large on behalf of himself and of all others similarly situated. Lehigh Coal, etc., Co. v. Central

R. R., 43 Hun, 546 (1887). Mere insolvency is not sufficient ground for the anpointment of a receiver where there is no charge of fraud, mismanagement or wasting of assets, especially where the insolvency is denied. Lawrence, etc., Co. v. Rockbridge Co., 47 Fed. Rep., 755 (1891). A general creditor cannot restrain the levy of execution by a judgment creditor, and the appointment of a receiver of the corporation in such a suit without making the corporation a party or giving it notice is void. Gravenstine's Appeal, 49 Pa. St., 310 (1865). A general creditor cannot enjoin the corporation from making a lease of its property to another general creditor nor have a receiver appointed. Although the corporation is insolvent, "this court has no authority to act as a court of insolvency for the liquidation of the affairs of an insolvent railroad corporation." Pond v. Framingham, etc., R. R., 130 Mass., 194 (1881). The general creditor must first get a lien by attachment. judgment or otherwise. Id. A federal court will sometimes appoint a receiver of an insolvent corporation although no judgment has been obtained. After the commencement of proceedings therefor an assignment by it for the benefit of creditors is ineffectual. Belmont Nail Co. v. Columbia, etc., Co., 46 Fed. Rep., 8 (1891). Where a manufacturing company is insolvent and has turned over its property to a trustee for some of its creditors, the court under the circumstances of the case will appoint a receiver. Consolidated, etc., Co. v. Kansas, etc., Co., 43 Fed. Rep., 204 (1890). In the case Avery v. Blees Mfg. Co., 27 N. J. Eq., 412 (1876), the court appointed a receiver on the bill of gene at creditors, two of whom were also stockholders,

cases, where it is insolvent and its assets will be largely lost and rendered unavailable to its creditors if it continues in possession, apply for and obtain a receiver of its own property.1

for the purpose of preserving the corporate assets during the litigation, where the company was insolvent and the board of directors had executed a fraudulent mortgage which was about to be enforced. A judgment creditor's action to reach corporate assets may be based on a judgment obtained in another state. And where violation of trust, dissipation and concealment of assets and conspiracy are charged, no prior judgment at law at all is necessary. Merchants' Nat'l Bank v. Chattanooga Can. Co., 53 Fed. Rep., 314 (1892). A simple creditor of an insolvent railroad corporation cannot obtain the appointment of a receiver. even though he files a bill in behalf of himself and others. Smith v. Superior Court, etc., 32 Pac. Rep., 322 (Cal., 1893). A policy-holder in a mutual benefit association may have a receiver appointed where it is alleged that the officers have converted three-quarters of the assets to their own use, and that the officers refused to call meetings of the directors and refused to publish the proceedings as required. Supreme Sitting of the Order of Iron Hall v. Baker, 33 N. E. Rep., 1128 (Ind., 1893). Where the directors of a bank, upon its dissolution, are winding it up, the court will not appoint a receiver where there is no special reason for doing so. Watkins v. National Bank, 32 Pac. Rep., 914 (Kan., 1893). Where debenture holders are foreclosing their lien the company may appoint a temporary manager as well as receiver. Makins v. Percy Ibotson & Sons, Limited, 63 L. T. Rep., 515 (1890). Parties who have intervened in a suit in equity. commenced to dissolve the corporation and appoint a receiver, cannot in that suit attack the order appointing a receiver. Commercial Nat. Bank v. Burch, 31 N. E. Rep., 420 (Ill., 1892).

1 Parties seeking payment of rent out of a receiver's fund cannot question the

legality of the appointment of receivers at the instance of the mortgagor. Quincy, etc., R. R. v. Humphreys, 145 U. S., 82 (1892), the court saying: "A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose . suggestion or by whose consent he is appointed: and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court for the benefit of the party ultimately proved to be entitled, but not to change the title or even the right of possession in the property." Prior to this decision it was commonly supposed that such a receivership was unauthorized by law. The decision of the court below in appointing the receiver was severely criticised, and the abuses which would arise in allowing the corporation to practically name its own receiver were vigorously set forth. The decision of the court below is found in Wabash, etc., R'y v. Central T. Co., 23 Fed. Rep., 513 (1888); also id., 272. This decision was seriously questioned in Atkins v. Wabash, etc., R'y, 29 id., 161 (1886), but sustained in Central T. Co. v. Wabash, etc., R'y, 29 Fed. Rep., 618 (1886). In the case Kimball v. Goodburn, 32 Mich., 10 (1875), the court, in holding that a deed of release by a corporation was valid, although a receiver claimed its assets, said: "We are aware of no case where a corporation, in its corporate capacity and name, can apply to be put in the custody of a receiver." The insolvency of a corporation is in itself alone not sufficient ground for the appointment of a receiver. The court will not appoint a receiver of an insolvent bank, even though the bank itself applies for the appointment. Hugh v. McRae, Chase's Dec., 466 (1869). Where the president, secretary and treasurer, with intent to wreck a corporation, and withA receiver will not be appointed in a suit by a stockholder to remedy the frauds or *ultra vires* acts of the directors or of the corporation itself. The court will not injure the whole enterprise in order to correct a wrong done to the enterprise. Other remedies will be applied.¹ The state cannot have a receiver appointed, even though it repeals the charter. The property then belongs to the stockholders, and the state cannot interfere with it through a receiver.²

In Indiana a lower court made the remarkable decision that where a "strike" had tied up a street railroad, and cars were not run on account of violence, a citizen might by bill in equity have a receiver appointed to run the road. This was, a case where the state failed to protect property, and then added to the injury by taking the property away from the owner because the owner was himself not strong enough to protect the property.³

A receiver, in a few instances, has been appointed to conduct an election, where none of the registered stockholders are entitled to vote.

In addition to receiverships, specified above, receivers are often appointed under the statutes of the various states. These statutes in many instances have extended the powers of courts of equity very greatly in regard to the appointment of receivers.⁵ Although

out the consent of the board of directors, cause a receiver to be appointed, the court will discharge him. Walters v. Anglo, etc., Co., 50 Fed. Rep., 316 (1892). In the old case Macon, etc., R. R. v. Parker, 9 Ga., 377 (1851), it seems that the company filed a bill and obtained an administration and sale of all its assets, it being insolvent.

¹ See § 746, supra.

² The legislature cannot upon dissolving a corporation order that its property be placed in the hands of a receiver. This is not due process of law. People v. O'Brien, 111 N. Y., 1, reversing 45 Hun. 519.

⁸ Fishback v. Citizens' St. R. R., Nat. Corp. Rep. Super. Ct. Ind., March 4, 1892.

⁴ King v. Barnes, 51 Hun, 550 (1889); aff'd, 112 N. Y., 655; ch. XXXVII, supra.

⁵ Jurisdiction to appoint receivers of corporations is wholly statutory, except receivers appointed to care for property during the pendency of a suit. The appointment does not dissolve the corpo-

ration nor stop its business, except as to the mortgaged property. The receiver is not a proper party to suits against the corporation. Decker v. Gardner, 124 N. Y., 334 (1890). Proceedings under a statute for a receiver must be in strict accordance with the statute. Chamberlain v. Rochester, etc., Co., 7 Hun, 557 (1876). Upon a voluntary dissolution under a statute the court has no power to appoint a temporary receiver unless the statute authorizes it. Matter of Boynton, etc., Co., 34 Hun, 369 (1884). Under the New Jersey statutes, where a receiver has been put in possession by reason of insolvency, and a mortgagee is foreclosing and asks that the receiver be made a party, the receiver may have perishable property sold on the ground that there is a conflict as to the priority of liens. Emmons v. Davis, etc., Co., 16 Atl. Rep., 158 (1888). This statute, authorizing the receiver to sell the property free from incumbrances, is constitutional. Potts v. N. J. Arms, etc., Co.,

parties are litigating over the right to a railroad, this is no ground for a receivership of it pending the litigation.

The power of the court to appoint a receiver of a railroad which is in financial difficulties, the purpose of the appointment being to

17 N. J. Eq., 395 (1866). But on appeal the court held that the receiver selling real estate under this statutory power must sell subject to existing liens thereon. Potts v. N. J., etc., Co., id., 516. overruling Kelly v. Neshanic, etc., Co., 7 N. J. Eq., 579. Under the above statute, although such a receiver is in possession, vet the trustees may commence foreclosure, and the court will order the receiver to deliver possession to them. and will direct the questions of the time, etc., of sale to be considered thereafter. Randolph v. Larned, 27 N. J. Eq., 557 (1876), reversing Middletown v. N. J., etc., R. R., 26 id., 270. Iu New Jersey by statute the court is empowered to appoint a receiver when a company shall become insolvent or shall suspend its business for want of funds to carry on the same. The courts hold that such "insolvency means a general inability of a dehtor to answer pecuniary engagements: and it does not follow that he is not insolvent because he may ultimately have a surplus after winding up his affairs." The court will discharge the receiver, however, whenever the debts and receiver's charges are paid. Sewell v. Cape May, etc., R. R., 30 Am. & Eng. R. R. Cas., 155 (N. J., 1887). In the case of Matter of Long Branch, etc., R. R., 24 N. J. Eq., 398 (1874), the court, by its power under the New Jersey statutes, appointed a receiver to operate a railroad which had ceased to operate for many weeks. The court stated that it would discharge the receiver whenever the company was ready and willing to operate the road. Where the court has put in a receiver under the New Jersey statute for failure to run trains, it will not in that proceeding decide who is entitled to the road when the receiver is discharged. The road will be returned to the company that had it.

Long Branch, etc., R. R. v. Sneden, 26 N. J. Eq., 539 (1875). In New Jersey by statute a receiver of the assets in the state of an insolvent corporation may be appointed with or without notice to the corporation. The proceeding is in rem. Albert v. Clarendon, etc., Co., 23 Atl. Rep., 8 (N. J., 1891). Under the New Jersey statute authorizing the court to appoint a receiver of an insolvent corporation upon the application of a stockholder or creditor, insolvency must not only be alleged, but must be clearly shown by facts and details. Atlantic Trust Co. v. Consolidated, etc., Co., 23 Atl. Rep., 934 (N. J., 1892). Insolvency sufficient for a receiver under the New Jersev statute is sufficiently proven by showing that the company has no money or credit, and its road is being built by another company, and suits are pending against it. Tuckahoe, etc., R'v Co. v. Baker, 25 Atl. Rep., 402 (N. J., 1892). If the directors, who by statute are made trustees to wind up the corporation upon dissolution, delay in so doing, the court will appoint a receiver. Matter of Pontius, 26 Hun, 232 (1882). In England the court will not appoint a receiver of a railway company that has never done anything towards proceeding with its enterprise. Re Birmingham, etc., R'y, L. R., 18 Ch. D., 155 (1881).

1 Where two railroad companies are in litigation over the construction of a contract which gives both companies the right to use a certain track and tunnel in company, the court will not appoint a receiver of the tunnel and track, but will enforce its decree when reached by other means. Delaware, etc., R. R. v. Erie R'y, 21 N. J. Eq., 298 (1871). Where two parties are litigating by a bill to quiet title to obtain title and possession of an unused railroad track, both parties being out of possession, the court will

preserve the property and prevent attachments and executions in order that it may be extricated from its financial difficulties, and its old resources or new money made available, seems to be established. Such was the purpose and result of the appointment of a receiver of the Reading Railroad in 1893, and such was the object in the appointment of a receiver of the Central Railroad and Banking Company of Georgia in 1892.

It is still undecided whether the supreme court of the United States may appoint a receiver of property pending an appeal,² but it seems that the circuit court below has that power during the appeal.³

In regard to the procedure in appointing a receiver the rules for the most part are very flexible, but it requires an extraordinary case to justify a court in appointing a receiver without notice to the corporation and the opportunity to it to be heard.

not appoint a receiver. St. Louis, etc., R. R. v. Dewees, 23 Fed. Rep., 519 (1885).

¹ Clarke v. Central, etc., Co. of Georgia, 54 Fed. Rep., 556 (Ga., 1893), the court saying: "The receivership, as it then existed, constituted a trust of a somewhat unusual but entirely salutary character. It was created, as stated, in an effort to tide over the unpleasant difficulties of vast, valuable, and probably solvent, though badly embarrassed, condition, mainly occasioned by unlawful causes." But see n. 1. p. 1411.

² Pacific R. R. v. Ketchum, 95 U. S., 1 (1877).

³ In the case of May v. Printup, 59 Ga., 128 (1877), the court said that the circuit court of the United States had power to appoint a receiver pending an appeal to the supreme court of the United States.

4 It must be a very strong case which will justify a court in appointing a receiver without notice. Florida v. Jacksonville, ctc., R. R., 15 Fla., 201 (1875), holding that the proper remedy is an injunction until the hearing. It is illegal to appoint a receiver of a corporation ex parte where the defendant might be served in the jurisdiction even though the suit is by a stockholder of a lessor corporation, and he sets forth facts showing that the property has

been practically ruined by the lessee and by collusion between the lessee and the board of directors of the lessor, and that the lessee is about to have a receiver appointed of the property. Wabash R. Co. v. Dykeman, 32 N. E. Rep., 823 (Ind., 1892). An appointment should be ex parte only when there is fraud or the property is being wasted, or removed. or great loss will occur during the time of giving notice. Hence judgment creditors cannot have a receiver appointed ex parte although the rolling stock has been levied on and the road not operated and trains are being delayed and freight not moved. Chicago, etc., Co. v. Cason, 32 N. E. Rep., 827 (Ind., 1892). An ex parte appointment of a receiver of a solvent corporation which attempted to make a consolidation, which consolidation was thereafter declared void by the courts, is void, even though some of the stockholders have . disobeyed an injunction. Railway Co. v. Jewett, 37 Ohio St., 649 (1882). The appointment of a receiver of a company on an ex parte application and on a bill which does not allege the insolvency of the corporation is void. Turgeau v. Brady, 24 La. Ann., 348 (1872). An ex parte appointment of a receiver and the ex parte granting of an injunction against the officers acting, the charge

A receiver of the assets in the jurisdiction belonging to a foreign corporation is more readily appointed ex parte, especially where it is difficult to obtain service. There is some doubt as to whether a receiver may be appointed by a judge in vacation time where there is no statutory power given to him for that purpose.

being fraudulent mismanagement, are void. Port Huron, etc., R'v v. Judge, 31 Mich., 456 (1875). A judgment creditor is not entitled to notice of an application for the appointment of a receiver. Morrison v. Menhaden Co., 37 Hun, 522 (1885). Where the road has been sold under a judgment and the purchaser is in possession, a receiver of the property canuot be appointed unless he is made a party. Searles v. Jacksonville, etc., R. R., 2 Woods, 621 (1873). In the case Mc-Henry v. N. Y., etc., R. R., 25 Fed. Rep., 114 (1885), the court discharged a receiver who had been appointed ex parte in the state court before the case was removed. Where the receivership is the main purpose of the suit the court will not appoint until the final hearing is had. Union, etc., Ins. Co. v. Union, etc., Co., 37 Fed. Rep., 286 (1889). In New York by statute the ordinary business of a corporation cannot be interfered with except upon notice.

¹ Klinfs v. Supreme, etc., of Iron Hall. N. Y. L. J., October 7, 1892 (Sup. Ct., Sp. T.), the court saying: "In People v. Albany & Susquehanna R. R. Co., 7 Abb. (N. S.), 290, it is said: 'In Verplanck v. Mercantile Insurance Company, 2 Paige, 450, Chancellor Walworth states the rule as follows: "By the settled practice of this court in ordinary suits, a receiver cannot be appointed ex parte before the defendant has had an opportunity to be heard in relation to his rights, except in those cases where he is out of the jurisdiction of the court and cannot be found. or where, for some reasons, it becomes absolutely necessary for the court to interfere before there is time to give notice to the opposite party to prevent the destruction or loss of property." The same rule is re-asserted by the chancellor in Sandford v. Sinclair, 8 Paige, 374,

and in Gibson v. Martin, id., 481, and is asserted in numerous cases, among which are Field v. Ripley, 20 How. Pr., 26: McCarthy v. Peake, 9 Abb. Pr., 166, and Dowling v. Hudson, 14 Beavan. In the case of Verplanck v. Mercantile Insurance Company, supra, the chancellor also said that 'In every case where the court is asked to deprive the defendant of the possession of his property without a hearing, or an opportunity to oppose the application, the particular facts and circumstances which render such a summary proceeding proper should be set forth in the bill or petition on which application is founded."

² The court has power in vacation time to appoint a receiver. Greeley v. Provident, etc., Bank, 15 S. W. Rep., 429 (Mo., 1891). A receiver of a railroad cannot be appointed in vacation time by a judge of an Illinois court, but the appointment may be validated by confirmation of the court. Hervey v. Ill. Mid. R'y, 28 Fed. Rep., 169 (1884); Hammock v. Loan & T. Co., 105 U. S., 77 (1881). Concerning the limited powers of a judge at chambers in vacation time, see Blair v. Reading, 99 Ill., 600 (1881). A judge may appoint a receiver where he has power to grant an injunction out of court. Cincinnati, etc., R. R. v. Sloan, 31 Ohio St., 1 (1876). appointment of a receiver is an equitable remedy, and bears a similar relation to courts of equity that proceedings in attachment bear to courts of Hence the appointment of a receiver has been said to be an equitable execution. . . A promiscuous receivership is, in effect, an injunction, and something more stringent still." Where a judge has power to appoint a receiver out of course, he has power to vacate the appointment. Cincinnati, etc., R. R.

The appointment of a receiver is not complete where a commissioner or referee has made the appointment. The court must confirm I

If the bonds, upon which the foreclosure suit and the appointment of the receiver are based, are void the receivership itself is void.2 But the fact that the service of the summons was irregular and void does not necessarily vitiate the receivership.3

The regularity, propriety and validity of the appointment of a receiver can be questioned only in the court that appointed him. and only in a direct proceeding to test that question.4 The anpointment of a receiver does not prevent the company from holding its regular elections.5

§ 864. Who will be selected for receiver.— As a general rule the court will not make one of the officers or directors or stockholders of the corporation the receiver. on will it appoint one of the

n. Sloan, 31 Ohio St., 1 (1877). A judge of the United States supreme court may grant an injunction though he is out of the circuit to which he has been assigned. United States v. Louisville, etc., Canal Co., 4 Dill., 601 (1873). ceiver may be discharged at chambers. Walters v. Anglo, etc., Co., 50 Fed. Rep., 316 (1892).

¹The report of a commissioner that he has appointed a receiver is insufficient to complete the appointment unless the report is confirmed. Kimball v. Goodburn, 32 Mich., 10 (1875).

² Where the bonds are invalid a receiver appointed in the foreclosure suit has no power to collect subscriptions. Farmers' L. & T. Co. v. San Diego, etc., St. Car Co., 49 Fed. Rep., 188 (1892). If a bond is not required from the receiver, it is not necessary for him to give one. Wilson v. Welch, 31 N. E. Rep., 712 (Mass., 1892).

3 It seems that a court of equity has power to appoint a receiver of an insolvent corporation to preserve its property, even though the service of the summons, etc., on the corporation was void, but the court cannot in such a case authorize a sale of the land of the corporation. St. Louis, etc., Co. v. Sandoval, etc., Co., 111 Ill., 32 (1884).

pointment of a receiver cannot be questioned or tried in a different court and case from that in which the receiver was appointed. The remedy of the party complaining is to move to set it aside. Vermont, etc., R. R. v. Vermont Central R. R., 46 Vt., 792 (1873). See, also, a dictum in Klein v. Jewett, 26 N. J. Eq., 474 (1875), to effect that the power of the court to appoint a receiver is to be determined solely by the court appointing him. Where the receiver sues on a note. the defendant cannot attack the regularity of the proceedings by which he was appointed. Case v. Marchand, 23 La. Ann., 60 (1871). In proceedings to commit a person for contempt in garnishing assets after the receiver has been appointed, the validity and regularity of the receiver's appointment cannot be attacked or questioned. Richards v. People, 81 Ill., 551 (1876).

⁵ Taylor v. Phil., etc., R. R., 7 Fed. Rep., 381 (1881).

⁶ Atkins v. Wabash, etc., R'y, 29 Fed. Rep., 161 (1886), the court saying that such an appointment should never be made except upon consent of all parties. The receiver will not be chosen from the directors of the insolvent company, nor from the parties to or counsel in the case. Finance Co. v. Charleston, etc., ⁴The validity and propriety of the ap- R. R., 45 Fed. Rep., 436 (1891). The counsel of either party, nor any party interested on either side, unless all consent thereto. A trust company may be appointed, and in a famous litigation in Vermont a railroad company was for many years the receiver of another railroad company. The courts

president of the company was appointed receiver in the case of Clarke v. Central. etc., Co. of Georgia, 54 Fed. Rep., 556 (Ga., 1893). An officer of the corporation should not be appointed its receiver, and if after his appointment charges of fraud are made which it will be the duty of the receiver to investigate he will be removed. McCullough v. Merchants', etc., Co., 29 N. J. Eq., 217 (1878). In Richards v. Chesapeake, etc., R. R., 1 Hughes, 28 (1876), the court refused to appoint the vice-president receiver, "notwithstanding the almost unanimous consent of parties." In Freeholders v. State Bank, 28 N. J. Eq., 166 (1877), the court refused to appoint as receiver any one connected with the management of the insolvent corporation. In the receivership of the Reading Railroad Company in 1893 the president of the company was made one of the receivers, but he resigned within a few months. In the case of Young v. Montgomery, etc., R. R., 2 Woods, 606 (1875), it appeared that in another suit pending in the same court the president of the insolvent corporation had been appointed receiver. In the case of In re Fifty, etc., Bonds, 15 S. C., 304 (1880), the court appointed the president and directors as receivers, in asmuch as the foreclosure was by the state, and the state could not be required to give security upon the appointment of a receiver. See, also, same case, Gibbes v. Greenville, etc., R. R., id., 518. Later, however, the court decided that such officers were not receivers to the extent of rendering the property liable for expenses in continuing to run the road, where the company's note is taken in payment. Ex parte Williams, 17 id., 396 (1881). In England the appointment of the board of directors as receivers is looked upon with favor. In the case of Re Manchester, etc., R'y,

L. R., 14 Ch. D., 645 (1880), the court said: "If they were acting fairly and working fairly, they would, most likely, be appointed; and in fact, in practice, I believe, as a general rule, either the directors are appointed, or some of them, or the secretary, so as to keep the management in the board of directors." The court will not appoint as receiver the general manager of the company. Fripp v. Chard R'y, 11 Hare, 241 (1853).

¹ Finance Co. v. Charleston, etc., R. R., supra.

² In Cowdrey v. Railroad, 1 Woods, 331 (1870), where by consent one of the foreclosing hondholders was made receiver, the court refused to remove him subsequently to his appointment and Where two receivers have been appointed, each party naming one, and this leads to dissensions and unnecessary expense, the court will remove both and appoint a new one. Meier v. Kansas, etc., R'y, 1 Woods, 331 (1870). Where a court appoints a receiver on the supposition that all the parties in interest agree to the appointment of that particular person, and it afterwards transpires that such was not the case, he will be removed and a new one appointed, the first appointment having really been one-sided and partisan. Wood v. Oregon Development Co., 55 Fed. Rep., 901 (Oreg., 1893).

³ The author has himself caused The Central Trust Company of New York to be appointed receiver of bonds in a railroad case.

⁴ In the case Vermont, etc., R. R. v. Vermont Central R. R., 46 Vt., 792 (1873), S. C. on appeal, 50 Vt., 500 (1877), a railroad company was made receiver, and the court refused to consider in a collateral attack the power of the company to accept the position. Langdon

do not favor the appointment of a receiver from a distant state.¹ The receiver should not select his counsel from either side.²

§ 865. A second receiver will not be appointed where one receivership already exists.— Such is the rule even though the application for the second receiver is by a first mortgagee who has filed his bill to foreclose.³ The question of a conflict of jurisdiction between the federal and state courts is considered elsewhere.⁴ Even if a second one is appointed he takes subject to the rights of the first receiver, except as to property not included in the first receivership.⁵

v. Vermont, etc., R. R., 54 Vt., 593, 613 (1882). See, also, Roxbury v. Central Vt. R. R., 60 Vt., 121 (1887).

¹ Mr. Justice Miller in Meier v. Kansas, etc., R'y, 1 Woods, 476 (1878), said that it was improper and unnecessary to appoint for a Kansas railroad a receiver located in New York. Where two receivers have been appointed to act jointly, one appointed by each party, and they cannot agree, the court will remove them and appoint a new single resident receiver. One is enough. Meier v. Kansas, etc., R'y, 5 Dill., 476 (1878). A mortgagee who names the receiver may be liable for his misfeasances. Sorchan v. Mayo, 23 Atl. Rep., 479 (N. J., 1892).

² The receiver should not appoint as his counsel his brother, who has come into the circuit for the purpose of obtaining the receivership business, and who was attorney for the bondholders before the receiver was appointed. Blair v. St. Louis, etc., R. R., 20 Fed. Rep., 348 (1884).

³ Where receivers have been appointed at the instance of the insolvent corporation, additional receivers will not be appointed on the application of mortgages who file a cross-bill for foreclosure. Wabash, etc., R'y v. Central T. Co., 22 Fed. Rep., 272 (1884). Where a receiver has been appointed by the federal court in a foreclosure suit by second-mortgage hondholders, the first-mortgage bondholders cannot subsequently, by starting a foreclosure suit on the first mortgage, oust such receiver

and have one appointed in their suit. They cannot have a receiver until the first receiver is discharged. Young a Montgomery, etc., R. R., 2 Woods, 606 (1875). The federal court of bankruptcy. when in existence in 1873, held that it would not appoint a receiver of a railroad company where the circuit court of the United States had already appointed one, even though the latter receiver had abandoned his duties. bama, etc., R. R. v. Jones, 7 Nat'l Bankr. Rep., 145. So also Alden v. Boston, etc., R. R., 5 id., 230 (1871), where a state court had appointed a receiver. Where several mortgages on the same property cover the income, and the junior mortgagee causes a receiver to be appointed. the prior mortgagees being made parties defendant, a prior mortgagee may apply to the court to order the receiver to apply the income to the prior mortgage. Seibert v. Minneapolis, etc., R'y Co., 53 N. W. Rep., 1151 (Minn., 1893). Where receivers appointed over property in two circuits have been removed as to property in one of those circuits, the court will order the receivers to turn over the property, money, rolling stock, etc., in the circuit where their powers have ceased. Central T. Co. v. Wabash, etc., R'y, 29 Fed. Rep., 618 (1886).

⁴ See § 839.

⁵ Where a receiver is in possession of a fund, another receiver subsequently appointed in another action in the same state is not entitled to the fund, and if he gets it he will be compelled to restore it to the first receiver. O'Mahony v. BelThe usual rule is to apply to the court to have the first receiver made receiver in the second action also, or to have it extended to property not already included.¹ The court will readily appoint a resident receiver of the assets of a foreign corporation,² and will often appoint as resident receiver the receiver who has already been appointed in another state.³

Where a receiver has been appointed in the state court and the

mont. 5 J. & S., 380 (1874). There may be a second receiver appointed on the application of judgment creditors of such corporate assets as are not included in the mortgage in the foreclosure of which the first receiver has been appointed. Whitney v. N. Y., etc., R. R., 32 Hun. 164 (1884). A receiver may apply to the court to have another receivership declared void. Id. A federal receiver has prior rights over a state receiver appointed subsequently. Tenn., etc., R. R. v. Atlanta, etc., R. R., 49 Fed. Rep., 608 (1892). See. also. \$ 839.

¹ An ancillary receivership will be granted ex parte subject to the right of the court to cousider the appointment on a subsequent motion where a receivership has been granted in the main action. Platt v. Philadelphia, etc., Co., 54 Fed. Rep., 569 (Mass., 1893), the court refusing to follow Mercantile Trust Co. v. Kanawha & O. R'y Co., 39 id., 337 The receivership may be extended to an additional line of railroad upon the application of one of the parties who claims a lien on such additional part also. Mercantile T. Co. v. Missouri, etc., R'y, 41 Fed. Rep., 8 (1889). If a receiver is in possession, the same court in a subsequent suit affecting the same property will extend the first receivership to the second suit. But if the court appoints a new receiver he displaces the old. State of Florida v. Jacksonville, etc., R. R., 15 Fla., 201 The receivership obtained at the instance of the mortgagee cannot at his instance be extended to property not included in the mortgage. Id., 280. In Florida a receiver appointed in one

county has no control over the part of the road which is in other counties. Id.

² A receiver of the property in one state of a foreign insolvent corporation will be appointed at the instance of a resident creditor, even though the corporation has been dissolved and its affairs are in process of liquidation in the other state. The surplus after paying the creditors will be distributed among the stockholders. Redmond v. Hoge, 3 Hun, 171 (1874). See, also, Klinfs v. Supreme, etc., of Iron Hall, supra, § 863, note.

³ Dunlap v. Paterson, etc., Ins. Co., 12 Hun, 627 (1878). In the foreclosure of the West Shore Railroad, receivers were first appointed by the New York state court, and then the same receivers were appointed in a suit instituted in the federal court in New Jersey to cover the part of the property in New Jersey. The federal court referred matters of doubt to the New York court for decision. United States T. Co. v. N. Y., etc., R'y, 25 Fed. Rep., 797 (1885). Although the judges in the different circuits in which a consolidated railroad is being foreclosed issue different orders to the receiver. who is the receiver in each circuit, as regards payments to be made, yet if these orders are all legal, the circuit judge will not interfere with them. Central T. Co. v. Texas, etc., R'y, 22 Fed. Rep., 135 (1884). Comity as to allowing receivers appointed in one state to sue in another state does not go the extent of allowing a bill in equity of such a receiver to extend his receivership over property in the state to displace a prior bill filed by a creditor of the corporation to have a receiver appointed, etc.

case is then removed to the federal court the same receiver continues 1

§ 866. Levy of execution, attachment and garnishee process in the state after the order for the receivership is made—Vesting of title.— The law favors the diligent creditor, and the diligent creditor is always endeavoring to secure a preference over other creditors by obtaining levy of execution before other creditors levy and also before a receivership is ordered. The law, however, favors the priority of the receivership in such cases, especially in railroad cases, where the public is interested in keeping the property together, and in insolvent corporation cases, where rascality is apt to abound. After the entry of an order that a receivership is granted, a levy of execution, attachment or garnishment upon the personal property is invalid and a contempt of court, even though the receiver himself has not yet been named or has not yet filed his bond.²

Nor should the two suits be consolidated. Day v. Postal Tel. Co., 66 Md., 354 (1886).

¹ Turner v. Indianapolis, etc., R'y, 8 Biss., 527 (1879).

² After a receiver of the rents is appointed a judgment creditor will be enjoined from attaching them. Ames v. Trustees, etc., 20 Beav., 332 (1855). Where a creditor obtains judgment against the corporation on December 9th, and at once issues execution, and on December 31st a receiver is appointed and at once takes possession in another action, and the first creditor garnishes a debtor of the company on January 18th, the receiver takes title in preference to the garnishee process, even though he did not file his bond until some forty days later. Maynard v. Bond, 67 Mo., 315 (1878). An attachment of partnership property is not good as against a receiver's title where the attachment was levied after the appointment of the receiver but before he filed his bond. Steele v. Sturges, 5 Abb. Pr., 442 (1857). So, also, where process of execution is levied after the order to ascertain a fit receiver, but before his appointment. Rutter v. Tallis, 5 Sand., 610 (1852). The right of the receiver to take possession accrues when he files his bond. Noyes v. Rich, 52 Me., 115 (1862). The decision in the old case of Farmers' Bank, etc., v. Beaston, 7 G. & J. (Md.), 421 (1836), to the effect that a garnishee process subsequent to the appointment and giving of bonds of a receiver is good as against the receivership, where the receiver has not actually taken in charge the fund so garnished, is not the law. It has been held in England that the receiver of the assets of an individual does not take title until he gives the required security. and an execution levied after his appointment but before he gives security is not a contempt of court. Edwards v. Edwards, L. R., 2 Ch. D., 291 (1876). After the receiver takes possession a judgment creditor who levied on the real estate before the receiver was appointed can foreclose his lien only through the court that appointed the receiver. Wiswall v. Sampson, 14 How., 52 (1852). The title of a receiver, on his appointment, dates back to the time of granting the order. East Tenn., etc., R. R. v. Atlantic, etc., R. R., 49 Fed. Rep., 608 (1892). See, also, In re Schuyler, 136 N. Y., 169. Even though the receiver declines to accept the position, an execution cannot legally be levied on the property. Skinner v. Maxwell, 68 N. C., 400 (1873).

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In regard to real estate, the receiver does not take title by the mere fact of his appointment. Until the insolvent corporation actually makes a deed of its real estate to the receiver, the title of the receiver thereto is good only in equity.¹ Such also is the rule in regard to patent-rights. An assignment is necessary.² As to personal property the appointment does not in itself convey title to personalty or choses in action located out of the state.³ In appointing a receiver the court may withhold from him certain assets upon which there are mortgages which are about to be enforced under the power of sale.⁴ The order appointing the receiver may compel the company to turn over to it all the books of the company and also the seal.⁵

§ 867. Levy of execution, attachment and garnishee process in another state after a receivership has been ordered in one state—Receiver of assets of a foreign corporation.—It is a settled rule that each state will favor its own litigants who are creditors of a corporation as against a receiver of that corporation appointed in another state. Hence an attachment, execution or garnishee pro-

1 Unless the statute provides otherwise. as it does in New York, the real estate of the corporation is not vested in the receiver except by an actual conveyance from the corporation to him. St. Louis, etc., Co. v. Sandoval, etc., Co., 111 Ill., 32 (1884). A levy of execution prior to the filing of the bill through which the receiver is appointed takes precedence of course over the receiver. Chautauque, etc., Bank v. Risley, 19 N. Y., 369 (1859). Unless a deed of the real estate is made to the receiver, a purchaser from him has no title and cannot maintain a suit for partition. Scott v. Elmore, 10 Hun, 68 (1877). A statute may of course provide that title shall vest without a deed. Matter of Att'y-Gen. v. Atlantic, etc., Ins. Co., 100 N. Y., 279 (1885), where the statute applied to receivers of insurance companies. A receiver to whom the property has been assigned takes precedence over a subsequent judgment and levy all in the same state. Swift's, etc., Works v. Johnson, 26 Fed. Rep., 828 (1886). The judgment lien of a party dates from its entry and not from the time when a verdict was rendered. Jennings v. Phil., etc., R. R., 23 Fed. Rep., 569 (1884). Title

vests in the receiver under the New York statute upon his appointment. Upon filing his bond the title relates back, although he does not at once take possession. It is contempt to file a libel against the property after such order is made and bond filed. Matter of Schuyler's, etc., Co., 64 Hun, 384 (1892). Where the receiver does not take actual possession but merely collects rental, it is held in Mississippi that the mortgagor company may convey the property and give good title. Miss. Val. Co. v. Chicago, etc., R. R., 58 Miss., 896 (1881).

² In Pennsylvania the receiver of a corporation has no such title to patents as gives him power to institute a suit thereon. He is custodian merely. Dick v. Struthers, 25 Fed. Rep., 103 (1885).

Booth v. Clark, 17 How., 322 (1854).
Weihl et al. v. Atlanta, etc., Co. et al.,
15 S. E. Rep., 282 (Ga., 1892).

⁵ American Can. Co. v. Jacksonville, etc., R'y, 52 Fed. Rep., 937 (1892). The receiver is entitled to the books, documents and papers of the company. Engel v. The South, etc., Co., 66 L. T. Rep., 155 (1892).

cess levied in the state on assets in the state belonging to a foreign corporation will take precedence over the title of a receiver appointed prior thereto in another state. But there is a certain danger connected with such a proceeding. If the court that appointed a receiver can reach the creditor who has obtained such a precedence over the receiver, it will compel such creditor to release his advantage or will commit him for contempt of court; or will

1 A debt due from a citizen of Massachusetts to a New York corporation on overdue promissory notes may be attached in Massachusetts by a Massachusetts creditor of the corporation, and this attachment comes in ahead of the rights of a New York receiver of the corporation, even though the receiver was appointed before the attachment was made. If the corporation had been dissolved the attachment snit would of course have failed. Taylor v. Columbian Ins. Co., 96 Mass., 353 (1867). The priority of a suit in New York by the receiver on these notes does not change the above rule. Id. The sequel of this decision is found in Osgood v. Maguire, 61 N. Y., 524 (1875), where the unfortunate payor of the above-mentioned notes was obliged to pay them over again, because the New York courts declared the Massachusetts decision to be contrary to law. In Connecticut it is held that a Massachusetts assignee appointed by the court has no rights as against attachments of the assignor's property in Connecticut. Upton v. Hubbard, 28 Conn., 274 (1859). An Ohio receiver of an Ohio bank has no precedence over attachments levied in New York on funds of the bank in New York, although the attachments were subsequent in time to the appointment of the receiver. Willitts v. Waite, 25 N. Y., 577 (1862). An attachment in New York of property of a New Jersey corporation after a receiver had been appointed in New Jersey, but before a receiver was appointed in New York, is good as regards property attached but no further. Woerishoffer v. North River Con. Co., 99 N. Y., 398 (1885); Dunlop v. Patterson, etc., Ins. Co., 12 Hun, 627

(1878); affirmed, 74 N. Y., 145. In Louisiana it is held that where a receiver of a Tennessee bank is appointed in Tennessee, and a part of the assets are illegally taken from Tennessee into Louisiana. the courts of the latter will on an intervention by the Tennessee receivers restore the property to him, even as against an attachment in Louisiana. Paradise v. Farmers', etc., Bank, 5 La. Ann., 710 (1850). An attachment in Maine against the property of a New York corporation is not displaced by the subsequent appointment in New York of a receiver of the corporation. Hunt v. Columbian Ins. Co., 55 Me., 290 (1867). Where a receiver took possession of a barge in Missouri, wherein he was appointed, and caused the barge to continue business, and the barge goes into the state of Illinois, it cannot there be attached, even for a corporate debt due to a citizen of Illinois. The court said that the receiver was rightfully in possession, and such a case does not come under the rule that "a foreign receiver should not be permitted, as against the claims of creditors resident in another state, to remove from such state the assets of the debtor, it being the policy of every government to retain in its own hands the property of a debtor until all domestic claims against it have been satisfied." Chicago, etc., R'y v. Keokuk, etc., Co., 108 Ill., 317 (1884). A receiver appointed in New Jersey over a New Jersey corporation may send property into Connecticut to build a bridge, and that property cannot be attached for a debt of the company. Pond v. Cooke, 45 Conn., 126 (1877).

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enjoin him from obtaining such preference.\(^1\) Moreover the courts of one state do not favor attachments in that state by a resident of another state as against a receiver appointed in the latter state.2 This same question of interstate comity arises in regard to the right of a receiver in one state to bring suits in the courts of another state.3 As regards rolling stock the rule is strict in preserving it from attachment, the object here being to enable the receiver to continue the operation of the road.4

The courts of one state will at the instance of creditors of a foreign corporation appoint a receiver of the assets of such corporation so far as such assets are within the state.5

1 Where the courts of Illinois appoint a receiver of a copartnership and a Connecticut corporation, having an office and agent in Chicago, causes through such agent an attachment to be levied in the District of Columbia on goods belonging to such insolvent copartnership. it is a contempt of the Illinois courts and the agent of the corporation will be committed for contempt. Sercomb v. Catlin, 128 Ill., 556 (1889). Where a partnership in Massachusetts is about to go into insolvency, its creditors, citizens of Massachusetts, will not be allowed to levy an attachment in Pennsylvania on property there belonging to the firm. After the assignee in insolvency is appointed the Massachusetts court will enjoin the citizens of that state from continuing the Pennsylvania action. Dehon v. Foster, 86 Mass., 545 (1862), In the case of Chaffee v. Quidnick Co., 13 R. I., 442 (1881), an attorney of New York, who had appeared in this case in -Rhode Island and taken part therein, and knew that a receiver had been appointed of the defendant, his client, and had then attached funds in New York for his fees, was ordered to discontinue his suit in New York. He did so. The court appointing a receiver will enjoin residents of that state from instituting legal proceedings in other states to reach funds which belong to the receiver. It is contempt of court for residents so to do even though there is no injunction. The moneys involved in this case were earnings made after the receiver took

possession. The receiver was appointed in Vermont. A Vermont corporation. a creditor of the insolvent corporation, attached funds in Massachusetts. The court granted the petition of the receiver to enjoin the parties from proceeding with the attachment suit. Vermont, etc., R. R. v. Vermont Central R. R., 46 Vt., 792 (1873).

² Where a bill in equity is filed in Virginia on March 13 for foreclosure and a receiver of a Virginia corporation, and on June 6 an order of appointment is made and the receiver files his bond on June 12, and a citizen of Virginia on June 12 attaches all the defendant's property in Pennsylvania, the courts of the latter state will not sustain the attachment or garnishee process. The receiver takes title. Bagby v. Atlantic. etc., R. R., 86 Pa. St., 291 (1878). Where a receiver in New York is appointed over a New York corporation and the creditors are enjoined from prosecuting the suits against the company, a resident of New York cannot, by starting a suit in Wisconsin against the corporation in garnishing a resident of Wisconsin, obtain a preference in the assets. Gilman v. Ketcham, 54 N. W. Rep., 395 (Wis., 1893). In New York, by statute, a non-resident's right to bring an action against a foreign corporation is very limited. See Code of C. P., § 1780.

3 See § 869.

⁵ Murray v. Vanderbilt, 39 Barb., 140 (1863); Phoenix Foundry v. North River

⁴ See §§ 854, 855.

B. SUITS AND CLAIMS BY AND AGAINST RECEIVERS.

§ 868. The receiver should obtain the leave of his court before bringing a suit.— This is the established rule. It is no defense to his suit that he has not obtained this leave of court, but he will be personally liable for costs if he brings the action without leave of court and is beaten.¹

§ 869. The receiver may sue in other courts of the state or of other states and in certain cases may sue in the federal courts.— Although it is customary for the receiver to bring his suits in the court which appointed him where that court has jurisdiction, yet it is allowable for him to sue in other courts of the state. There is more difficulty, however, in determining whether the receiver may sue in the courts of another state. He can do so only by the comity of states. As receiver he has no absolute right to do so. Generally, however, a foreign receiver is allowed to carry on litigation if the interests of resident creditors are not injured, and if justice will be promoted by sustaining his suit.²

Con. Co., 33 Hun, 156 (1884), where the court also enjoined pending actions against the corporation; Redmond v. Enfield Mfg. Co., 3 Hun, 171 (1872); Beach on Receivers, §§ 422, 427; Re Commercial Bank, etc., 55 L. T. Rep., 609 (1887); N. Y. Code of C. P., § 1812. Cf. Taylor v. Life Ass'n, 13 Fed. Rep., 493 (1882). A debenture issued in Australia by a company organized in Australia, creating a lien on the unpaid subscriptions, including subscriptions in Scotland, does not have priority over an attachment levied in Scotland by Scotch creditors of the company before a receiver has been appointed at the instance of the debenture holders. Re The Queensland, etc., Co., 64 L. T. Rep., 555 (1891); aff'd, 66 L. T. Rep., 433 (1891). Where a receiver is appointed in England over property belonging to a French corporation, and four days afterward a receiver is appointed in France in liquidation proceedings, the parties obtaining the appointment of the receiver in England are entitled to have the property held by such receiver applied to their debt, even though they had subsequently applied for payment of their debt in the French receivership proceedings also. Lavasseur v. Mason and Barry, Limited, 63 L. T. Rep., 700 (1890); aff'd, 64 id., 761.

¹ A receiver will be charged personally with costs where he brings a suit as receiver without leave of the court and for his personal advantage and the transaction was not in good faith. Chapin v. Thompson, 4 Hun, 779 (1875). The general statutes of the state sometimes authorize the receiver to bring suits, and in that case it is not necessary for him to obtain leave from the court. Haves v. Brotzman, 46 Md., 519 (1877). In this case, however, the decree had authorized the receiver to bring suits. In Georgia it has been held, where the receiver sued to recover box-cars, that the defendant under the general issue might compel the receiver to prove his authority to sue, and that where the court had not expressly authorized him to sue, his suit failed. Screven v. Clark, 48 Ga., 41 (1872). Cf. High on Receivers, § 208.

² A foreign receiver may maintain a suit where there are no domestic creditors whose rights are to be protected. Comstock v. Frederickson, 53 N. W. Rep., 715 (Minn., 1892). On the ground of comity a foreign receiver may bring

In regard to suits in the federal court, a receiver appointed by a federal court may bring all his suits in that court, on the ground of their being ancillary to the suit in which he was appointed. If, however, the receiver was appointed by a state court he can sue in the federal court only when the necessary diverse citizenship exists.¹

an action in the corporate name to collect a note due from a citizen of the state. Winans v. Gibbs, etc., Mfg. Co., 30 Pac. Rep., 163 (Kan., 1892). A foreign receiver filing a bill to enjoin resident creditors from enforcing their claims cannot obtain a preliminary injunction on the ground that such claims are fraudulent, Rogers v. Haines et al., 11 S. Rep., 651 (Ala., 1892). A foreign receiver may foreclose a mortgage where corporate creditors do not object. Boulware v. Davis, 8 S. Rep., 84 (Ala., 1890). A receiver appointed in Kentucky of a Kentucky railroad in a foreclosure suit may bring suit in Ohio to recover possession of rolling stock which was attached in Ohio during the pendency of the application for a receiver, the rolling stock being subject to the mortgage and the mortgaged property being insufficient to pay the mortgage debt. Bank v. McLeod, 38 Ohio St., 174 (1882). A receiver of a New York savings bank appointed in New York may bring suit at law in New Jersey to recover debts due to the bank. This is allowed on the theory that the receiver has practically an assignment of the bank's claims. No citizens of New Jersey intervened as creditors in this suit. Hurd v. City of Elizabeth, 41 N. J. L., 1 (1879). A receiver appointed by a New York court was allowed to file and prove a claim in the federal bankrupt court against the bankrupt, in the case Ex parte Norwood, 3 Biss., 504 (1873). In Patterson v. Lynde, 112 Ill., 196 (1884), the court in a dictum said that a receiver of an Oregon corporation appointed in Oregon would be allowed to bring suit in Illinois to collect the unpaid subscriptions of stockholders residing in Illinois, where there are no creditors of the corporation residing in Illinois.

Concerning the question whether a receiver appointed in one state may sue in the courts of another state or reach property in other states, see the notes to Cagill v. Woolbridge, 5 Cent. L. J., 6 (1876). Receiver may sue in other Metzner v. Bauer, 98 Ind., 425 (1884). In the old case Booth v. Clark. 17 How., 322 (1854), the court said, however, "our industry has been tasked unsuccessfully to find a case in which a receiver has been permitted to sue in a foreign jurisdiction for the property of the debtor." A trustee of a corporation appointed by a court cannot sue in the courts of another state. Avres v. Seibel, 47 N. W. Rep., 989 (Iowa, 1891). Mr. Justice Miller said in Chandler v. Siddle. 3 Dill., 477 (1874): "It is, perhaps, true that where duly appointed and authorized, a receiver may, ordinarily, sue in another state. This power, when it exists, arises from comity, in the absence of special statute regulations, and it is, in general, subordinate to the right of local creditors as respects property within the jurisdiction where such a suit is brought." In the case Farmers', etc., Ins. Co. v. Needles, 52 Mo., 17 (1873), the court held that an Illinois receiver of an Illinois corporation could not bring suit in Missouri on a note given by a Missourian to the corporation, unless the note has been actually assigned to the receiver; and the fact that he has possession of it is not enough.

Where a citizen of New York is appointed receiver of a Texas corporation, he may bring suit in the federal courts against citizens of Texas on the ground of diverse citizenship. Gray v. Davis, 1 Woods, 420 (1871). Where a citizen of Massachusetts is appointed receiver of an Ohio corporation by the federal court sitting in Ohio, he may on the

§ 870. Suits which the receiver may institute—Suits to obtain possession of the property—Other suits.—As against the company whose property passes to the receiver, the receiver may obtain possession by a summary order of the court.¹ So, also, as regards any other parties who are parties to the suit, the court has power to summarily order such parties to turn over to the receiver property in their possession,² but this rule is so harsh that now the court will compel the receiver to sue for possession, if the party claiming the property shows that there are questions of fact and law involved which should not be disposed of by affidavits and motion.

Where the receiver claims property which is in the hands of persons who are not parties to the suit in which the receiver is appointed, then the receiver's remedy is by suit. His remedy in such cases is the same as the company's would have been if no receiver had been appointed. He cannot file a bill in equity to obtain possession of real estate and to remove a cloud from the title, where it is clear that his remedy is at law.

A receiver may institute almost any suit which the corporation itself might institute. He may file a bill to ascertain which of the bonds secured by a mortgage are valid and were legally issued, and which of the bonds were invalid and illegally issued.⁵ He may

ground of diverse citizenship and also on the ground of its being an ancillary proceeding, bring suit at law in the federal court to collect moneys belonging to the corporation. Farlow v. Lea. 2 Cin. Law Bull., 329 (U. S. C. Ct., 1877), citing Davis v. Gray, 16 Wall., 203. A receiver in a state court after obtaining judgment upon a claim may sue thereon in a federal court. This suit is then as a judgment creditor, and not as receiver. Wilkinson v. Culver, 25 Fed. Rep., 639 (1885). If the receiver is a citizen of another state he may remove the case to the federal courts. Brisenden v. Chamberlain, 53 Fed. Rep., 307 (1892).

¹ If the treasurer of a manufacturing company refuses to turn over to the receiver the funds in his hands, he is guilty of contempt of court. Edrington v. Pridham, 65 Tex., 612 (1886). The court may commit the president for contempt for not turning over the property to the receiver. Tolleson v. People's Sav. Bank, 11 S. E. Rep., 599 (Ga., 1890). In order to put a party in contempt for not deliver-

ing property to a receiver, a personal demand by the receiver must be shown. McComb v. Weaver, 11 Hun, 271 (1877). A tenant may be ordered to pay the rents to the receiver. Sea Ins. Co. v. Stebbins, 8 Paige, 565 (1841). But if he has defenses the court will not summarily order him to pay.

² Parker *v.* Browning, 8 Paige, 388 (1840).

³ To get possession of property from the insolvent party the receiver proceeds by order, but to obtain it from third parties, not parties to the suit, he must bring an action. Yeager v. Wallace, 44 Pa. St., 294 (1863).

⁴ Harland v. Bankers', etc., Tel. Co., 32 Fed. Rep., 305 (1887); S. C., 33 id., 199. The court has no power in an action by the receiver against a debtor to order the debtor to pay the money into court. Balestier v. Metropolitan Nat'l Bank, 43 Hun, 564 (1887).

⁵ Hubbell v. Syracuse, etc., Works, 42 Hun, 182 (1886). In this case the receiver was appointed, not in a foreclossue the directors for fraud, *ultra vires* acts or negligence.¹ He may sue to set aside illegal transfers of the corporate property,² and to quiet title to land, and enjoin sales under adverse titles,³ and to recover back illegal dividends which were paid out of the capital stock.⁴ The receiver represents the corporation, stockholders and creditors. He may sue to collect subscriptions to stock.⁵

ure suit, but in sequestration proceedings. The receiver of an insolvent corporation is the representative of its creditors, and as such may, by suit or defense, avoid any instrument which is void as against them. Receiver of Graham, etc., Co. v. Spielmann et al., 24 Atl. Rep., 571 (N. J., 1892). A receiver appointed in a foreclosure suit should contest the validity of the mortgage itself if it is void by reason of having been given when the corporation was insolvent. Tompson v. Huron Lumber Co., 30 Pac. Rep., 741 (Wash., 1892).

¹ See Part IV, supra. In an action by a receiver against directors for misconduct the stockholders have no right to become parties. Kimball v. Ives. 30 Hun, 568 (1883). A stockholder or creditor may hold a director liable for negligence where a receiver cannot. Briggs v. Spaulding, 141 U. S., 132, 150 (1891). A receiver may hold directors liable for corporate funds used by them to purchase state bonds - an ultra vires act. Austin v. Daniels, 4 Denio, 299 (1847). A receiver may be directed by the court to sue directors to make them pay moneys loaned by the corporation in violation of law. Thompson v. Greelev. 17 S. W. Rep., 962 (Mo., 1891), citing As to the right of corporate creditors to sue for negligence, and an action by a receiver or assignee in behalf of them, see Penn. Bank v. Hopkins, 2 Atl. Rep., 83 (Pa., 1886). The receiver of an insolvent railroad corporation may file a bill in equity to compel the directors and their attorney to disgorge corporate funds which they divided among themselves. Gindrat v. Dane, 4 Cliff., 260 (1874). Where a receiver sues directors for negligence, stockholders are not proper parties. Kimball v. Ives,

30 Hun, 568 (1883). A receiver has power, irrespective of the statutes, to sue for all moneys due to the company and for all property improperly disposed of in violation of the rights of either creditors or stockholders. Osgood v. Laytin, 48 Barb., 463 (1867): aff'd, 3 Keves.

² Receiver may sue to set aside illegal or fraudulent transfers of the property, or to recover its funds or securities invested or misapplied. Attorney-General v. Guardian, etc., Ins. Co., 77 N. Y., 275.

³ A receiver may file a bill against state officials to quiet title and enjoin sales in hostility to his title. In such a receiver's suit to quiet title the creditors of the company are not necessary or proper parties. Gray v. Davis, 1 Woods, 420 (1871); Davis v. Gray, 16 Wall., 203 (1872). "A receiver takes the property subject to all the equities which exist against the bank." Putnam, etc., Bank v. Beal, 54 Fed. Rep., 577 (Mass., 1893).

⁴ A receiver of the corporation is the proper party to sue to recover back any dividends which were paid from the capital stock. Corporate creditors cannot sue for these after the receiver goes in. It is doubtful whether the corporation itself could complain of such dividends. A sale of the assets by the receiver does not carry this cause of action. Minnesota, etc., Co v. Langdon, 46 N. W. Rep., 310 (Minn., 1890).

⁵ A receiver represents the corporation, its stockholders and creditors. Hubbell v. Syracuse, etc.. Works, 42 Hun, 182 (1886). "The receiver represents the creditors as well as all other parties interested in the corporation." A subscriber sued by him on the subscription cannot set up fraudulent representations inducing him to subscribe. Ruggles v. Brock, 6 Hun, 164 (1875).

The receiver does not succeed to the right to sue for damages for personal injuries to the corporation, such as libel.¹ If he sues on a note of the corporation, he sues subject to all the defenses that existed when he was appointed.² Moreover, any set-off or counterclaim that existed at the time that the receiver was appointed is a good defense to an action by him.³ If the receivership is denied by the defendant in any suit brought by the receiver, the order of the court and the receiver's bond are sufficient proof.⁴ The com-

See, also, § 208, supra. A receiver may cause to be assessed and may collect assessments on parties liable therefor to pay insurance losses. McDonald v. Ross-Lewin, 29 Hun, 87 (1883). An order that the receiver may collect the unpaid subscriptions is not a "call," but merely gives authority. Liggett v. Glenn, 51 Fed. Rep., 381 (1892), The statute of limitation runs only from the time when the court makes a call. action at common law on subscriptions must be in the company's name, and not in the name of the assignee of the company. Glenn v. Marbury, 145 U.S., 499 (1892).

¹ Milwaukee, etc., Ins. Co. v. Sentinel Co., 51 N. W. Rep., 440 (Wis., 1892).

² Bill v. Shibley, 33 Barb., 610 (1861),

3 As against the receiver of a national bank, a rule of equity prevails that a depositor who has borrowed money of the bank and has given his note therefor, and deposits the money to be drawn upon, has an equitable, although not a legal, right to a set-off, the court saying, however, that the rule would be otherwise where the party acquired the claim against the corporation after it became insolvent. Scott v. Armstrong, 146 U.S., 499 (1892). In the case Barbour v. National Exch. Bank, 33 N. E. Rep., 542 (Ohio, 1893), the court held that a judgment by the creditor, obtained after the receivership on notes maturing after the receivership, was a good set-off to the judgment obtained by the receiver against the creditor for taking excessive interest under the national banking act. As against a claim by the receiver on an account, the de-

fendant may set up a failure of the insolvent company to deliver goods according to contract, even though no demand for the goods had been made before the receiver was appointed. Lavbourn v. Seymour, 54 N. W. Rep., 941 (Minn., 1893). See, also, Osgood v. Ogden. 4 Keyes, 70; Clark v. Brockway, 3 Keyes, 13. A set-off is not allowable as against a receiver of an insolvent bank where the debtor acquired the set-off or the set-off accrued after the receiver was appointed. Van Dyck v. McQuade, 85 N. Y., 616; Matter of Receiver, 1 Paige, 585; In re Van Allen, 37 Barb., 231; Murray v. Deyo, 10 Huu, 3 (1877). A lessee sued by the receiver for rent may set up any defenses, counter-claims or set-offs he might have pleaded in a suit by the lessors. Cox v. Volkert, 86 Mo., 505. The maker of a note to a corporation may set off against the corporation to the same extent that he might have done so against the corporation, even though the note was not due when it passed into the receiver's hands. The set-off in this case accrued before the appointment of the receiver. Berry v. Brett, 6 Bosw., 627 (1860). Cf. U. S. Trust Co. v. Harris, 3 Bosw., 75. Creditor cannot purchase claims after the winding-up order and offset them, but may bring in a matter of surety which was not then complete. In re Mosely, etc., Co., 4 De G., J. & S., 756 (1864). The indorser of a note which becomes due after a receiver is appointed may set off his deposits in the bank when the receiver went in. Yardley v. Clothier, 51 Fed. Rep., 506 (1892). ⁴ The receiver's capacity to sue is

pany itself may institute suits notwithstanding the receivership unless the court has forbidden it. A receiver may bring suit in his own name as receiver. The court of equity which appoints him may give him that power, and he then need not bring the snit in the name of the company of which he was appointed receiver. But where a receiver has not been authorized to sue for or recover property of a corporation, and such property has not been in his possession nor assigned to him, he cannot sue in his own name for it, but may sue for it in the name of the company.

§ 871. Suits against receiver — Suits pending at the time of appointment — Leave of court to bring suit — Levying upon property in the hands of the receiver — "Strikes" against a receiver.— The fact that a receiver is appointed does not stop or affect a suit that is pending against the corporation at the time of the appointment. The suit may continue without him or he may apply to come in as a party. He must, however, observe any injunction that exists against the company.

proven by producing the petition for the appointment, also the order of appointment, also the bond. Palmer v. Clark, 4 Abb. N. C., 25 (1877). The order of appointment proves the receivership without showing that the court had jurisdiction. Haves v. Bratzman, 46 Md., 519 (1877). If the existence of a receivership is denied, it may be proved by the order of appointment. Allen v. Central R. R., 42 Iowa, 683 (1876). The order appointing a receiver is not sufficient proof of receivership in an action where the receivership is denied. Spring v. Bowery Nat'l Bank, 63 Hun, 505 (1892)

¹ Even though a receiver has been appointed, the corporation may, by leave of the court, bring actions in its own name against any one except the receiver to try the legal title to property. St. Louis, etc., Co. v. Sandoval, etc., Co., 111 Ill., 32 (1884).

² Harland v. Bankers', etc., Tel. Co., 33 Fed. Rep., 199 (1887), reversing to that extent S. C., 32 id., 305. Under a statute authorizing receivers to sue "in the name of the corporation or otherwise," a receiver may sue in his own name." Manlove v. Burger, 38 Ind., 211 (1871). But where the statute merely authorizes

the court to allow him to sue in his own name, he must obtain that permission and allege it. Garver v. Kent, 70 Ind., 428 (1880). Under a code which prescribes that the party in interest shall sue in his own name, a receiver may sue in his own name. Gray v. Lewis, 94 N. C., 392 (1886). In regard to patents and real estate, however, he must obtain title before he can sue. So held in Dick v. Struthers, 25 Fed. Rep., 103 (1885), a patent case. The receiver bringing suit for conversion occurring prior to his receivership must sue in the name of the partnership of which he has been appointed receiver. Yager v. Wallace, 44 Pa. St., 294 (1863).

³ Wilson v. Welch, 31 N. E. Rep., 712 (Mass., 1892).

⁴The appointment of a receiver does not cause a pending action to abate. It may be continued by the receiver. Phœnix W. Co. v. Badger, 6 Hun, 293 (1875); affirmed, 67 N. Y., 294. A receiver cannot be substituted as defendant in an action for tort against the company commenced before his appointment. Decker v. Gardner, 124 N. Y., 334 (1891). The appointment of a receiver does not prevent a sale under foreclosure where judgment therefor was obtained before

In regard to new suits instituted after the receiver is appointed, the permission of the court which appointed the receiver must be obtained before a suit is brought against the receiver or against the property in his possession. If this permission is not obtained, the party commencing the suit is guilty of contempt of court.

the appointment. Preston v. Loughran. 58 Hun. 134 (1890). It is in the discretion of the court whether it will allow the receiver to come into a suit which is pending when he is appointed. Dunlop v. Patterson, etc., Ins. Co., 74 N. Y., 145 (1878). The fact that a receiver is appointed during the pendency of an application by the corporation for a mandamus to compel a town to deliver bonds does not abate the proceeding or affect it in any way, so long as the receiver does not object. The corporation remains in existence and capable of suing and being sued. People v. Barnett, 91 Ill., 422 (1879). A receiver and the funds in his hands are not affected by a judgment obtained against the company in a federal court, even though the receiver had intervened in the suit to the extent of preserving some assets. The judgment is not allowed to partici-People v. Knickerbocker, etc., Ins. Co., 106 N. Y., 619 (1887), Newly appointed receivers are proper parties defendant in a pending action against the company to try the title to land. San Antonio, etc., R'y v. Ruby, 15 S. W. Rep., '1040 (Tex., 1891). A receiver must obey an injunction in existence at the time he takes possession of a railroad. If he does not he will be punished for contempt, even though he was appointed by a federal court and the injunction was in a state court. Safford v. People, 85 Ill., 558 (1877). The court, upon the appointment of a receiver of an insolvent corporation, may restrain the prosecution of suits against it. Phœnix Foundry v. North River Con. Co., 33 Hun, 156 (1884). A foreclosure of a lien in a state court may go on though a receiver is appointed in the meantime by the federal court in foreclosing the mortgage. The latter court, however,

will not aid a judgment in the former case. Blair v. St. Louis, etc., R. R., 25 Fed. Rep., 2 (1885). Cf. § 839. A receiver appointed during the pendency of a suit against a cornoration need not be brought in as a party. If he applies to come in and set up a defense the court will generally allow him to do so. Willink v. Morris, etc., Co., 4 N. J. Eq., 377 (1843). The appointment of a receiver does not abate, continue or bar a suit pending against the corporation. suit may continue. Toledo, etc., R'v v. Beggs, 85 Ill., 80 (1877). Where at the time of the appointment of a receiver a suit is pending on a claim and the plaintiff files his claim against the receiver and continues his suit, the amount found due in the suit will be the amount allowed as against the receiver. Pine, etc., Co. v. Lafavette, etc., Works, 53 Fed. Rep., 853 (1893). In Eugland, where judgment is obtained against a company after the stockholders have resolved to wind it up, the action will be stayed as against the receiver. Westbury & Sons v. Twigg & Co., 66 L. T. Rep., 225 (1891).

1 "The jurisdiction of the court appointing a receiver is necessarily exclusive, and actions at law cannot be prosecuted against him except by leave of that court." Texas, etc., R'y v. Cox, 145 U. S., 593 (1892). In the case of Thompson v. Scott, 4 Dill., 508 (1876), the court ordered that a party who had brought suit in another court for damages against the receiver appointed by the former court without obtaining leave should be committed for contempt unless he discontinued the suit. Refusing to follow Allen v. Central R. R., 42 Iowa, 683, and Kinney v. Crocker, 18 Wis., 74. Demurrer lies to a suit brought against a receiver without leave, even though a state statute authorizes suit without Where an application is made for leave to sue the receiver, the court, if it allows the suit, will generally require that it be brought in that court and not in a foreign court.¹

such leave, the receiver being appointed by a federal court. Hale v. Duncan, 6 Rep., 422 (U. S. C. C., 1878). Where a receiver is in possession of a railroad, a telegraph company cannot acquire a right of wav ever it by condemnation proceedings. unless the court permits the proceedings. Western, etc., T. Co. v. Atlantic, etc., T. Co., 7 Biss., 367 (1877). In the case of Henderson v. Walker, 55 Ga., 481 (1875), where permission to sue at law had been obtained, the court at law, in dismissing the complaint on the evidence, withdrew at the same time the permission to sue. If the receiver submits to be sued at law without leave being first obtained, and if counsel do not raise the question, the court on appeal will not raise it, the case itself being dismissed. Smith v. Flint, etc., R'y, 46 Mich., 258 (1881). Although a receiver has been sued without leave of the court, yet the court will not always enjoin the suit, but may allow it to pro-The injunction if granted is against the person and not against the other court. The receiver cannot set this up as a matter of defense. remedy is to apply to the court which him for an injunction. Lyman v. Central Vt. R. R., 59 Vt., 167 (1886); Blumenthal v. Brainerd, 38 id.,

402 (1866): Kinney v. Crocker, 18 Wis., 74 (1864), but criticised in Thompson v. Scott, 4 Dill., 508 (1876). Where a receiver is sued without leave, but does not object and goes to trial, he cannot, after a verdict is given, arrest judgment on that ground. Elkhart, etc., Co. v. Ellis, 113 Ind., 215 (1887); Camp v. Barney, 4 Hun, 373 (1875). Permission to sue the receiver in an action of trespass on land need not be obtained where there is nothing to show that the receiver is in possession. The receiver was made a party defendant as a joint wrong-doer with the corporation, which was also made a party defendant. receiver, it seems, might have applied to his court to enjoin the action. Wayne, etc., R. R. v. Mellett, 92 Ind., 535 (1883). A party must apply to the court before suing at law for damages. Melendy v. Barbour, 78 Va., 544 (1884). Where the receiver is a railroad company, and in addition to being receiver of one road is lessee of another road, it is liable to be sued for an injury on the latter without leave of the court to bring such suit being granted. Lyman v. Central Vt. R. R., 59 Vt., 167 (1886). In Vermont it is held that a receiver may be sued for negligence in constructing a crossing, and that the permission

¹ Central T. Co. v. Wabash, etc., R. R., 2³ Fed. Rep.. 858 (1885), where application was made to allow suit to have declared void certain bonds held by the receiver. An action against a receiver is, it seems, merely ancillary to the receivership, and the court appointing the receiver has jurisdiction. Texas, etc., R'y v. Cox, 145 U. S., 593 (1892). Under a statutory power to enjoin creditors' actions after a receiver is appointed, the court may enjoin a subsequent proceeding in the federal court. In re Schuyler, etc., Co., 18 N. Y. Supp., 89 (1892).

In the case of Peale v. Phipps, 14 How., 368 (1852), the court held that a receiver appointed by a state court could not be sued in the federal court. By permission of the court an attachment may be levied by a creditor of a non-resident person on a debt due from a resident receiver to such non-resident. Green v. Wallis, etc., Works, 23 Atl. Rep., 498 (N. J., 1892). An order refusing to allow a party to sue a receiver is appealable. Meeker v. Sprague, 31 Pac. Rep., 628 (Wash., 1892).

There is a difference of opinion as to whether the same rules apply where receivers appointed in one state are sued in another state on causes of action arising from acts or contracts of the receiver. By act of congress receivers appointed by the federal courts may be sued without leave of court being first obtained.²

of the court to bring the suit need not be obtained. Roxbury v. Central Vt. R. R., 60 Vt., 121 (1887). The receiver when sued at law without leave may plead his receivership. It is a good defense. Barton v. Barbour, 104 U.S., 126 (1881). In this case, however, there is a vigorous dissenting opinion by Mr. Justice Miller. who said of the receiver: "He generally takes the property out of the hands of its owner, operates the road in his own way, with an occasional suggestion from the court, which he recognizes as a sort of partner in the business: sometimes, though very rarely, pays some money on the debts of the corporation, but quite as often adds to them. and injures prior creditors by creating a new and superior lien on the property pledged to them." If the receiver objects he must do so promptly. Jerome v. McCarter, 94 U.S., 734 (1876). Punishment for contempt can be inflicted only on those who were personally served. American Con. Co. v. Jacksonville, etc., R'y, 52 Fed. Rep., 937 (1892).

¹ An attachment on property being administered in New York by a New Jersey receiver will not lie ou a cause of action against the receiver for excessive charges on freight. The court will not allow an interference with the custody of the law in another state. Killmer v. Hobart, 58 How. Pr., 452 (1880). The courts of one state will not order a receiver appointed in another state to pay over money owing by him to a judgment creditor of the person to whom the receiver owes it. Smith v. McNamara, 15 Hun, 446 (1878). Where a receiver appointed in one state is operating a road in another state, service of papers upon him in the latter state is made in the same way as by statute may be made upon corporations. Such re-

ceiver may be garnished in the latter state without first obtaining the consent of the court in the former state. Phelan v. Ganebin, 5 Colo., 14 (1879). A receiver appointed by a Vermont court over a Vermont and Massachusetts railroad may be sued in Massachusetts in an action at law for damages to freight, the courts of Vermont sustaining such actions when brought in Vermont. Paige v. Smith, 99 Mass., 395 (1868). A receiver appointed in one county cannot be enjoined by the court of another county from paying out funds until sufficient funds are set aside to pay certain damages. Leave of the former court must first be obtained. De Graffenried v. Brunswick, etc., R. R., 57 Ga., 22 (1876). Where a statute regulates the service of papers a receiver may be so served. Lewis v. Seifert. 116 Pa. St., 628 (1887), where the court refused to set the service aside. Where a receiver of the federal court is in possession, a claimant of land occupied by the company and the receiver cannot start suit in the state court to try the title. He must apply to the federal court. Fort Wayne, etc., R. R. v. Mellett, 92 Ind., 535 (1883). A suit brought in a state court against a receiver appointed by the federal court may be removed into the federal court. Evans v. Dillingham, 43 Fed. Rep., 177 (1890). Although a federal court has appointed receivers of a corporation, yet a suit may be brought in a state court to cancel a mortgage given to the corporation. Calhoun v. Lanaux, 127 U.S., 634 (1888). A Vermont receiver operating a New York railroad may be sued in New York for negligence. Kain v. Smith, 80 N. Y., 458 (1880).

² Under the federal statutes a federal receiver may be sued without first applying to the court for permission. The St.

It is contempt of court for a creditor of the corporation or of the receiver to levy an attachment, execution or garnishment on property of the receiver after he has been appointed.¹

Nicholas, 49 Fed. Rep., 671 (1892). By the acts of congress a receiver appointed by any federal court may be sued without the previous consent thereto of the court. If a receiver is out of the state, service may be made on local agents, as is provided by the state laws. Central Trust Co. v. St. Louis, etc., R'v. 40 Fed. Rep., 426 (1889). Concerning the federal statute that a receiver of a federal court may be sued without leave of court, see Texas, etc., R'y v. Cox, 145 U. S., 593 (1892). A receiver appointed by a federal court may be served by serving an agent of the railroad company in accordance with the state statutes providing for service upon corporations. Eddy v. Lafavette, 49 Fed. Rep., 807 (1892), In St. Joseph, etc., R. R. v. Smith, 19 Kan., 225 (1877), where a receiver appointed by the federal court was sued in the state court for taxes, the latter court held that it was no defense that leave to sue had not been obtained from the federal court. The remedy of the receiver was not by way of defense, but by injunction or contempt proceedings instituted in the federal court. Although a federal receiver is in charge of an Indiana railroad, yet the Indiana courts ho'd that the receiver may be sued in the state court for an accident under the state statute rendering all receivers liable, and he may be served by serving process on a conductor as provided in the statutes. Louisville, etc., R. R. v. Cauble, 46 Ind., 277 (1874); Indianapolis, etc., R. R. v. Ray, 51 id., 269 (1875); Ohio & M. R. R. v. Fitch, 20 id., 498 (1863); McKinney v. O. & M. R. R., 22 id., 99 (1864). A citizen of Indiana, injured by a railroad in the hands of a receiver appointed by a Virginia court, has no constitutional right to bring her suit for damages in the federal court. Reed v. Myers, 84 Va., 231 (1887). In the case of Phelan v. Ganebin, 5 Colo., 14 (1879), the

court sustained a garnishee process served upon a receiver appointed by the courts of another state over a railway partly within the state. A receiver appointed by a federal court may be sued in the state court without the permission of the federal court, the acts of congress so providing. Fordyce v. Withers, 20 S. W. Rep., 766 (Tex., 1892).

¹ Concerning such proceedings before the receiver is appointed, see § 853. Garnishee proceedings instituted after the receiver is appointed are a contempt of court, even though the receiver has not taken possession of the money garnished, or demanded or sued for it. Richards v. People, 81 Ill., 551 (1876).Although a judgment creditor has levied on property in the receiver's hands, yet the court upon his purging himself of contempt will allow him to intervene in the foreclosure suit and attack the bonds. Farmers' L. & T. Co. v. Toledo, etc., R. R., 43 Fed. Rep., 223 (1890). A receiver's right to property cannot be interfered with by attachments, etc., after he has qualified. Matter of Christian, etc., Co., 128 N. Y., 550 (1891). In Russell v. East Anglian, etc., R'y, 3 Mac. & G., 104 (1850), on a motion to commit the sheriff for levying a fi. fa. on property in the hands of the court's receiver, the court, upon the sheriff submitting, ordered him to give up his possession of the property and pay the costs. Although the court does not order the sheriff to withdraw a levy aud answer for contempt for levying on property in the hands of a receiver, vet this does not validate the levy and enable it to come in ahead of the mortgages. The possession of the receiver is the possession of the mortgagee. Coe v. Columbus, etc., R. R., 10 Ohio St., 372, 403 (1859). The court will set aside a levy of execution on property in the hands of a receiver. If the judgment

Aside from the rules given above, a suit or proceeding against a receiver is carried on very much the same as any other suit.¹

The corporation itself may be sued on claims against it not withstanding a receiver has been appointed.²

The court will punish for contempt of court all "strikers" who by force prevent other men from working for the receiver.3

creditor believes that the property levied on was not subject to the mortgage he must apply to the court to discharge the property from the receivership before he makes his levy. Robiuson v. Atlantic, etc., R. R., 66 Pa. St., 160 (1870). If a person claims personalty as mortgagee but a receiver is in possession, the former's remedy is a suit for possession and not in trover. The receiver is not a trespasser in such a case. Morrill v. Noves, 56 Me., 458 (1863). If a judgment creditor levies process on the profits of docks which are in the hands of a receiver without first obtaining leave from the court the court will enjoin him. Ames v. Trustees, etc., 20 Beav., 332 (1855). An execution levied after the receiver takes possession gives no prior lien. Coe v. Knox, etc., Bank, 10 Ohio St., 412 (1859). The owner of an engine which a company was using, and which the receiver of the company has taken possession of, may replevy the same without asking the permission of the court. The receiver is a mere trespasser. He was entitled to possession of the company's property only. Hills v. Parker, 111 Mass., 508 (1873).

¹The court does not favor an order that the receiver pay over money to claimants, the decision being based on affidavits. A common-law trial is safer and better to preserve the interests of all parties. Matter of North River Bank. 60 Hun, 91 (1891). A receiver when sued at law for damages may set up the statute of limitations as a bar. Bartlett v. Keim, 50 N. J. L., 260 (1888). Money collected by an insolvent bank for another bank cannot be recovered as a trust fund from the receiver unless its identity is traced into his hands. Frank v. Bingham, 58 Hun, 580 (1890).

The receiver will be ordered to pay out of the fund costs awarded against him in a suit. People v. John, etc., Co., 42 Hun, 484 (1886); People v. Remington, 45 id., 347 (1887). Costs to au unsuccessful claimant will not be allowed out of the funds in the receiver's hands. People v. Security, etc., Co., 23 Hun, 597 (1881). Where rental is claimed from a receiver the court may order the question to be determined by action rather than by motion. Woodruff v. Erie R'y, 93 N. Y., 609 (1883).

² A suit for damages against the corporation itself may be brought without obtaining permission of the court which appointed a receiver of the company. The damage was done after the receiver was appointed but before he filed his bond. Allen v. Central R. R., 42 Iowa, 683 (1876). In Maine, after a receiver has been appointed of a bank, and he has taken possession, a creditor will not be allowed to sue the bank. Leathers v. Shipbuilders' Bank, 40 Me., 387 (1855). The appointment of a receiver of a national bank does not dissolve the corporation. A creditor may sue on a claim and join both the bank and the receiver. Green v. Walkill Nat'l Bank, 7 Hun, 63 (1876). But as to ordering such a receiver to pay over money, see Ocean Nat'l Bank v. Carll, id., 237.

³ It is contempt of court for "strikers" to prevent employees of the receiver from working. Secor v. Toledo, etc., R'y. 7 Biss., 513 (1877), where the court committed one striker to jail for four months and another for two months, and then subsequently released them. To same effect, King v. Ohio, etc., R'y, id., 529. In the case of *In re* Higgins, 27 Fed. Rep., 443 (1886), the court committed to jail for terms ranging from

C. DUTIES AND POWERS OF RECEIVERS.

§ 872. Duties of a receiver — What he may do without order of the court, and what he may do under order of the court.— A receiver has no power, unless expressly authorized by the court, to incur any expense on account of the property in his hands except such as is absolutely necessary for its preservation. He has no

fifteen to ninety days several strikers who threatened other employees, stoned the cars and otherwise interfered with property in the hands of the court. The court will punish strikers who by threats and intimidation interfere with the operation of the road by the receiver. In re Doolittle, 23 Fed. Rep., 544 (1885): United States v. Kane, id., 748 (1885). A court may direct its receiver to adjust differences between the receiver and the employees, but the court will not tolerate a rule of the "Brotherhood of Locomotive Engineers" which prevents employees from handling freight from other roads with which the Brotherhood are in conflict. Waterhouse v. Comer. 55 Fed. Rep., 149 (Ga., 1893).

¹ Cowdrey v. Galveston, etc., R. R., 93 U. S., 352 (1876), where the court disallowed a disbursement of the receiver made in preventing any aid to a proposed parallel line of road. A mortgagee in possession will, upon a bill filed by the mortgagor for redemption, be allowed expense for necessary repairs and for protection of the title, but not for improvements, unless the mortgagor consented thereto or was notified in advance and did not object. Sandon v. Hooper, 6 Beav., 246 (1843). The receiver of a railroad has inherent power to purchase a delivery wagon, etc., and scales, and to rent an office and pay in. terest on money borrowed by him. "All outlays made by the receiver in good faith in the ordinary cause with a view to advance and promote the business of the road and to render it profitable and successful are fairly within the line of discretion which is necessarily allowed to a receiver intrusted with the management and operation of the railroad

in his hands." This includes not only "the keeping of the road, buildings and rolling stock in repair, but also the providing of such additional accommodations, stock and instrumentalities as the necessities of the business may require: " but he should apply to the court or master as to any considerable outlay, and always to the court in advance if the outlay is great. Cowdrey v. Railroad, 1 Woods, 331 (1870), per Bradley, J. A receiver will not be allowed a disbursement for advertising for a business where a firm which used his name as the firm name was penefited thereby. Id. In the case of Raht v. Attrill, 106 N. Y., 423 (1887), the court said in regard to receivers' expenses: "The act of the court in taking charge of property through a receiver is attended with certain necessary expenses of its care and custody; and it has become the settled rule that expenses of realization, and also certain expenses which are called expenses of reservation, may be incurred under the order of the court on the credit of the property; and it follows from necessity, in order to the effectual administration of the trust assumed by the court, that these expenses should be paid out of the income, or when necessary out of the corpus of the property before distribution, or before the court passes over the property to those adjudged to be entitled. . . . It would be difficult to define by a rule applicable in every case what are expenses of preservation which may be incurred by a receiver by authority of the court. It was said by James, L. J., in Regents' Canal Iron Works Company, L. R., 3 Ch. Div., 411, 427, that 'the only costs for the preservation of the property

inherent power to grant illegal rebates; or allow another company to cross his tracks; or to lease the railroad; or to loan the money in his hands; or release the president from liability to the company for diversion of its funds.

"The receiver stands in the place of the stockholders, as their representative, and all the rights of the company reside in him."

would be such things as the repairing of the property, paying rates and taxes which would be necessary to prevent any forfeiture, or putting a person in to take care of the property." A claimant cannot enforce as against the property a contract with the receiver for the furnishing of ties where that contract was improvident and known so to be to the contractor. The rule is different if the contractor did not know that it was improvident. The fact that a new receiver has been appointed does not change the rule. The succeeding receiver is bound. Vanderbilt-v. Central R. R., 43 N. J. Eq., 669 (1887), reversing Lehigh, etc., Co. v. Central R. R., 41 N. J. Eq., 167, and passing upon Id., 35 id., 426, and 38 id., 175.

¹ Handy v. Cleveland, etc., R. R., 31 Fed. Rep.. 689 (1887), where the receiver was removed for granting rebates to the Standard Oil Company. In the case Cowdrey v. Railroad, 1 Woods, 331 (1870), Mr. Justice Bradley sustained the receiver in giving a rebate in order to get business, it being shown that other roads did the same. This was prior to the Interstate Commerce Act. Cf. Cutting v. Florida, etc., Co., 43 Fed. Rep., 747 (1890).

² The receiver has no power to allow another railroad to cross his own road, and a stockholder may enjoin it. Howlett v. N. Y., etc., R'y, 14 Abb. N. C., 328 (1882).

³ A receiver has no inherent power to lease the property. McMinnville, etc., R. R. v. Huggins, 3 Baxt. (Tenn.), 177 (1873). In this case the court had not authorized the receiver to make a lease.

In the case Attorney-General v. North America, etc., Ins., Co., 26 Hun, 294 (1882), (modified 89 N. Y., 94), the court said: "The strict duty of the re-

ceiver holding these funds for distribution, and not for investment, was to keep them separate from all other moneys so that they could at all times be traced and identified. He ought not in any way to use the funds unless by direction of the court. It is true that under some circumstances it may be his duty to see that the fund shall not remain unproductive, but when it becomes necessary to invest it he should apply to the court for instructions, and should make no loans or investments without having first obtained such instructions. If he invests the money he should, we think, in the absence of other directions from the court, invest it in government or real-estate securities, as is the duty of other trustees for investment, or in the manner prescribed for insurance companies by statute. And he should keep clear, accurate and precise accounts, otherwise all presumptions are against him and all obscurities are resolved adversely to him. These rules are adopted for the protection of the fund and cannot be too strictly enforced." For breach of these rules the receiver is personally liable and will be charged interest. It is a breach of duty for the receiver to deposit the funds in the bank to his individual credit. Schwartz v. Keystone, etc., Co., 25 Atl. Rep., 1018 (Pa., 1893).

⁵ A president sued in Rhode Island for diversion of corporate assets cannot set up a release by a receiver of the corporation in Pennsylvania, although the company was incorporated in the latter state. See Griswold v. Hazard, 141 U. S., 260 (1891).

⁶ Hood v. McNaughton, 24 Atl. Rep., 497, 498 (N. J., 1892).

After dissolution proceedings have been commenced it is in the discretion of the court whether to allow a transfer on the books of the company, the court saying that such transfers should not be allowed except for strong reasons. The books of the company in his hands should be open to all parties.2

The court may authorize its receiver to complete a line of railroad which is in his possession; 3 to enter into and carry out traffic contracts with other companies; to take a lease of a connecting line: 5 to condemn land: 6 to aid a corporation whose stock the re-

1 Re The Onward, etc., Soc., 65 L. T. Rep., 516 (1891).

² Fowler's Petition, 9 Abb. N. C., 268 (1878). He is entitled to the books. See § 866. supra.

3 Where two out of twenty miles of road are uncompleted the receiver may be authorized to complete them in order to prevent a forfeiture of a land grant. Allen v. Dallas, etc., R. R., 3 Woods, 316 (1878). A receiver may complete a railroad partially built as well as operate one completed. Moran v. Lydecker, 27 Hun, 582 (1882). In the case of Gibert v. Washington, etc., R. R., 33 Gratt. (Va.), 586 (1880), the court authorized its receiver to expend \$10,000 to aid in building a short branch road, it subsequently turning out to be profitable. In Cowdrey v. Railroad, 1 Woods, 331 (1870), the court authorized the purchase of more rolling stock, but refused to order the construction of a connecting link of road and the purchase of a bridge.

⁴ A receiver will be ordered to turn over to another railroad such part of the income from a pooling contract as has come into the receiver's hands from the corporation of which he is receiver, so far as the same was to go to the other railroad by the terms of the pooling contract. Central T. Co. v. Ohio C. R. R., 23 Fed. Rep., 306 (1885). A receiver may pay the proper amount of freight to a connecting road, he having collected freight for the whole distance. Meyer v. Johnston, 64 Ala., 603 (1879). Where

two railroads are in the hands of receivers appointed by the same court, the court has power to modify an existing contract relative to the use of the terminal of one by the other, and to reduce the rent called for by the contract. In re N. J. & N. Y. R'v, 29 N. J. Eq., 67 (1878). Funds coming into the hands of a receiver by reason of a traffic contract with another line, such funds belonging to the other line, may be attached for a debt of the latter. First Nat'l Bank v. Portland, etc., R. R., 2 Fed. Rep., 831 (1880). A receiver's traffic contracts are terminable at will where no time is specified in the contract. No notice is necessary. Investment Co., etc., v. Ohio, etc., R'v, 41 Fed. Rep., 378 (1889).

5 A receiver may be authorized to acquire a connecting line by lease for the purpose of reaching a commercial center. Authority to him to do so may be given without notice to the parties to the suit. For illustrations of the remarkable extent to which courts have gone in allowing receivers to expend money, see this case. Mercantile T. Co. v. Missouri, etc., R'y, 41 Fed. Rep., 8 (1889). The court authorized the receiver to take leases of two other roads, in Gibert v. Washington, etc., R. R., 33 Gratt. (Va.), 586 (1880). In the case of La Crosse R. R. Bridge, 2 Dill., 465 (1873), the court authorized the receiver to make a contract hinding him, the company, purchasers, assignees, etc., for ten years to pay certain tolls for the use of a

the railroad. Lehigh, etc., Co. v. Central

⁶ It seems that the receiver may proceed to condemn lands for the use of R. R. 35 N. J. Eq., 379 (1882).

ceiver holds; to enjoin the company he represents from constructing a parallel line; to buy rolling stock and steel rails; and to sell and assign the choses in action which come into his hands.

In regard to the powers which the court will not give him, the court will not authorize him to continue the insurance business, or reduce rates when the state statute directing it is of doubtful constitutionality, or pay the expenses of a reorganization, or sell rolling stock on credit to raise money to pay interest, or pay interest on another mortgage when such payment will not prevent a foreclosure. In

§ 873. Rolling stock — Liability of the receiver and the fund for car rentals — Purchases of rolling stock.— The court may authorize a receiver to purchase or rent rolling stock for the operation of the road. If the rolling stock which the receiver finds upon the road when he takes possession is not owned but is rented to the company, and if the receiver continues to use such rolling stock,

bridge to be constructed at the terminus of the road under foreclosure in that case. At the end of ten years the rates were to be readjusted every five years by the court, if necessary, with a right to purchase at the end of twenty years.

¹The court may authorize the receiver to loan money to a corporation whose stock he holds. Kalbfleisch v. Kalbfleisch, 13 N. Y. Supp., 397 (1891).

² In the case of Pullan v. Cincinnati, etc., R. R., 4 Biss., 35 (1865), the court enjoined the company from proceeding to construct a new line parallel to the one under foreclosure.

³ Wabash, etc., R'y v. Central T. Co., 22 Fed. Rep., 269 (1884). In the case of Re Eastern, etc., Co., 66 L. T. Rep., 153 (1891), the court authorized the receiver to make a contract for additional rolling stock.

⁴The receivers may be authorized to receive and pay for steel rails that were ready for delivery when they were appointed. Wabash, etc., R'y v. Central T. Co., 22 Fed. Rep., 269 (1884).

⁵ Hoyt v. Thompsou, 5 N. Y., 320 (1851).

⁶A receiver will not be allowed to continue the business of an insolvent insurance corporation where the effect would be to freeze out the policy-holders by the assessments. People v. Atlantic, etc., Ins. Co., 15 Hun, 84 (1878).

⁷ Where a receiver is in charge he will not be ordered by the federal court to reduce the rates in accordance with a state statute which is not being obeyed by other roads and the validity of which is being tested, but he will be allowed to obey it if he thinks best, or the trustees of the mortgage desire him so to do. The court, however, will allow a shipper to sue the receiver for the excess of charges. *In re* McElrath, 2 Dill., 460 (1873).

⁸ In the case Central T. Co. v. Wabash, etc., R'y, 25 Fed. Rep., 69 (1885), the court refused to allow payment out of the fund in court of the expenses of reorganization.

⁹ The court will not authorize the receiver to borrow money by selling the rolling stock to a car trust and then taking back the same on the instalment plan. Taylor v. Phil. & Read. R. R., 9 Fed. Rep., 1 (1881).

10 The court will not direct the receiver to pay the interest on the fourth-mortgage bonds in order to prevent the principal becoming due, there being default on prior mortgages. Brown v. N. Y., etc., R. R., 22 How. Pr., 451 (1859).

then the court will direct that a reasonable rental be paid therefor by the receiver.1

Where, however, the receiver finds the company in possession of rolling stock under a "car trust," or lease or contract whereby the stipulated rental is really a partial payment for the cars, the court may direct the receiver to continue the payments and thus complete the purchase, or the court may reduce the figures to a reasonable rental?

¹ Where a receiver continues to use rolling stock belonging to another, the fund in court will be used to pay the rental therefor, and also for repairs which the receiver should have made but did not make. Turner v. Indianapolis, etc., R'y, 8 Biss., 527 (1879). court having in its decree retained jurisdiction of the case to settle and adjudicate claims may pass upon the claim of another railroad company for rental for its cars used by the receiver and the reorganized company. Central T. Co. v. Wabash, etc., R'y, 46 Fed. Rep., 156 (1891). The receiver may be authorized to purchase the rolling stock which is found on the road, but which belongs to another company, the stock having been placed on the road without any contract whatsoever. Central T. Co. v. Marietta, etc., R. R., 48 Fed. Rep., 32 (1891). Where the road is entirely without rolling stock, the court may authorize the receiver to purchase such as is necessary for the operation of the road. McLane v. Placerville, etc., R. R., 66 Cal., 606, 626, (1885).

² The receiver should pay instalments due to a car trust, although the trust has merely a mortgage interest in the cars. The receiver should pay this the same as though he were purchasing rolling stock to operate the road. It is a proper charge on income in preference to the bondholders' interest. It is for the court to say whether rental be paid or the contract of purchase of the cars he completed. In this case the receiver was ordered to continue making the partial payments. But inasmuch as supply and labor claims were in arrears

the court ordered a cessation of the payments on the cars for the time being. The court held that the labor and supply claims took precedence over the car payments from income. claims in Frank v. Denver, etc., R'v, 23 Fed. Rep., 123 (1885). Car rentals during the receivership in foreclosure proceedings should be paid out of the final assets. even though the receiver operated the road at a loss. All the rolling stock is entitled to the rental, whether used by the receiver or not. If there was too much the bill of foreclosure should not have asked for a receiver of all of it. Kneeland v. American L. & T. Co., 136 U.S., 89 (1890). In a railway mortgage foreclosure a car claim will be determined upon its merits and not upon the agreements where the same persons controlled the railway and also the car. company. Such rental will be allowed as similar cars would have received from other railroad companies. The rental on the cars for six months prior to the appointment of the receiver and for subsequent time will be paid out of the income and out of the fund realized upon the sale of the property. Interest is allowed where there has been a vexatious and unreasonable delay in payment. Certain repairs also, which the receiver had agreed to make, were allowed for. Thomas v. Peoria, etc., R'y, 36 Fed. Rep., 808 (1888). Although a receiver continues to use the cars of a car trust, after delivery thereof to the car trust has been demanded by the latter, the partial payments therefor not having been met by the receiver, nevertheless the court will not order the receiver

§ 874. Rent vaid by the receiver on lines of railroad leased to him - Royalties, etc., vaid by the receiver. - As shown in the prior section the court has power to authorize a receiver to take a lease of a connecting railroad. It often happens, also, that where a receiver is put in charge, he finds several lines of railroad already leased to and in operation by the insolvent mortgagor company. The question then arises, what shall he do? Shall he continue to operate the leased lines and pay the stipulated rental, or shall he cut them off? The courts have finally settled on the rule that he may operate them for a short time to determine whether he cares to assume the lease and the payment of the rental. The court will then direct him to assume the lease, or, if an opposite course is determined upon, the court will authorize the lessor company to retake its property unless it is willing that the receiver retain possession and pay such rental as the profits of the leased line will justify. Such also is the rule where a receiver continues to occupy

to make such partial payments. The court will allow the car trust a reasonable rental. Farmers' L. & T. Co. v. Chicago, etc., R'y, 42 Fed. Rep., 6 (1889). The lessor of the rolling stock which the lessee contracts to purchase on the instalment plan cannot insist on the receiver paying the balance due and taking the rolling stock where the contract provided for a return of the rolling stock in case of inability to pay. It is doubtful whether the partial payments could be recovered back by the receiver. Sunflower Oil Co. v. Wilson, 142 U. S., 313 (1892); Fosdick v. Schall, 99 U.S., 235 (1878); Fosdick v. Car Co., id., 256; Huidekoper v. Locomotive Works, id., 258. In determining the amount of rent which the receiver should pay for rolling stock the court will add to the cost price any increase in the value thereof. Central T. Co. v. Marietta, etc., R'y, 48 Fed. Rep., 875 (1891).

Where the receiver under authority given by the court continues to operate leased lines instead of cutting them off or negotiating for a reduction of rental, he must pay the contract rental, even though he operates them at a loss. Woodruff v. Erie R'y, 93 N. Y., 609 (1883). The court will order a receiver to pay the rent of a railroad for the

time during which the receiver operated it. where the continuance and preservation of the leasehold was clearly intended in the foreclosure proceedings. The lessor railroad is not liable for any part of the expenses of foreclosure. Brown v. Toledo, etc., R. R., 35 Fed. Rep., 444 (1888). The appointment of a receiver of a system of railroads, made up largely of leased lines, does not obligate the receiver to pay the rental on such leased lines as do not pay operating expenses. But the court will order payment of the rent on those leased lines which earn more than operating expenses, such payment to be made from the profits derived from such leased lines. Central T. Co. v. Wabash, etc., R'y, 34 Fed. Rep., 259 (1888). Where the receivers are operating the whole system, consisting of many leased lines, the accounts of each leased line will be kept separately and the expenses of each reduced if possible until it pays operating expenses. If unable to do so, receivers' certificates on the whole system will be issued to aid such leased line. Central T. Co. v. Wabash, etc., R'y, 23 Fed. Rep., 863 (1885).

Where the court orders that any lessor of a railroad to a system of railroads which is undergoing foreclosure may leased real estate or to use patents on which royalties are to be naid.1

§ 875. Payment of operating expense, car rentals, damages, etc., incurred during the receivership.—Inasmuch as a receiver takes the income of a railroad he of course must apply that income first

retake possession for non-payment of rent, and then orders the receiver to pay certain rent to a certain lessor after other previous orders for payments of money are fulfilled, such lessor, on the final accounting, cannot claim that he is entitled to navment absolutely. Central T. Co. v. Wabash, etc., R'v. 38 Fed. Rep., 63 (1889). A receiver cannot by agreement with a lessor company abrogate the lease pending the receivership except by consent of the court. The court will consider the relations to be as they were when the receiver was appointed. Day v. Postal Tel. Co., 66 Md. 354 (1886). Where a lease to a railroad is declared void in a foreclosure suit against the latter, the lessor company has no right to payment of a quantum meruit out of the fund arising from the foreclosure sale, it being shown that the lease had been for many years a source of loss to the lessee of the company. St. Louis, etc., R. R. v. Cleveland, etc., R'y, 125 U.S., 658 (1888). The lessor of a railroad to a company that has passed into the hands of a receiver cannot by petition compel the receiver to pay the rent where the receiver denies that he is operating the road under the lease. The disputed questions of fact and important legal questions involved should be tried by action. The bondholders are necessary parties to such an action. People v. Erie R'y, 54 How. Pr., 59 (1877). The court may authorize the receiver to pay a fair rental even in preference to the bondholders: also to pay for depreciation and to pay for supplies used on such road, all in preference to the bondholders. Miltenberger v. Logansport R'v. 106 U. S., 286 (1882). In the case Milwaukee, etc., R'v v. Brooks, etc., Works, 121 U. S., 430 (1887), the trustee upon taking possession, notified the lessor of a railroad to the mortgagor company that he, the trustee, repudiated the lease but would pay a fair compensation. The court upheld this notice. A receiver may be given power to continue to operate leased railroads and to pay the rental out of the corpus of the estate. If he does operate them, the rental fixed by the original contract of lease must be paid. It is no defense to allege that the original lease was ultra vires. Woodruff v. Erie R'v, 93 N. Y., 609 (1883). The court may order the rights of the parties to he determined by action instead of on motion. Id. Upon a receiver being appointed it is proper to order the receiver to take possession of a line which the insolvent mortgagor was operating under a lease, and the receiver is then bound to take possession. If on the final sale, however, there are no surplus assets and the leased road was operated at a loss, the lessor has no right to payment of rent accruing during the receivership. The court may refuse to order such payment. The receivers are

¹The court will order the receiver to pay rent for premises which he continues to occupy after he takes possession. People v. Universal, etc., Co., 30 Hun, 142 (1883). A receiver must pay royalties the same as the company would have had to do before it could sell the patented article. People v. Remington

[&]amp; Sons, 59 Hun, 282 (1891). Where a receiver has taken the benefit of a contract whereby he was to pay royalties, and the patentee applies to the court for pay, it is error for the court to refuse on the ground that the remedy is at law. A petition is the proper remedy. Andrews v. Stanton, 18 Ill. App., 163 (1885).

to the payment of the wages of employees, cost of repairs, and to all liabilities incurred by him as receiver in the operation of the road, including damages due to the negligence of his employees. The bondholders will not be allowed to take the income until all the liabilities incurred in earning that income are paid. The ordinary wages of his employees must of course be paid.

All the cases assume this principle of law, and the order appointing the receiver generally expressly has a provision to that effect. There are a few cases which pass upon special applications of the rule 1

entitled to a reasonable time after taking possession to ascertain whether they desired to assume the lease. Quincy R. R. v. Humphreys, 145 U. S., 82 (1892); St. Joseph, etc., R. R. v. Same, id., 105, Where the receiver makes a valid contract for repairs on a leased line, he is liable thereon as receiver, although the line is afterwards turned over to another receiver. Central T. Co. v. Wabash, etc., R'v. 52 Fed. Rep., 908 (1892). Where the receiver is ordered to pay rental for cars, he cannot offset repairs made by him while using the cars. Central T. Co. v. Wabash, etc., R'y, 50 Fed. Rep., 857 (1892). A receiver is not hound by and need not carry out contracts which are in operation relative to rates at the time he takes possession. Central T. Co. v. Marietta, etc., R'y, 51 Fed. Rep., 15 (1892).

¹The court may direct the receiver to pay wages to an employee during recovery from an injury received while on duty. Missouri P. R'y v. Texas, etc., R'y, 41 Fed. Rep., 319 (1890). The court will consider applications from the employees of the receiver for advanced pay. Frank v. Denver, etc., R'y, 23 Fed. Rep., 757 (1885). A person who made a contract with the receiver in regard to carting away ashes, etc., may file a bill in equity and ask the court to decree him damages out of the property, although the receiver has retired and a new one been appointed. Kerr v. Little, 39 N. J. Eq., 83 (1884). Where the receiver employs a manager and the court directs that the receiver out of his com-

pensation shall pay the manager a certain sum, the receiver may set off a sum due from the manager to the receiver. Gatzmer v. Philadelphia, etc., R. R., 39 N. J. Eq., 363 (1885). Where moneys are taken from the earnings to make permanent improvements, the material-men are entitled to reimbursement from the bondholders to that extent. Co., etc., v. Charleston, etc., R. R., 52 Fed. Rep., 524 (1892). Where a builder is engaged on a building for a railroad when receivers go in, he may go on and can collect from the receivers for work done after they go in. Girard, etc., T. Co. v. Cooper, 51 Fed. Rep., 332 (1892).

Where the road does not pay operating expenses the court will not order damages for an accident, occurring during the receivership, to be paid out of the property. The party damaged is no better off than he would have been if the company had continued to operate the road. The mortgages must be paid first. Davenport v. Receivers, 2 Woods, 519 (1875). Where the order appointing the receiver does not expressly so provide, claims for labor, etc., due to the receiver's management of the property cannot be paid out of the corpus. They can be paid only from the income, and are not paid at all if there is no income. Nor can the cost of an extension be paid out of the corpus except as against those bondholders who have consented. Hand v. Savannah, etc., R. R., 17 S. C., 219, 266 (1881). In ordering payment of the operating expenses the court will not apportion them according to underlying If, however, any of the income has been used to improve the property, then to that extent the moneys realized on the final sale of the property may be used to pay operating expenses.^I

Damages done to property or persons by reason of the negli-

mortgages, but will order them paid from the general fund in the receiver's bands. Calhoun v. St. Louis, etc., R'v. 14 Fed. Rep., 9 (1880); Central T. Co. v. Wabash, etc., R'v, 30 id., 332 (1887). Where the railroad earns nothing over its running expenses while in the hands of a receiver at the instance of a judgment creditor, car rentals during the four months at the end of which foreclosure is commenced cannot be allowed for those four months in preference to the mortgage debt. Kneeland v. American L. & T. Co., 136 U. S., 89 (1890). Where foreclosure is by cross-bill the cornus of the property is not liable for rentals of leased lines operated by the receivers, there having been no demand for them during the time. The case is different from one where the mortgagee files a bill and asks the court to take charge. Central T. Co. v. Wabash, etc., R'y, 46 Fed. Rep., 26 (1891). Necessary supplies purchased by the receiver are chargeable upon the fund left upon foreclosure sale. The amount may be divided among various divisions of the road. Kneeland v. Foundry, etc., Works, 140 U. S., 592 (1891). A receiver appointed by the state, under a statute by which the state has a lien on the property, does not have the powers of a receiver appointed by a court of equity. and his debts are not enforceable against the property, although they may be as against the income of the property while in the hands of the receiver. State v. Edgefield, etc., R. R., 6 Lea (Tenn.), 353 (1880). Where the receiver rents cars which were sold on the instalment and pays the rental, the vendor of the cars cannot recover anything from the fund arising from the foreclosure sale. Fosdick v. Schall, 99 U. S., 235 (1878). If under such a contract of sale the cars

are nevertheless sold with the railroad at foreclosure sale the purchasers must pay the amount due on the contract or restore the cars. Fosdick v. Car Co., id., Under a similar contract to sell cars the vendor whose cars are returned cannot be paid out of the receiver's funds for injuries to the cars. Huidekoper v. Locomotive Works, id., 258. Where during the receivership granted to enforce a judgment the parties or most of them agree upon a reorganization without completing the foreclosure, and the receiver by such agreement is directed to continue in control and management, he thereupon ceases to be a receiver and becomes a representative of the parties, even though a decree by consent is entered. Hence large debts incurred by him thereafter in the management are not receiver's debts. court had no power to carry on such a receivership. The parties holding these debts cannot obtain from the court an order to sell the property in order to pay the debts, on the theory that they are receiver's debts. Vermont, etc., R. R. v. Vermont, etc., R. R., 50 Vt., 500 (1877).

¹Calboun v. St. Louis, etc., R. R., 9 Biss., 330 (1880). "Net earnings of the road are to be applied primarily to the payment of the employees of the company and of the amounts due for supplies and materials furnished, and if, instead of making these payments, the earnings are diverted either to the payment of what is due to the mortgagees, or for improvements or betterments placed upon the road, that constitutes a valid claim against the corpus, the property in the hands of the court, which it is the duty of the court to see enforced." Calhoun v. St. Louis, etc., R'y, 14 Fed. Rep., 9 (1880).

gence of the employees of the receiver are to be paid out of the income received by him from the operation of the road. But it seems that the income is to be applied first to the payment of all other liabilities incurred by the receiver. But the person injured has no absolute right to payment of such damages. He obtains payment only by favor of the court. He is not entitled to a jury trial of his case. He must apply to the court of equity which appointed the receiver. The court will consider the application, and if it appears just will send the case to a jury to ascertain the amount of damage done, or the court will itself fix the amount and place that amount among the liabilities of the receiver to be paid if his funds are sufficient.

1 A receiver is liable as receiver for torts committed while the railroad property is in his hands or the hands of his predecessor. McNulta v. Lockridge, 27 N. E. Rep., 452 (Ill., 1891); Cowdrey v. Galveston, etc., R. R., 93 U.S., 352 (1876). The receiver is a common carrier, and hence the mortgagees who cause him to be appointed must expect that the earnings received by him shall be subject to the liabilities incurred by him as a common carrier. Douglass v. Cline, 12 Bush, 608, 628 (1877); Melendy v. Barbour, 78 Va., 544 (1884); Lyman v. Central Vt. R. R., 59 Vt., 167 (1886); Kinney v. Crocker, 18 Wis., 74 (1864); Paige v. Smith, 99 Mass., 395 (1868). In Ex parte Brown, 15 S. C., 518 (1880), the court held that damages for an injury while the receiver was operating the road should be paid before the bondholders were paid. Damages for injuries occurring during the receivership are not entitled to payment even out of the earnings of the road, unless the order of the court placing the receiver in possession so provided. Davenport v. Receivers, 2 Woods, 519 (1875).

²A receiver is liable, as receiver, in the operation of the road, the same as the company would have been liable if it had continued to operate the road. The court may try the case itself — a case of negligence in this instance — or may send it to a jury. Klein v. Jewett, 26 N. J. Eq., 474 (1875); Murphy, Adm'r, v. Holbrook, 20 Ohio St., 137 (1870), over-

ruling a demurrer. For injuries caused by a railroad while in a receiver's hands a party has no remedy except to apply to the court by petition. The court may then in its discretion order a reference. or a trial by jury, or adopt some other procedure. The injured party has no constitutional right to a trial by jury. Kennedy v. Indianapolis, etc., R. R., 3 Fed. Rep., 97 (1880). In the case of Atlantic, etc., R. R., 4 Hughes, 157 (1882), where the administrator petitioned for a jury to assess damages due to negligence during a receivership, the court said that the amount of damages would be submitted to a jury for settlement, but whether there was negligence the court itself would first determine; and in this case the court held, on all proofs taken before the master, that there had not been any negligence. In the case of Morse v. Brainerd, 41 Vt., 550 (1869), the court enjoined the action at law brought without its leave, and then on a petition ordered a trial before a master and gave damages for loss of freight on a connecting line over which the receiver forwarded the freight. judgment at law against the receiver "would not constitute a lien on the property of either the nominal or real defendant. It could not be enforced by execution. In short, the action is simply the means adopted by the court of chancery to ascertain whether the plaintiff has a cause of action, and if so, the amount of damages which have acThe effect of a discharge of the receiver is considered elsewhere.¹ The mortgagor company itself is not liable for damages due to accidents while the receiver is in charge.²

crued." Bartlett v. Keim, 50 N. J. L., 260 (1888). The court said, in Thompson v. Scott. 4 Dill., 508 (1876), that the proper practice was to bring the demand into the court which appointed the receiver. That court will then. through its master, examine into the case, and if meritorious the court will order a trial at law. The court may refuse to allow a regular trial, and may order a reference to try claims against a receiver, the claims having arisen during the receivership. People v. Remington & Sons, 45 Hun, 347 (1887). A federal court will allow damage claims against the receiver to be adjudicated on petition, and if a case for a jury, will impanel one. It will not allow suit to be brought in the state court. Atlantic, etc., R. R. Case, 4 Hughes, 157 (1880). The court should refuse to allow a trial at law for damages, where on the face of the petitioner's papers he does not make out a prima facie case. Jordan v. Wells, 3 Woods, 527 (1879). Although the receiver cannot appeal from the decision of the court fixing the damages for the loss of freight, inasmuch as he is but the agent of the court and cannot question the judgment, yet the party claiming damages may appeal. Where there had been three trials by the court below in fixing the damages due to loss of freight by a receiver, the upper court in reversing the judgment ordered the issue to be tried before a jury. Melendy v. Barbour, 78 Va., 544 (1884). The better practice is to direct a trial at law of a contractor's claim for supplies furnished to the receiver, yet the court in this case seems to have adopted the other practice. Vanderbilt v. Central R. R., 43 N. J. Eq., 669, 688 (1887). The federal court which appointed a receiver will not question or reduce the amount of a judgment recovered against the receiver in a state court. It will not

permit execution to be levied upon the property, however. Central T. Co. v. St. Louis, etc., R'y, 41 Fed. Rep., 551 (1890). In the case of Palys v. Jewett, 32 N. J. Eq., 302 (1880), the court in a dictum said that a person injured during a receivership had a right to a trial by jury, and that the chancellor was bound to give it to him; yet, inasmuch as the party acquiesced in the chancellor's assessing the damages, the appellate court would review the assessment, and in this case the court (reversing 29 N. J. Eq., 604) gave \$3,000 to plaintiff.

¹ See § 882.

² The company itself is not liable for accidents occurring while the receiver is in possession and control. Ohio & M. R. R. v. Davis, 23 Ind., 553 (1864); Bell v. Indianapolis, etc., R. R., 53 id., 57 (1876); Memphis, etc., R'y v. Stringfellow, 44 Ark., 322 (1884); Kansas Pac. R'y v. Searle, 11 Colo., 1 (1887); Ellis v. Indianapolis, etc., R. R., 6 Am. L. Rec., 288 (Cir. Ct., 1877). The company itself is not liable for damages occurring during the receivership. Ryan v. Hays. 62 Texas, 42 (1884); International, etc., R'y v. Ormond, id., 274; Thurman v. Cherokee R. R., 56 Ga., 376 (1876). The company is not liable in damages for an accident occurring while a receiver is in charge. Ohio & M. R. R. v. Anderson, 10 Ill. App., 313 (1882); Wyatt v. Ohio, etc., R. R., id., 289, holding, however. that the objection should not be raised by a motion to dismiss for want of jurisdiction, and holding also that the fact that the receiver was appointed by the federal court was no bar to this action. Where the receiver is discharged and the property restored with improvements the company is liable for accidents during the receivership. Brown v. Rosedale St. R'y, 15 S. W. Rep., 120 (Tex., 1890); Texas, etc., R'y v. Geiger, id., 214. "The railroad company is not

88 876-77. Receiver's certificates — Loans of money to the receiver — Purchasing on credit.— Receiver's certificates are merely evidences of debts due from the receiver. They are very similar to a due-bill. There has been a vast amount of discussion and litigation over the legality and desirability of allowing receiver's certificates. The real questions involved have been whether the receiver should be allowed to create a debt which should be paid before the mortgage bondholders are paid. In prior sections of this chapter the questions have been whether certain debts and liabilities should be paid out of the income before any of that income should be paid to the bondholders. We now come to the question whether the court, in order to keep a road in operation or to improve it, may authorize the receiver to borrow money for those purposes, and whether the court may decree that such borrowed money shall be repaid out of the proceeds of the sale of the property before the bondholders are paid any part of their debt.

The law is clear that such an extraordinary power cannot be exercised by the receiver except upon the express order of the court.

liable for the injuries complained of in the bill, for the reason that they were committed while it was out of possession of the property and had no control over it. This conclusion is sustained by principle and authority." Davis v. Duncan, 19 Fed. Rep., 477 (1884). The receiver is not liable for injuries occurring by the negligence of the company's servants, nor is the company liable for those occurring by the negligence of the receiver. Texas, etc., Co. v. Bledsoe, 20 S. W. Rep., 1135 (Tex., 1893); Turner v. Hannibal, etc., R. R., 74 Mo., 602 (1881). Where the property is returned to the corporation and the receiver discharged the corporation is liable for damages for injuries occurring during the receivership. Texas, etc., Co. v. Bloom, 20 S. W. Rep., 133 (Tex., 1892). The company may be sued even though a receiver is in charge. No leave of the court need be obtained in such a case unless there is an injunction. company, however, is not liable for the receiver's obligations or liabilities. Service on the receiver's agent is not service on the company. Heath v. Missouri. etc., R'y, 83 Mo., 617 (1884). Although

a receiver is in charge the corporation is liable under a statute rendering all railroad corporations liable for double the value of a fence which is built by adjoining property owners in cases where the company neglects or refuses to build it. Ohio & M. R'y v. Russell, 115 Ill., 52 (1885). Where the receiver wrongfully enters upon land and takes it for the use of the railroad and is afterwards discharged and the property delivered back to the corporation, the corporation is liable therefor, even though the receiver gave notice for the presentation of claim and this was not presented. Bloomfield R. R. v. Van Slike, 107 Ind., 480 (1886). Where the federal court returns the property to the company the latter is liable for injuries incurred during the receivership, although the federal court ordered otherwise. Texas, etc., R'y v. Watts, 18 S. W. Rep., 312 (Tex., 1891). The company is liable after the receiver is discharged where the earnings were used for improvements. Texas, etc., R'y v. White, 18 S. W. Rep., 478 (Tex., 1891); Texas, etc., R'y v. Bailey, id., 481.

The receiver has no implied power to create a debt that shall displace the bonds.¹ It is true that the court may authorize the receiver to borrow money and to pledge some of the property for that purpose in order to protect and preserve the property in accordance with its purposes during the receivership.² The controversy, however, as to whether the court could authorize the receiver to borrow large sums of money which should be repaid before the bondholders are paid has been a long one, but the power to so borrow has been sustained. The courts hold that they can authorize the receiver to borrow money and issue receiver's certificates there-

¹ In the case Vilas v. Page, 106 N. Y., 439 (1887), the court said: "The receiver had no power, as incident to his general authority as receiver, to create a lien on the property of the railroad company for the purchase of rolling stock. The jurisdiction of the court to appoint receivers of property has for its primary object the care and custody of the property which is the subject of the receivership, pending the determination of the questions involved in the litigation, and to enable the court, by placing the property under the control of its officer, to preserve it to answer the final decree which may be made in the action. But the receiver cannot of his own motion contract debts chargeable upon the fund in litigation. The court must authorize expenditures on account of the property before they can be charged thereon; and while it may, and does in its discretion, allow expenses incurred by a receiver strictly for preservation to be charged upon the fund, although incurred without the prior sanction of the court, it is nevertheless the order of the court, and not the act of the receiver, which creates the charge and upon which its validity depends."

²The court will not allow the receivers to borrow \$1,000,000 on the company's rolling stock as security, in order to pay interest on the debt which is the basis of the foreclosure. *In re* Receivers of Phil. & R. R. R., 14 Phil., 501 (U. S. C. C., 1881). In the case *Ex parte* Carolina Nat'l Bank, 18 S. C., 289 (1882), the receiver borrowed money to operate the

railroad and pledged the unissued bonds of the company. He borrowed \$20,000 and pledged \$134,000 of bonds. pledgee sold them out for \$13,000 and now applies to have the remaining \$7,000 paid out of the income. The court so ordered, the bondholders having failed to object for six years. In the case Clarke v. Central, etc., Co. of Ga., 54 Fed. Rep., 556 (Ga., 1893), where a receiver was in charge of the property at the instance of the corporation itself. the court held that it might authorize the receiver to pledge the property of the company to secure loans necessary to the operation of a road, and also incur liabilities for the expenses of a refunding scheme. Inasmuch, however, as creditors claiming liens had been made parties, the court refused to order such acts until such lien holders had been notified. Where upon the application of one debenture holder a receiver is appointed and is given power to borrow a certain sum and carry on the business, an application to allow the receiver to borrow a further sum, the first sum having been lost, will not be granted where the expense is merely speculative and special urgency is not shown, there being no danger of the property being destroyed or forfeited. and all of the parties interested not being before the court. Securities, etc., Corporation v. Brighton Alhambra, 68 L. T. Rep., 249 (1893). Liquidator may be authorized to borrow money aud make it a first charge. Re Alexandra, etc., Co., 61 L. T. Rep., 325 (1889),

for and make these receiver's certificates payable in preference to the bonds, and that the money so borrowed by the receiver may be used to make repairs, buy rolling stock, construct more road, complete an unfinished road, build a bridge, buy materials, pay freight balances and unpaid wages, and pay rents.1

operate the road and obtain rolling stock may be issued. Wallace v. Loomis, 97 U. S., 146 (1877). Receiver's certificates and debts created by order of the court for purchasing rolling stock, constructing new road and a bridge, materials, repairs, freight balances, ninety days' arrears of wages and operating debts. and rents to leased lines, may be paid first out of the fund before the bondholders are paid. Miltenberger v. Logansport R'v. 106 U.S., 286 (1882). Receiver's certificates for repairs, taxes, operating expenses, replacing worn-out material, etc., are valid and prior to the mortgage though issued at a discount. Certain wages, debts for supplies, damages, rentals and running expenses allowed over the mortgage debt. Union T. Co. v. Illinois, etc., R'y, 117 U.S., 434 In the case Hale v. Nashua, etc., R. R., 60 N. H., 333 (1880), a receiver was appointed of a road that had not been completed and had no rolling stock, and was not being operated. The receiver was empowered to put the road in a sufficient state of repair for its preservation and for operation, and to permit the lessee of the road to furnish the means so to do and operate the road. The court held that expenditures so made had priority over the other debts, including the bonded debt. Receiver's certificates to make necessary repairs and improvements may be authorized by the court, but in some instances the court has refused even these. Credit Co. v. Arkansas, etc., R. R., 15 Fed. Rep., 46 (1882). In the case Hoover v. Montclair, etc., R'y, 29 N. J. Eq., 4 (1878), all the parties being before the court, the receiver was authorized to borrow money on his certificates of indebtedness and to use the funds to make neces-

Receiver's certificates to repair and sary repairs, the certificates to be prior to existing mortgages in right of pavment. Where a land grant and also the charter will be forfeited unless twenty miles of road are built within thirty days, and two miles thereof are not vet built, and the company is unable to build it, the court, on the application of the trustee for the bondholders, will appoint a receiver and authorize him to build the two miles, the expense turning out to be only \$5,000. Allen v. Dallas, etc., R. R., 3 Woods, 316 (1878). The court will appoint a receiver in order to prevent a land grant lapsing by reason of a failure to complete the road within a certain time; and in order to complete the road within that time and save the grant, the court will authorize the receiver to issue receiver's certificates prior to all other liens. Without this grant the bondholders would get practically nothing. Kentucky v. St. Paul, etc., R. R., 2 Dill., 448 (1873). The same case subsequently came before the court in 5 Dill., 519 (1878), where a dissenting bondholder attacked the validity of the receiver's certificates. The court, however, upheld them, it appearing that originally four-fifths of the bondholders assented and the other fifth did not object, and the money being advanced by the bondholders themselves on the certificates, and one hundred and twentyfive miles of road had been built.

In order to preserve a grant the court may authorize the receiver to issue certificates to raise money and to complete a canal. Purchasers of bonds at pledgor's sale, though the pledge was by the company itself, and the price at such sale very low, may enforce such bonds at their par value. Jerome v. McCarter, 94 U.S., 734 (1876). Receiver's certificates may be issued and the proceeds used to pay In some instances these receiver's certificates and receiver's debts have consumed the entire property, leaving nothing whatsoever for the mortgage bondholders — a natural result of courts engaging in the carrying on of business enterprises.¹

employees and material-men for labor and materials furnished prior to the appointment for the operation of the road. Such debts are entitled to payment out of the net income. Taylor v. Phil., etc., R. R., 7 Fed. Rep., 377 (1880). The court has no power to order the issue of a receiver's certificates in order to raise money to pay taxes, the application for such issue being made by the state alone. Central T. Co. v. N. Y. C. & N. R. R., 47 Hun, 587 (1888). Compare S. C., 110 N. Y., 259. An order of the court that the receiver purchase rolling stock, and that the debt therefor shall be a first lien on the mortgaged property, is valid, the trustee being a party to the suit. Vilas v. Page, 106 N.Y.. 439 (1887). For a remarkable case wherein in 1872 the circuit court of the United States authorized a receiver to borrow money and give a mortgage to secure its repayment, see Southerland, Trustee, v. Lake Superior Ship Canal R. R., etc. (referred to in 53 Ala., 338). The giving of a first mortgage, however, is not different from the order of the court making the certificate a first lien. A receiver's certificates receivable in payment for freight are legal, and where the road was sold subject to them the new company must accept them. If refused, the holder may sue for cash. Evansville, etc., R. R. v. Frank, 29 N. E. Rep., 419 (Ind., 1891). Although the receiver has promised to buy rolling stock in use by him, but belonging to other parties, and has obtained leave of the court to issue receiver's certificates therefor, yet the court will not compel him to carry out the understanding if it is improvident. But he must pay rent. Coe v. N. J. Midland R'v. 27 N. J. Eq., 37 (1876). Receiver's certificates are valid although issued before foreclosure suit was commenced and before the receiver took possession, it appearing that the proceeds were used for the benefit of the property. Purchasers at the foreclosure sale take subject to them. Pavment may be demanded by an intervening petition even though only unpaid interest is due. Central T. Co. v. Sheffield, etc., R'y, 44 Fed. Rep., 526 (1890). The court has no power to authorize the issue of receiver's certificates to pay for labor and services rendered prior to the receivership. Metropolitan T. Co. v. Tonawanda, etc., R. R., 103 N. Y., 245 (1886). Except of course as against those who consent. Id. Receiver's certificates were issued in Calhoun v. St. Louis, etc., R'y, 14 Fed. Rep., 9 (1880), in payment of claims payable under the six-months rule, but these certificates were to be paid from income only. Although the court passes upon all claims presented after sale, yet outstanding receiver's certificates are a valid lien on the property, even though they are not presented until long afterwards, no notice having been given them and the property having been sold subject to claims. The holders have a lien on the property instead of on the fund. Mercantile T. Co. v. Kauawha, etc., R'y, 50 Fed. Rep., 877 (1892). Receiver's certificates may be enforced though issued on an order made without notice. Mercantile T. Co. v. Kanawha, etc., R'y, 50 Fed. Rep., 877 (1892). The court may authorize the receiver to issue receiver's certificates to buy rolling stock. Central T. Co. v. Tappan, 6 R'y & Corp. L. J., 489 (N. Y. S. Ct., 1889).

¹Where receiver's certificates are issued in the foreclosure of a canal mortgage, the issue being made with the consent of the trustee, and the certificates are turned in in payment of the price for which it is sold on the foreclosure sale, the sale is valid even

There is a limit, however, beyond which the courts do not go. The issue of receiver's certificates will not be ordered unless the trustee of the mortgage bondholders is a party to the suit and has notice of the application. Sometimes the court will refuse to order an issue unless the trustee consents, and sometimes the consent of a majority or even all of the bondholders is required. And often the court sustains the issue on the sole ground that the parties in interest did not object.¹

Receiver's certificates issued under the order of the court by a

though the certificates exceed in amount the price of the property at the sale, thus leaving nothing for the bondholders. Kent v. Lake Superior, etc., Co., 144 U. S., 75 (1892). In the case Shaw v. Railroad, 100 U. S., 605 (1879), the court said that receiver's certificates should never be issued to complete a railroad except "under extraordinary circumstances."

1 An application of a receiver to issue first-lien certificates for new construction and extensive improvements, the application being sustained by a large proportion of the bondholders, will be granted as to consenting bondholders. but the certificates will not be a first lien as regards non-appearing and dissenting bondholders. Leave may be given to apply for an order that the certificates be a first lien as to all, but notice to all must be given, and it must be clearly proved that the expenditure has increased the value of the property to such an extent as to make the order equitable. Investment Co. v. Ohio, etc., R. R., 36 Fed. Rep., 48 (1888). An order of the circuit court, made after the whole case has been appealed, authorizing receiver's certificates is appealable. Farmers', etc., T. Co. v. Petitioners, 129 U. S., 206 (1889). Receiver's certificates issued in a foreclosure suit of a second mortgagee are not valid as against the first mortgagee who was made defendant, but who did not join in the application for a receiver. Metropolitan T. Co. v. Tonawanda, etc., 103 N. Y., 245 (1886). Where no notice is given the certificates are not valid. Raht v. Attrill, 106 N. Y., 423 (1887). Where a bondholder, who is also a director, knows that, on the application of the trustee of the mortgage, the receiver has been authorized to issue receiver's certificates, as a prior lien on the property, to pay off a chattel mortgage and taxes, and such bondholder does not ohject but allows the certificates to be sold, neither he nor his vendee, who purchases his bonds with notice, will be allowed to attack the validity of the issue. Humphreys v. Allen, 101 Ill., 490 (1882). Bondholders objecting to receiver's certificates must intervene promptly. Miltenberger v. Logausport R'y, 106 U.S., 286 (1882). Receiver's certificates issued to complete and equip an uncompleted road are not prior in right to the holder of a mechanic's lien who was not made a party to the foreclosure suit. Snow v. Winslow, 54 Iowa, 200 (1880). Where a general creditor is about to sell the stock of a company whose road forms part of a railroad line, such stock having been pledged to him by the main company, and the court orders receiver's certificates to be issued in payment of the claim, thus saving the stock, such receiver's certificates being assented to by the trustee and his counsel for the gen eral mortgage which is being foreclosed, a purchaser at the foreclosure sale who takes also the stock cannot object to the certificates. Kneeland v. Luce, 141 U. S., 491 (1891). The assent of the complainant trustee to the issue of receiver's certificates in settlement of a claim, prevents such trustee from afterreceiver of a hotel, improvement company or mining company have been declared illegal. Receiver's certificates are transferable, but not negotiable, even though payable to bearer. A bona

wards objecting to the certificates. Central Trust Co. v. Seasonwood, 130 U. S., 482 (1889).

Receiver's certificates issued by a receiver appointed in New York may be contested by a trustee foreclosing a mortgage ou lands in Texas, so far as such mortgage is concerned. The suit in Texas will not be enjoined by the New York courts. Walton v. Grand, etc., Co., 56 Hun, 211 (1890). The consent of a trustee in a mortgage to the issue of receiver's certificates binds every bondholder. Kneeland v. Luce. 141 U.S., 491 (1891). Receiver's certificates issued in a suit brought by judgment creditors have no priority over the corporate mortgages, the mortgagees not being parties to the suit. But the court may, after the mortgagees become parties, allow such certificates to have priority, the mortgagees having been allowed to contest them. Hervey v. Ill. Mid. R'v. 28 Fed. Rep., 169 (1884); aff'd on this point in Union T. Co. v. Ill. Mid. R'v. 117 U. S., 434 (1886). A receiver does not represent and bind bondholders who are hostile to his acts. Vermont, etc., R. R. v. Vermont Central. etc., R. R., 50 Vt., 500, 594 (1877). Where receiver's certificates are issued without notice to some of the parties, and without sufficient notice to any of those representing creditors, they may move to set the issue aside, except such part as was necessary to operate the property. Those issued to buy necessary rolling stock and repairs will be allowed. Ten per cent, on such certificates and their issue at ninety cents on the dollar are illegal under the usury laws of Alabama. Meyer v. Johnston, 53 Ala., 237, 350 (1875). In the Alabama & Chattanooga Railroad Case (see statement in 53 Ala., 341) Mr. Justice Bradley sitting at circuit in 1872 allowed the receiver to borrow money and complete a railroad then under foreclosure, but the order was by consent, and the receiver's certificates of indebtedness were not to be good unless signed by a majority of the trustees in the mortgage. An order authorizing the receiver to borrow and expend \$75,000 for cross-ties, iron and rolling stock is invalid where it is not made on a motion with notice and after a proper investigation and hearing. Ex parte Mitchell, 12 S. C., 83 (1879). In the case of Hand v. Savannah, etc., R. R., 17 S. C., 219, 276 (1881), where most of the bondholders had consented to the issue of receiver's certificates to build an extension, such extension to be subject to the receiver's certificates, the court held that, except as against a bondholder who was expressly excepted in the order,

¹Receiver's certificates issued by the receivers of an insolvent hotel company, in a suit brought by a stockholder for a winding up of the business, do not take preference over the mortgage bondholders, the trustee of the mortgage not being a party to the suit. The certificates were issued by order of the lower court and were declared to be a first lien, but the court of appeals declared them to be subject to the mortgage. They were issued to complete the hotel. Labor debts have no preference over

the mortgage. Raht v. Attrill, 106 N. Y., 423 (1887). Receiver's certificates cannot be issued to come in ahead of the mortgage of an improvement company for the purpose of paying the wages of employees employed prior to the receivership. Id., 42 Hun, 414. The court cannot authorize the receiver of a coal company to issue receiver's certificates in order to operate the mines where some of the bondholders object. Farmers' L & T. Co. v. Grape, etc., Co., 50 Fed. Rep., 481 (1892). See, also, § 861.

fide purchaser stands in no better position than the original party who took them.¹ Receiver's certificates are sometimes issued in payment of past-due interest.²

the amount realized upon the sale of such extension should be applied first to the payment of the certificates, and that any deficiency should not be good against the other property. In the case of Matter of United States Rolling Stock Co., 55 How. Pr., 286 (1878), the foreclosure being by second mortgagees, receiver's certificates were authorized and made a lien prior to the second mortgage, but not to the first. In the case of Hyde v. Sodus Point R. R., decided by the New York supreme court at special term in 1874 (see 53 Ala., 339), a judgment creditor caused a receiver to be appointed, and receiver's certificates for \$125,000 were issued to build wharves. connections, etc., about \$649,000 out of the \$700,000 bondholders acquiescing therein. Under the English statutes the court has no power to authorize a liquidator of a company appointed at its instance to incur debts in the carrying on of the business, which shall be paid before the debenture debt is paid. the debenture holders not being before the court. In re Regents', etc., Co., L. R., 3 Ch. D., 411 (1875).

¹ In the case Stanton v. Alabama, etc., R. R., 2 Woods, 506 (1875), the order appointing the receivers directed them to complete and put the road in repair and equip it, and the same order authorized them to issue \$1,200,000 of receiver's certificates for that purpose, bearing eight per cent. interest and disposable at ninety cents on the dollar, the certificates to be a first lien on the property. The receivers issued them in

pledge at less than ninety cents on the dollar and misanpropriated the money received for them. The court held that they were not negotiable, and that they were enforceable to the extent that the money actually paid for them would buy them at ninety cents on the dollar, but that the purchaser was not bound to see that the receiver properly applied the money. Where a receiver's certificate is issued to a party for no consideration whatever, neither he nor a bona fide purchaser from him can enforce it, although the court had authorized the receiver to issue certificates. Turner v. Peoria, etc., R. R., 95 Ill., 134 Receiver's certificates are not negotiable, inasmuch as they lack nearly every essential quality of negotiable paper: they are not payable unconditionally, and are pavable only from the fund and in case the fund of the receivers therefor is sufficient. The fact that the certificates are payable to bearer does not change the rule. Turner v. Peoria, etc., R. R., 95 Ill., 134 (1880). Receiver's certificates in excess of the amount authorized by the court are void, but if the money received therefor was used to pay interest coupons the holder of the certificates is subrogated to an interest in such coupons and may enforce them. Newbold v. Peoria, etc., R. R., 5 Bradw. (Ill.), 367 (1879). Where a receiver is authorized to issue certificates of indebtedness for "money borrowed, material furnished, labor performed or on account of contracts made by him on account of the con-

every six months to collect the interest, the court will allow the issue, even against the wishes of the trustee of such divisional mortgages. Skiddy v. Atlantic, etc., R. R., 3 Hughes, 320, 341 (1877).

²Where the holders of prior mortgage bonds, divisional mortgage bonds, past due, are willing to extend the time of payment thereof for ten years, if receiver's certificates for semi-annual interest are given them, in order to save the trouble of sending in the bonds

D. LIABILITY, COMPENSATION, ACCOUNTS AND DISCHARGE OF RECEIVERS.

§ 878. A receiver is not personally liable or responsible for any debts incurred or contracts made or damages done by him as receiver, or by his subordinates and employees—He is liable only for personal misconduct or neglect.—These are well-established rules. Were they not so it would be impossible to induce a responsible

struction of the road," in order to construct, complete and equip the road, certificates issued for material before it is furnished cannot be enforced where such material is not furnished afterwards. A transferee of the certificates cannot enforce them. They are not negotiable, since they refer to the order authorizing them. Bank of Montreal v. Chicago, etc., R. R., 48 Iowa, 518 (1878). A receiver's certificate is not nezotiable, and a purchaser of it cannot collect if the original holder thereof never paid for it the sum he agreed to Union T. Co. v. Chicago, etc., R. R., 7 Fed. Rep., 513 (1881). Although receiver's certificates recite that they are a first lien on the property and were issued under the authorization of the court, yet if the court subsequently refuses to enforce them, a purchaser cannot hold the receiver liable for false and fraudulent representations. Bank of Montreal v. Thayer, 7 Fed. Rep., 622 (1881). Receivers who wilfully and corruptly exceed their powers are liable for the actual damages sustained by reason of their misconduct, but for nothing more. Even though they have issued receiver's certificates at a greater discount than authorized by the court, yet inasmuch as the court will not enforce such certificates at the excessive rate of discount the receivers will not be held personally liable. Stanton v. Ala., etc., R. R., 2 Woods, 506 (1875). A receiver's certificate is not entitled to payment where the debt for which it was issued was not entitled to payment. Fidelity Ins., etc., Co. v. Shenandoah, etc., Co., 42 Fed. Rep., 372 (1889). Receiver's certificates are transferable but not negotiable. If they are issued for pur-

poses other than those specified in the order authorizing them they are not enforceable. Stanton v. Alabama, etc., R. R., 31 Fed. Rep., 585 (1887). Receiver's certificates are not negotiable, and if they are issued below par without the authority of the court, the holder or purchaser can enforce only to the extent of the money for which they were issued. Central Nat'l Bank v. Hazard. 30 Fed. Rep., 484 (1887). Receiver's certificates sold at ninety cents on the dollar are a lien on the property to that extent where the property was sold subject to liens. Swann v. Clark, 110 U.S., 602 (1884). Interest on the receiver's certificates was refused in Calhoun v. St. Louis, etc., R. R., 9 Biss., 330 (1880). In the case Farmers' L. & T. Co. v. Kansas City, etc., R. R., 53 Fed. Rep., 182. 191 (1892), the court said in regard to receiver's certificates: "In compliance with the order of the court, the creditors have presented their claims, and they have been allowed, and proper certificates of indebtedness issued, which have in most cases been assigned to persons who purchased them in good faith, relying upon the order of the court. The creditors and the public had a right to rely upon the court's order." The purchaser of receiver's certificates may enforce them, although the receiver has misappropriated the money. Mercantile T. Co. v. Kanawha, etc., R'y, 50 Fed. Rep., 874 (1892). The court in which ancillary proceedings are had may enforce the certificates, although they were issued in the main action. Id. form of receiver's certificates, and of the order appointing the receivers and authorizing the issue, is given in full in 2 Dill., 454. Another form is given in

person to act as receiver. It often happens that some of the receiver's debts or liabilities are never paid, the assets or income being insufficient for that purpose. A receiver is not liable personally on debts, contracts and liabilities incurred by him as receiver.

48 Iowa, 520. Persons loaning money to the receiver on his certificates are not bound to see that he properly applies the proceeds. Union T. Co. v. Ill. Mid. R'y, 117 U. S., 434 (1886).

1 "Actions against the receiver are in law actions against the receivership or the funds in the hands of the receiver. and his contracts, misfeasances, negligences and liabilities are official and not personal, and judgments against him as receiver are payable only from the funds in his hands." Texas, etc., R'y v. Cox, 145 U.S., 593 (1892); McNulta v. Loehredge, 141 id., 327. A receiver is not personally liable in damages to a stockholder for delay in performing his duty. there being no personal misconduct. Knowles v. Scott, 64 L. T. Rep., 135 (1891). A receiver "is under no personal liability to respond except for his own personal neglect." Davenport v. Receivers, 2 Woods, 519 (1875). A receiver in sequestration proceedings cannot be authorized by the court to take a fund. which by contract had been placed by the company in a trustee's hands, for a specific purpose. Matter of Home Assoc., 129 N. Y., 288 (1891). But where a receiver has paid out the money by order of the court he will not be held personally liable to pay it back even if the court revokes its former order. Id. The receiver is not personally liable on an agreement made pending a suit by a claimant, that in case such suit was successful the claimant should be paid in a manner set forth in the agreement. Vilas v. Page, 106 N. Y., 439 (1887). A judgment for taxes should be against the receivers as receivers and not against them personally. Commonwealth v. Runk, 26 Pa. St., 235 (1856). The receiver is not liable personally. Hopkins v. Con-.nel, 2 Tenn. Ch., 323 (1875).

"No receiver could be made individ-

ually liable in a personal action upon a contract made in his official capacity or for torts committed by his subordinates. If receivers could be exposed to such individual responsibility, no prudent man would accept such trusts in cases where vast numbers of subordinates must needs be employed, exposing him to the hazard of ruinous liabilities for their misconduct." Farmers' L. & T. Co. v. Central R. R., 2 McCrary, 181 (1881). A judgment against a receiver must be against bim as receiver and not personally, and must be made payable out of funds held by him in that capacity. Woodruff v. Jewett, 37 Hun, 205 (1885). Compare S. C., 115 N. Y., 267 (1889). A receiver is not personally liable for an accident on the railroad where he was not personally negligent in employing the operating force. Cardet v. Barney, 63 N. Y., 281 (1875). receiver cannot be held personally liable for injuries to a passenger carried on the railroad, the receiver not being personally negligent. He may apply to the court to enjoin the action. The suit should be against him as receiver and leave obtained to sue him. Camp v. Barney, 4 Hun, 373 (1875). The receivers are liable as receivers only. Davis v. Duncan, 19 Fed. Rep., 477 (1884); Murphy, Adm'r, v. Helbrook, 20 Ohio St., 137 (1870); Thompson v. Scott, 4 Dill., 508 (1876). The receiver is not personally liable on contracts for supplies which he makes as receiver. Vanderbilt v. Ceutral R. R., 43 N. J. Eq., 669 (1887). The receiver is not liable personally. Being liable as receiver only, the court of chancery which appointed may refuse to allow him to be sued. Kennedy v. Indianapolis, etc., R. R., 2 Flip., 704 (1889). In Davis v. Duncan, 19 Fed. Rep., 477 (1884), the court said: "A receiver, as such, upon principle and A few cases hold to the contrary, but the settled rule is that the receiver, being only an agent of the court, is no more liable than the court itself.

§ 879. Compensation of receivers and allowances to them for disbursements for counsel, etc.— A receiver will be allowed a reasonable compensation for his services. In the case of a railroad receiver more than ordinary ability and responsibility are involved, and the court recognizes this fact in fixing the compensation. Each case, however, turns on its own facts. The former tendency of the courts to allow very high compensation has been rebuked by the supreme court of the United States, but this does not limit the power of the court to pay sufficient compensation to enable it to obtain a competent receiver.² The receiver will also be given an

authority is not personally liable for the torts of his employees. Were he so liable few men would take the responsibility of such a trust; it is only when he himself commits the wrong that he is held personally liable. The proceeding against him as receiver for the wrongs of his employees is in the nature of a proceeding in rem, and renders the property in his hands, as such, liable for compensation for such injuries." The complaint may be amended so as to be against the receivers "as" receivers. Eddy v. Powell, 49 Fed. Rep., 814 (1892). A receiver is not personally liable for selling receiver's certificates at a less price than that authorized by the court, where the court refuses to enforce the certificates for anything more than the price at which the court authorized their issue. Stanton v. Ala., etc., R. R., 2 Woods, 506 (1875). The receiver is not personally liable. Little v. Dusenberry, 46 N. J. L., 614, 638 (1884).

¹ A receiver has power to incur expenses and charges for the preservation and use of property which comes to his hands in virtue of the receivership, and he is personally liable therefor if the funds in his hands are insufficient. Rogers v. Wendell, 54 Hun, 540 (1889). A receiver is liable personally for an injury occurring on a road leased to him as receiver, even though the court appointing him assented to the lease,

where the receiver was appointed in one state and the leased road was in another state. Kain v. Smith. 80 N. Y.. 458 (1880). It seems that the receiver may be sued and held liable personally, where it is alleged and proved that he knew of material defects in the machinery and equipment and yet ran thetrain which caused the injury. Erwinv. Davenport, Receiver, 9 Heisk. (Tenn.), 44 (1871). If a receiver is sued personally and does not object he is deemed to have waived the objection that he is liable only as receiver. Camp v. Barnev, 4 Hun, 373 (1875). In the case Blumenthal v. Brainerd, 38 Vt., 402 (1866), the court sustains the right to hold the receivers liable personally, but said that a receiver could always protect himself by applying to the court which appointed him for an injunction. Receivers who are sued personally for loss of freight are liable personally unless they "invoke the aid of the court of chancery." Newell v. Smith, 49 Vt., 255 (1877). Although the order appointing a receiver has been rescinded, vet he is liable for turning back to the company an engine for which a possessory warrant has been granted against him. Peacock v. Pittsburg, etc., Works, 52 Ga., 417 (1874).

² In the case Williams v. Morgan, 111 U. S., 684 (1884), the court reduced the receiver's fees from about \$130,000 to allowance for the payment of fees of his counsel, and also the receiver's own reasonable disbursements. But counsel for the mort-

\$75,000 for five years' service. See. also, Trustees v. Greenough, 105 U.S., 527 (1881). The compensation of the receiver should be determined by the master. But the court will do so if he does not. Five per cent. of receipts and also disbursements is generally allowed, unless the amount is large. But the court will consider the character of the work. Ten thousand dollars a year allowed in this case. The fact that the receiver has made mistakes should not deprive him of his pay if he acted in good faith. Cowdrey v. Railroad, 1 Woods, 331 (1870). Where the receiver handles about \$95,000, and most of the work is done in six months through clerks, his compensation was fixed at \$3,000 the first year, and \$1,000 subsequently. Prouty v. Prouty, etc., Co., 25 Atl. Rep., 1001 (Pa., 1893). In regard to the compen-

1 The court may allow reasonable fees to the receiver for the payment of his counsel. Stuart v. Boulware, 133 U.S., 78 (1890); Bronson v. La Crosse, etc., R. R., 2 Wall., 283 (1863). Fees to counsel will be allowed during the progress of the case, but these partial allowances will be small in amount. Central T. Co. v. Wabash, etc., R'y, 23 Fed. Rep., 675 (1885). As to the amount of counsel fees to be allowed, see Walker v. Quincey, etc., R'y, 28 Fed. Rep., 734 (1886). Where the receiver, even under the order of the court, has paid exorbitant fees to his counsel and for his own services, a creditor may apply to be made a party to the suit in order to have the orders set aside. Schenck v. Ingraham, 4 Hun, 67 (1875). Counsel fees will not be ordered paid in preference to a contractor's statutory lien. Newcastle, etc., R'y v. Simpson, 26 Fed. Rep., 133 (1886). The receiver should be allowed for counsel fees paid by him, also cost of litigation and expenses incurred in protecting, repairing and caring for the property. McLane v. Placerville, etc.,

sation allowed trustees who cause a sale to be made through a master, see § 818. supra. The receiver may properly from time to time be allowed compensation. The hasis for determining the amount is the responsibility, skill and labor involved, and the pay usually allowed for such work. In this case the receiver of a savings bank was allowed at the end of the first year \$7,500 for his services for that year, he having paid out about \$1,400,000, but he was not allowed disbursements given away to policemen as a gratuity for attendance during the rush. He was also allowed to retain commissions earned by him as a broker for placing mortgage loans from the insolvent bank with other parties. Special Bank Com'rs v. Franklin Inst., 11 R. L. 557 (1877).

In the case McArthur v. Montclair

R. R., 66 Cal., 606 (1885). The receiver will be allowed sums paid by him to his counsel in opposing a motion for his removal, where he was not removed. Cowdrey v. Railroad, 1 Woods, 331 (1870), where \$5,000 a year was allowed if it should appear that he had actually paid that amount to counsel. Compensation to counsel after appointment of receiver is in discretion of court. Beneville v. Whalen, 2 N. Y. Supp., 20. In the case of Williams v. Morgan, 111 U.S., 684 (1884), no objection was made to an allowance of \$31,000 to counsel for five years' service. Where the receiver's attorney settles his bill with the purchaser of the road and gives credit, a mortgage by the purchaser is prior to such attorney's claim. Bound v. South Car. R'y, 51 Fed. Rep., 58 (1892).

²Receivers "are entitled to repayment of their reasonable expenses and charges, in preference to all other claims upon the property, of whatever nature." Ellis v. Boston, etc., R. R., 107 Mass., 1, 28 (1871).

gagor company are not entitled to pay out of the receiver's funds, nor are the attorneys for second-mortgage bondholders or objecting first-mortgage bondholders, even though the latter are successful.¹

§ 880. Accounts and accounting by receiver — Control over his acts.—The receiver should render frequent accounts to the master during the receivership. The master's confirmation of such accounts goes a great ways towards securing the approval of the court.²

R'v. 27 N. J. Eq., 77 (1876), where three receivers acted jointly for two years until the road was sold, one was allowed \$1,400 and the other two \$3,000 each. Concerning the compensation of a receiver of a ship, see Jones v. Keen, 115 Mass., 170 (1874), allowing also for counsel. See, also, Corey v. Long, 12 Abb. Pr. (N. S.). 427 (1872), a partnership receivership case, not allowing for counsel. The compensation of receivers will be the same as of guardians, trustees, etc., so far as is practicable. Where second mortgagees foreclose and the first mortgagee intervenes and becomes a party aud files a cross-bill to foreclose, and sale is made subject to the first mortgage, and the receiver, who was appointed at the instance of the second mortgagees, is entitled to more pay than the proceeds of such sale, he may recover the deficiency from the complainants personally but not from the defendant first mortgagees. Tome v. King, 64 Md., 166 (1885). The court may order the fees of the receiver's attorney to be paid by the purchaser. Louisville, etc., R. R. v. Wilson, 138 U. S., 501 (1891), holding also that the fees of the attorney for the railroad in its effort to hold the system together need not be so paid where such efforts were fruitless. A receiver's compensation is in the discretion of the court, but will be fixed only after a hearing and notice to all Attorney-General v. North Am., etc., Ins. Co., 26 Hun, 294 (1882). As to a receiver's compensation, see, also, Attorney-General v. North, etc., Ins. Co., 89 N. Y., 94 (1882). Receivers allowed \$4,500 a year; trustee allowed

\$500; and the various counsel for the trust companies and others, \$100,000. Easton v. Houston, etc., R'v. 40 Fed. Rep., 189 (1889). As to the receiver's compensation in general, see Greelev v. Provident, etc., Bank, 15 S. W. Rep., 429 (Mo., 1891). In New York the court determines the amount of the receiver's compensation in a foreclosure case, and the statute relative to receiver's fees applies to receivers in bankruntey. United States T. Co. v. N. Y., etc., R'v. Co., 101 N. Y., 478 (1886). Compensation of receivers. Central T. Co. v. Wabash, etc., R'y, 32 Fed. Rep., 187 (1887). The court may allow the receiver extra compensation beyond that fixed by the order appointing him where there is good reason for so doing. Farmers' L. & T. Co. v. Central R. R., etc., 8 Fed. Rep., 60 (1881).

1 A receiver appointed in second-mortgage foreclosure proceedings cannot collect his fees out of the first-mortgage interests. Tome v. King, 21 Atl. Rep., 279 (Md., 1885). The fees of attorneys who successfully and in behalf of creditors resist the payment of improper claims by the receiver cannot be paid out of the funds in the receiver's hands. Attorney-General v. Knickerbocker, etc., Ins. Co., 31 Hun, 622 (1884); Attorney-General v. Continental, etc., Ins. Co., 27 id., 195 (1882). As to the fees of attorneys who are defending a suit for the railroad before a receiver was appointed, the receiver continuing the defense thereafter, see Blair v. St. Louis, etc., R. R., 20 Fed. Rep., 348 (1884),

²The receiver should account to the master frequently. The master's allow-

The receiver can be made to account only in the court that appointed him.¹ The court which appointed him is also the only court that has power to control and give orders to the receiver.² The validity of a sale by him must be contested in the court which appointed him and authorized the sale.³

§ 881. Distribution by the receiver.— Most of the principles of law which arise under this heading have been discussed in other sections of this chapter. All creditors of the same class are entitled to pay-

ance or disallowance of the account and items binds the court, unless the items are extraordinary. Cowdrey v. Railroad, 1 Woods, 331 (1870). Where a receiver's accounts have already been passed upon. the court will restrain the master from making another report on them. The remedy for mistakes, fraud, etc., is by a direct proceeding only. Farmers' L. & T. Co. v. Central R. R., 1 McCrary, 352 (1880). If there are several accounts the accounting of one does not necessarily involve the accounting by all. Farmers' L. & T. Co. v. Central R. R., 2 Fed. Rep., 751 (1880). The practice relative to the receiver and the master in chancery is stated in Cowdrey v. Railroad, 1 Woods, 331 (1870), where Mr. Justice Bradley said that exceptions in regard to the receiver's accounts must be made before the master, otherwise they will not be considered by the court. The court will, however, direct a change where mauifest errors or improper charges have been made. The master. in passing on the accounts, acts in a judicial and not a mere ministerial capacity. For errors by him the remedy is by petition to the court, and not by exceptions. The court will then consider the principle and rules adopted by the master, but will not go into the details of the account. If the receiver dies before his discharge, his executor may be called to account in the matter. Matter of Columbian Ins. Co., 30 Hun, 342 (1883). A receiver will be charged interest on such of the funds as he uses in his private business. Hinckley v. Railroad, 100 U. S., 153 (1879). The receiver may appeal from the decree rendered

on his accounts. Hinckley v. Gilman, etc., R. R., 94 U. S., 467 (1876).

¹A receiver cannot be called on to account before any court but that which appointed him: hence the federal court will not compel a state receiver to account in the federal court on a bill filed for that purpose. Conkling v. Butler, 4 Biss., 22 (1865); Mass., etc., Ins. Co. v. Chicago, etc., R. R., 13 Fed. Rep., 857 (1882). Concerning a suit upon the bond given by a receiver, and who may enforce it, see Thomson v. McGregor, 13 J. & S., 197 (1879), involving a partnership receivership. If there is a main suit and also an auxiliary one, the receiver should be brought to account in the main suit, and applications for allowance for damages should be made there. Central T. Co. v. East Tenn., etc., R. R., 30 Fed. Rep., 895 (1886). See, also, § 871, supra.

²The supreme court will not older a receiver appointed by the lower court to operate the road. People v. McLane, 62 Cal., 616 (1882). The supreme court of the state will refuse to mandamus a receiver to operate the road, the receiver having been ordered by the lower court not to operate it. State v. Marietta, etc., R. R., 35 Ohio St., 154 (1878). See, also, § 863, concerning the validity of the appointment of the receiver.

³The validity of a receiver's sale of property in his hands cannot be questioned in another court, the receiver having been discharged. Bradley v. Marine, etc., Co., 3 Hughes, 26 (1879). This can hardly be said to be the rule as between the courts of different states and between the state and federal courts.

ment proportionately. Interest is allowed in certain cases. If a surplus remains after paying one class of liens the next class take such surplus. A creditor may apply to participate even after partial dividends have been made.

§ 882. Resignation and discharge of receivers.— If a receiver is guilty of misconduct in his receivership the court will discharge him and appoint another in his place. If no successor is appointed

¹ A receiver is bound to pay all proportionately although some of the creditors have already received part payment in another state and present a claim for the balance. People v. Universal, etc., Ins. Co., 42 Hun, 616 (1886).

²When a receiver defers payment of a dividend to a creditor until it is first determined whether certain collateral securities shall first be applied to the debt, the creditor is entitled to interest on the dividend. People v. Remington & Sons, 59 Huu, 307 (1891).

³Where a receiver is appointed but the estate sells for enough to pay the first mortgage, the second mortgagee may reach the fund in the receiver's hands. Keogh v. McManus, 34 Hun, 521 (1885).

⁴Plaintiff in a suit pending against a corporation at the time it goes into a receiver's hands may apply to participate in the funds even after the time for presenting claims has elapsed and two dividends have been paid, but he cannot obtain past dividends. Smith v. Manhattan Ins. Co., 4 Hun, 127 (1875).

b The court will remove a receiver who has been guilty of malfeasance as one of the directors of the company of which he was appointed receiver. Wilson v. Barney, 5 Hun, 257 (1875). The court will consider charges of maladministration on the part of its receivers, even though the charges are presented irregularly by petition of some of the bondholders. Coe v. N. J. Mid. R'y, 28 N. J. Eq. 31 (1877). A receiver may be discharged by the court without notice to a party who has made a contract with the receiver as a common carrier. Corser v. Russell, 20 Abb. N. C., 316 (1887). The court may

at any time discharge a receiver who was appointed at the instance of creditors, and there can be no appeal from its decision. Washington, etc., R. R. v. South., etc., R. R., 55 Md., 153 (1880). In Cowdrey v. Railroad, 1 Woods, 331 (1870), the court refused to remove a receiver on vague charge of treachery and intent to run the road for the benefit of hostile interests. As regards the procedure for removing the receiver in New York under the statutes, see Attrill v. Rockaway, etc., Co., 25 Hun, 376 (1881); S. C., id., 509. A judge at chambers may discharge a receiver. Walters v. Anglo, etc., Co., 50 Fed. Rep., 316 (1892). Stockholders are not the proper parties to apply for a change of receiver. The board of directors may do so. Where a receiver is put in by the collusion of the corporation, the court will revoke its order restraining execution by creditors against the corporate property. Fifth Nat'l Bank v. Pittsburg, etc., R. R., 1 Fed. Rep., 190 (1880). Courts of equity will protect the interests of the minority holders of mortgage bonds of a railroad company as against the majority, and will remove receivers appointed at the instigation of the majority, where it appears that the receivers are incompetent, and that part of them have interests in other corporations adverse to the interests of the minority bondholders, and are using their influence and powers as receivers in advancing such corporatious at the expense of the railroad. Receivers should be impartial between the parties in interest; and stockholders and directors of an insolvent railroad company should not be appointed receivers unless the case is exceptional and urgent, and then

all suits and proceedings against him fall at once.¹ But if another receiver is appointed the suits may be continued against him and new suits instituted for acts of his predecessor.²

If the person damaged fails to present his claim until after the receiver has been discharged, the court generally has power still to aid him, but sometimes cannot do so.³

only on the consent of parties whose interests are to be intrusted to their charge. Atkins v. Wabash, etc., R'y, 29 Fed. Rep., 161 (1886). A receiver who gives an illegal rebate to shippers will be removed. Handy v. Cleveland, etc., R. R., 31 Fed. Rep., 689 (1887). Under the Ohio code an order vacating the appointment of a receiver is appealable. Cincinnati, etc., R. R. v. Sloan, 31 Ohio St., 1 (1876).

1 The court may discharge the receiver at any time, and outstanding proceedings against him as receiver fall with his discharge. N. Y., etc., Tel. Co. v. Jewett, 115 N. Y., 166 (1889); aff'g 43 Hun. 565. But if at the time of such discharge judgment against hlm for a claim has been obtained and he then had funds to pay it and was directed so to do, he is liable for turning over the funds without paying the judgment. Woodruff v. Jewett, id., 267 (1889); modifying 37 Hun, 205. Where a person sues a receiver for work, labor and services, his suit fails if the receiver has been discharged: but he may amend and pursue the company that succeeded to the property. Abbott v. Jewett, 25 Hun, 603 (1881). The receiver's liability ends with his receivership, and a pending suit stops. Bond v. State, 9 S. Rep., 353 (Miss., 1891). Where the judgment upon which the receiver was appointed is opened the receivership falls with it. Radbourn v. Utica, etc., R. R., 28 Hun, 369 (1882). Upon the receiver being discharged, actions against him should be discontinued. Boggs v. Brown, 17 S. W. Rep., 830 (Tex., 1891).

²A change of receivership does not affect the rights of claims arising under the receivership. *Ex parte* Brown, 15 S. C., 518 (1880). After judgment it is too late to object that during the pend-

ency of the suit another receiver was appointed. No change of parties was necessary anyway. Fordyce v. Dixon, 70 Tex., 694 (1888). A receiver may be sued for acts committed by his predecessor. McNulta v. Lochridge, 141 U. S., 327 (1891). Where a mortgagee has caused a receiver to be appointed, such receiver will not be discharged, although the company is subsequently dissolved and a receiver appointed in the dissolution proceedings. Barney v. Joshua Stubbs, Limited, 63 L. T. Rep., 619 (1890); aff'd, 64 id., 306.

3 Although the court has ordered that all claims must be presented within six months, and the property has been sold subject to such claims, nevertheless the court may extend the time so as to let in a claim for damages for negligence. Olcott v. Headrick, 141 U. S., 543 (1891), If a claim is not presented until after the receiver distributes the funds, be cannot be made liable therefor. Owen v. Kellogg, 56 Hun, 455 (1890). After the property has been sold and transferred and the receiver discharged, he cannot be made liable on causes of action that arose during the course of the receivership. The property itself may be pursued if the court has reserved jurisdiction over it for this purpose. Farmers' L. & T. Co. v. Central R. R., 7 Fed. Rep., 537 (1880). A claim for damages incurred during the receivership is an equitable lien on the earnings received by the receiver, and if the receiver is discharged before an opportunity is given to present the claim, a bill in equity against the company, to which the property has been returned, will lie. Mobile, etc., R. R. v. Davis, 62 Miss., 271 (1884). Where the receiver is discharged and the suit discontinued, the exclusive juIf all parties consent to vacate a receivership the receiver cannot prevent it; 1 and, if the mortgagor offers to pay the debt upon which the foreclosure is based, the court is bound to discharge the receiver.2

The prolonged litigation in Vermont over the question whether a receiver who is continued under a reorganization scheme is still a receiver, or only an agent, was finally decided to the effect that be continued as receiver.³

risdiction of the court to entertain claims for damages while the receiver was acting ends also. Id. Where a person claiming damages for a personal injury received from the operation of a railroad while in the hands of a receiver does not present his claim until after the receiver has turned over the property by order of the court, there being no reser-. vation in the order charging the property with such claims, the person injured is without remedy. Davis v. Duncan, 19 Fed. Rep., 477 (1884). Moreover the court cannot modify its order after the adjournment of the term at which the order was made. Id. The discharge of a receiver is a bar to any suit against him for liability incurred as receiver, and a state act to the contrary does not apply to a receiver appointed by a federal court. Fordyce v. Beecher, 21 S. W. Rep., 179 (Tex., 1892).

1 Where the parties to the suit consent

to vacate the receivership, the receiver cannot object. He has nothing to do with it. He is then interested only in the adjustment of his accounts. L'Engle v. Florida, etc., R. R., 14 Fla., 266 (1873). The discharge may be made at chambers. Walters v. 'Anglo, etc., Co., 50 Fed. Rep., 316 (1892).

² Milwaukee, etc., R. R. v. Soutter, 2 Wall., 510 (1864).

³ Langdon v. Vermont, etc., R. R., 54 Vt., 593, 603 (1882), holding also that the debts incurred by such receiver must be paid; practically overruling Vermont, etc., R. R. v. Vermont, etc., R. R. 50 Vt., 500 (1877). Until a receiver is regularly discharged, no one will be allowed to set up that his functions as receiver ceased, and that his later acts were those of agent or trustee merely. Langdon v. Vermont, etc., R. R., 53 Vt., 228 (1880).

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CHAPTER LIL

PURCHASES AND REORGANIZATIONS.

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885. The trustee of the mortgage deed of trust may, and should in certain cases, purchase the property at foreclosure sale for the benefit of all the bondholders -Bondholders may then participate in the property — Trustee is disqualified from purchasing whenf

886. The bondholders or a part of them may themselves, or through a committee acting for them, purchase the property at foreclosure sale for the purpose of reorganizing - Such à purchase is legal.

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\$ 888. Limiting the time within which bondholders may come into the reorganization — Applications during that time - Varying the reorganization agreement — Trustees' temporary certificates.

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890. Status of a purchaser of the property at forcclosure sale - He takes the property free from claims of unsecured creditors, and the contracts and liabilities of the old company - His duty as to completing and operating the road - He may operate the road, but does not succeed to the corporate existence — Exemptions from tax-ation — The purchaser takes with notice of certain claims.

§ 883. What are reorganizations? — Voluntary reorganization by scaling down the securities.— A reorganization of a corporation is a business arrangement whereby the stock and bonds of the company are readjusted as to income or priority, or the property is sold to a new corporation for new stock and bonds, or the property is sold by foreelosure of a mortgage upon it, and the purchaser buys for himself and such of the old stockholders and bondholders as he associates with him. An agreement of the kind first named, to scale down the securities, cannot be enforced as against any stockholder or bondholder who objects. schemes of this kind are referred to in the notes below. This

¹ Reorganization can be effected only by unanimous consent of the bondmay enforce the mortgage. Hollister v. Stewart, 111 N. Y., 644 (1889). Even though nearly all of the bondholders as-

closure does not bind those bondholders who do not come in. Bill v. New Alholders and stockholders or by a fore- bany, etc., R. R., 2 Biss., 390 (1870). closure. If any bondholder objects he Where foreclosure is commenced in the federal court, and then by agreement of nearly all the bondholders a plan of reorganization is adopted and approved sent, yet a reorganization without fore- by the court and is acted on by nearly mode of reorganization is but a recapitalization. Strictly speaking, however, a recapitalization of a corporation differs from a reorganization. The former occurs where new capital is added to

all the parties, the suit not being formally discontinued but apparently abandoned, the suit continues nevertheless. and a subsequent foreclosure by the trustee in a state court gives no rights to a purchaser at the foreclosure sale as against a bondholder who did not take part in the reorganization. He may review and proceed with the case in the federal court. Id. Where the mortgage bondholders agree to waive their lien and take new second-mortgage bonds, and the trustee does discharge the mortgage, a failure of the company to issue the new second-mortgage bonds in accordance with the contract does not entitle the old bondholders to be restored to their position as first-mortgage bondholders. They may, however, have their bonds allowed as second-mortgage bonds upon foreclosure. Fidelity. etc., Co. v. Shenandoah, etc., R. R., 11 S. E. Rep., 58 (W. Va., 1890). A reorganization agreement whereby the bondholders agreed to take bonds in a new company will be specifically enforced, a receiver's sale having been had and the property sold subject to the mortgages and the road completed. Dester v. Ross, 48 N. W. Rep., 530 (Mich., 1891). The consent of a bondholder to a reorganization scheme is not implied by his silence. Phil., etc., R. R. Co. v. Love. 17 Atl. Rep., 455 (Pa., 1889). A reorganization without foreclosure, whereby the property is leased to another corporation at a price which leaves nothing for unsecured creditors, may be attacked by the unsecured creditors. Farmers', etc., T. Co. v. Missouri, etc., R'y, 21 Fed. Rep., 264 (1884). Concerning such a transactiou, see, also, ch. LIII, infra. A voluntary reorganization agreement extending the time of payment and making the interest payable in gold instead of currency cannot be enforced even by the decree or confirmation of the courts as against dissenting bondholders. Taylor v. Atlantic, etc., R'v. 55 How. Pr., 275 (1877), and Reinach v. Meyer, id., 283, where such reorganization was enjoined. A purchaser of stock which voted in favor of a reorganization scheme cannot object to the scheme as being ultra vires, there being nothing illegal per se in it. Hollins v. St. Paul. etc., R. R., 9 N. Y. Sunn., 909 (1889), An agreement to assign property, etc., for the purposes of a reorganization may be too vague for specific performance. Ballou's Appeal, 19 Atl. Rep., 304 (Pa., 1890). Concerning promoters' contracts. see § 705, supra. Where a director and stockholder, the owners of a judgment against a corporation, allow it to go into the statement of a reorganization scheme as a smaller amount and be acted upon, their assignee cannot collect the full amount. Jacoby v. Stephenson, etc., Co., 6 N. Y. Supp., 370 (1889), Where, during the receivership granted to enforce a judgment, the parties, or most of them, agree upon a reorganization without completing the foreclosure, and the receiver by such agreement is directed to continue in control and management, he thereupon ceases to be a receiver and becomes a representative of the parties, even though a decree by consent is entered. Hence, large debts incurred by him thereafter in the management are not receiver's debts. court had no power to carry on such a receivership. The parties holding these debts cannot obtain from the court an order to sell the property in order to pay the debts on the theory that they are receiver's debts. Vermont, etc., R. R. v. Vermont, etc., R. R., 50 Vt., 500 (1877). But see 54 Vt., 593. Concerning the subject of reorganizations of corporations, see Cook on The Corporation Problem. pp. 63-67. In the case of Pollitz v. Farmers' L. & T. Co., 53 Fed. Rep., 210 (1892), the existing corporation, or old securities and liabilities are voluntarily reduced in amount. No foreclosure takes place.1

In England a reorganization without foreclosure is the only reorganization that is possible, inasmuch as in that country no foreclosure of railroad mortgages or debentures is allowed.2 By act of parliament, however, reorganizations are effected by the decree of a court approving of such a plan of reorganization as a specified proportion of the security holders may formulate.3

§ 884. Reorganization by disposing of the assets without a foreclosure.— A second mode of reorganizing a corporation is where the directors or the stockholders turn over the assets of the corporation to a new corporation. This is done in various ways. It may be by a consolidation with another company, or by a sale or lease of the whole corporate property to that other corporation. validity of such acts as against the dissent of a stockholder has been treated elsewhere.4 The validity of such sales of the corporate property is generally determined by ascertaining whether the sale is ultra vires or not. Sometimes, however, an element of fraud is involved and will suffice to set aside the transaction. Thus it is illegal and fraudulent for the majority of the stockholders to purchase the property of the corporation at a sale authorized by themselves.⁵ Such a purchase by the majority may be set aside in the same way and to the same extent that a purchase of corporate property by a director may be set aside. This is the rule even though the majority purchase and proceed to a reorganization of

a reorganization was effected without comotive Works, 3 Atl. Rep., 162 (N. J., foreclosure, and the court directed that a bond be given for the payment of those bondholders in full who did not wish to go into the reorganization. A bondholder who declined to go into the reorganization and also declined to take his pay was compelled by the court to surrender his bonds. The holders of full-paid stock cannot be assessed on such stock even under a reorganization agreement of the majority of the stockholders. Where, however, for four years the stockholder does not object and then applies for a transfer of his stock, a court of equity may refuse to grant the transfer and may give him damages for the value of his stock at the time of the demand of transfer, together with interest. Gresham v. Island, etc., Bank, 21 S. W. Rep., 556 (Tex., 1893).

¹ For instances, see Park v. Grant Lo-

1885); Gilfillan v. Union Canal Co., 109 U. S., 401 (1883); Canada, etc., R. R. Co. v. Gebhard, id., 527. See also cases in the last note; also § 889, infra.

²See § 833, supra, and § 889, infra.

³ Concerning this subject see the Act of Parliament, 30 and 31 Vict. (1867), 127, §§ 6-16; also In re Cambrian R'y, L. R., 3 Ch. 278; Munns v. Isle of Wight R'y, L. R., 8 Eq., 653; In re Bristol, etc., R'y, L. R., 6 Eq., 448; London, etc., Assoc. v. Wrexham, etc., R'y, L. R., 18 Eq. 566; In re Devon, etc., R'y, L. R., 6 Eq., 610; Id., 615: Stevens v. Mid-Hants R'y, L. R., 8 Ch., 1064. Similar acts exist in Canada. See Jones v. Canada, etc., R'y, 46 Up. Can., Q. B., 250; Canada, etc., R'y v. Gebhard, 109 U. S., 527.

⁴See ch. XL, supra.

⁵ See § 662, supra.

⁶ Id.

the corporation, and offer to allow all the stockholders to become members of the new corporation.1 That a purchase by a corporation director at such a sale is voidable is well established.2 It is also fraudulent and illegal for the majority to dissolve the old corporation, form a new one, and sell the property of the old one to the new corporation at a valuation placed upon the property by the majority themselves.3

Where without foreclosure the bondholders purchase the property at an assignee's sale subject to the mortgage and pay the price by turning in bonds, the bonds cannot be enforced against the stockholders of the mortgagor company.4

The third mode of reorganization, that of foreclosure and sale, is the subject of this chapter.

§ 885. The trustee of the mortgage deed of trust may, and should in certain cases, purchase the property at foreclosure sale for the benefit of all the bondholders — Bondholders may then participate in the property — Trustee is disqualified from purchasing when? — It seems that a trustee has implied power at the foreclosure sale to bid for the property in behalf of the bondholders, up to a figure equal to the principal and interest due upon the mortgage debt. It would seem also that it is the duty of the trustee so to do. any case, however, the court in its decree may authorize and direct the trustee to bid for the property at the sale the amount of principal and interest due.5

1 See ch. XXXIX, supra.

²See § 653, supra.

³ See ch. XXXIX, supra.

4 Cock v. Bailey, 23 Atl. Rep., 370 (Pa., 1892).

5 The court may authorize and direct the trustee to bid the amount of principal and interest due to him. The reorganization clause in the mortgage was construed to enable the majority of bondholders, in case the trustee purchased, to formulate the plan of reorganization and compel the minority to accept it. Sage v. Central R. R., 99 U. S., 335 (1878); Rogers v. Wheeler, 43 N. Y., 598 (1871). It is the right of the trustee in his discretion, upon the foreclosure sale of the property, to bid up to the par value of the debt which he represents where the mortgage authorizes him to do so. The fact that a majority of the bondholders designate a lower

that figure. He purchases for the benefit of all. He has no right to sell, but if so provided in the mortgage he must organize a new corporation and convey to it for the sole benefit of all the bondholders. A majority of the bondholders cannot compel a sale to another corporation instead of the reorganized corporation. The trustee acting in violation of his duty in purchasing and disposing of the property is liable to a dissenting bondholder for the real value of his bonds. James v. Cowing, 82 N. Y., 449 (1880); reversing 17 Hun, 256. Where the trustee of the mortgage buys in the property as trustee for the bondholders, a bondholder who assents to a transfer by the trustee to a new corporation cannot afterwards complain. Butterfield v. Corning, 112 N. Y., 486 (1889). Where railroad property is, by agreement of the bondholders, bought figure does not oblige him to stop at in at foreclosure sale for a small sum Where the trustees purchase for the bondholders, a bondholder who delays for many years to come into a reorganization loses his right to come in. It has been held that a trustee is disqualified from purchasing the mortgaged property at a foreclosure sale, unless the decree of the court or a statute provides otherwise, inasmuch as the trustee represents the company as well as the bondholders and should not be under temptation to purchase the property cheaply. Yet the court will not be anxious to set the sale aside

by a trustee for their benefit, and is afterwards sold by the trustee to a new company formed by him and one of the bondholders, the profits of the sale going to such bondholder, another bondholder who has, as far as requested, advanced his share of the expenses of the foreclosure sale, can compel the trustee and the first-named bondholder to account to him for his share of the property. The right of such bondholder to his share in the sale cannot be affected by the neglect of some of the other bondholders to advance their share of the expenses, or by their withdrawal from the agreement. Cushman et al. v. Bonfield, 28 N. E. Rep., 937 (Ill., 1891). In a reorganization scheme, a bondholder who goes into it may hold the trustees personally responsible for his agreed iuterest in the new company. Riker v. Alsop, 27 Fed. Rep., 251 (1886). Cf. Stanton v. Missouri, etc., R'y. Co., 4 R'y & Corp. L. J., 370 (N. Y., 1888). If the bondholders do not respond to the trustee's call for payments on the mortgaged property which he has bought in for them, he should apply to the court for a résale. Cushman v. Bonfield, 28 N. E. Rep., 937 (Ill., 1891). In Sanxey v. Iowa, etc., Glass Co., 63 Iowa, 707 (1883), a bondholder objected to a provision in the foreclosure decree allowing the trustee to bid in the property for the bondholder, on the ground that he was a guarantied bondholder, and the court sustained him. In Duncan v. Mobile, etc., R. R., 3 Woods, 597 (1879), Mr. Justice Bradley said: "A sale for the benefit of all is attended with the difficulty of determining who shall make the bid. The court has sometimes authorized the trustees of the mortgage to bid for the bondholders. In this case it is obvious that one class or the other of the bondbolders would be dissatisfied with any selection of trustees which the court might make." In the case Wetmore v. St. Paul, etc., R. R., 1 McCrary, 466, 472 (1880), it appears that the trustees were authorized by the court to bid, if the property was likely to be sold for a totally inadequate price. The court sustained the trustees in not buying, the selling price being \$1,500,000 above the upset price fixed by the court.

1 Where the trustee of a railroad mortgage buys in the property at foreclosure sale for the benefit of the bondholders and then conveys it to a new corporation for their benefit, those bondholders who wish to come into the new corporation must do so within a reasonable Fourteen years' delay is fatal. Zebley v. Farmers', etc., Co., 63 Hun, 541 (1892). The trustees of a proposed reorganization agreement may enforce their contract lien on the securities turned in to them for advances and expenses incurred by them. Coppell v. Hollins, N. Y. L. J., July 26, 1892. See, also, concerning the obligation of the bondholders, cases in previous note.

²The trustee who sells under the power of sale cannot be interested personally in the purchase of the property. He is trustee for the company as well as the bondholders. Washington, etc., R. R. v. Alexandria, etc., R. R., 19 Gratt. (Va.), 592 (1870). A trustee may purchase at a sale of the property brought about by

on this ground, if substantial justice was done to all the parties.¹ The attorney of the company may purchase for the bondholders at the sale.² The subject of who may purchase at the sale is considered elsewhere also.³

§ 886. The bondholders or a part of them may themselves, or through a committee acting for them, purchase the property at foreclosure sale for the vurpose of reorganizing — Such a vurchase is legal.— The law favors such purchasers, inasmuch as they furnish a bidder at the sale, and enable the court to realize some kind of price for the property. Generally a scheme of reorganization is formulated which allows such of the old stockholders and bondholders to participate as apply to come in within a specified time. The object in allowing the old stockholders to participate is to get an assessment in cash from them and to dispose of defenses in the suit of foreclosure. An ordinary foreclosure of a mortgage on land proceeds quietly to a sale of the property. But the large interests involved in a railway foreclosure lead to strenuous opposition thereto. Accordingly it is found to be expedient, during or previous to a railway foreclosure suit, for the parties interested in the property, whether they be the stockholders or bondholders or mere outsiders. to formulate and propose to the bondholders and stockholders a plan of reorganization whereby, after a foreclosure sale, the purchaser of the property will allow the said bondholders, and often also the stockholders, to come into a new company which shall own the property so purchased. It has been found necessary, in most

other parties. Allan v. Gillette, 127 U.S., 589 (1888). Where the mortgagor surrenders possession to the trustee, the trustee's agent in possession and control is disqualified from purchasing at the foreclosure sale even for the bondholders. The mortgagor may redeem. Racine, etc., R. R. v. Farmers' L. & T. Co., 49 Ill., 331 (1868). Where the trustee, after taking possession of the railroad, purchases many of the bonds and makes a profit thereby, the profit belongs to the company and not to him. Ashuelot R. R. v. Elliott, 57 N. H., 397 (1874). Concerning the power of a party to the suit purchasing at the sale, see Pewabic Min. Co. v. Mason, 145 U.S., 349 (1892).

A sale will not be set aside even for illegality unless the disbursements made by a new company for improvements are provided for. Washington, etc.,

R. R. v. Alexandria, etc., R. R., 19 Gratt. (Va.), 592, 622 (1870). If the trustees are interested in the reorganization the sale is voidable at the instance of the company, but not void, and laches is fatal to setting it aside. Kitchen v. St. Louis, etc., R'y, 69 Mo., 224, 260 (1878). Wisconsin a statute allows the trustee to purchase. Barnes v. Chicago, etc., R. R., 8 Biss., 514 (1879). And even if the statute did not allow it the trustee himself could not raise the objection. Id.; aff'd, 122 U.S., 1 (1886). In the case of James v. Railroad, 6 Wall., 752 (1867), the trustee purchased. The sale was set aside chiefly, however, on account of other frauds.

² Pacific R. R. v. Ketchum, 101 U. S., 289 (1879).

³ See § 886.

cases, to reorganize on some such plan, in order to quiet the defenses to the foreclosure, or to raise the funds required in the reorganization, or to obtain a charter from the state for the reorganized enterprise, or to preserve intact the system of railways, branches, leases and connections which give value to the property foreclosed. This method of effecting a reorganization is legal and valid, since it involves an ordinary foreclosure of a mortgage and an agreement of interested parties to purchase at the foreclosure sale. The foreclosure cuts off all rights of the old corporation and stockholders to the property foreclosed, and also the rights of the bondholders whose mortgage is foreclosed.1 The only rights which any of these parties have, after the foreclosure, are the right to participate in the assets or such rights as the plan or contract of reorganization gives them. By this plan generally the old stockholders are allowed to come into the new corporation upon the payment of a fixed sum for each share of stock held by them. The bondholders are generally allowed to exchange the old bonds for new ones in the new corporation on different terms of interest and times of payment. Plans of reorganization such as this are legal and are favored by the courts, inasmuch as a better price is obtained for the property in that wav.2

¹ In Fosdick v. Schall, 99 U. S., 235 (1878), the court said: "It rarely happens that a foreclosure is carried through to the end without some concessions by some parties from their strict legal rights, in order to secure advantages that could not otherwise be attained, and which it is supposed will operate for the general good of all who are interested. This results almost as a matter of necessity from the peculiar circumstances which surround such litigation."

2 "Without such previous organizations and arrangements great sacrifice and loss must attend all such sales. They are, therefore, to be promoted rather than discouraged by unnecessary and improper exposure of their membership." Robinson v. Philadelphia, etc., R. R. Co., 28 Fed. Rep., 340 (1886); Yates v. Boston, etc., R. R., 53 Conn., 333 (1885). Reorganization agreements Mackintosh v. Flint, etc., are legal. R. R., 34 Fed. Rep., 582 (1888); Farmers' L. & T. Co. v. Green, etc., R. R., 6 id., 100 (1881). An action by a stockholder to set aside a foreclosure sale, which he alleges was collusive and fraudulent in that the hondholders and part of the stockholders had arranged to have the foreclosure made for the purpose of reorganization, is demurrable unless the consenting stockholders and the trustees in the mortgages are made parties defendant. Ribon v. R. R. Companies, 16 Wall., 446 (1872). See, also, Harpending v. Munson, 91 N. Y., 650, with reference to the corporation as a party to the suit. In a suit by a receiver and general manager of a railroad against the purchasers of it at a foreclosure sale to allow him to have an interest, as had been agreed upon before the sale, the only way to raise the question of the legality of the agreement is by demurrer. Farley v. Kittson, 120 U.S., 303 (1887). Gates v. Boston, etc., R. R. Co., 53 Conn., 333 (1885), holds that a purchase of the foreclosed road by a portion of the bondholders and a reorganization by them is legal. A bondholder who had no notice cannot set the transaction aside. A bondholder seeking to remedy a conFraud or collusion whereby the property at the sale brings less than its real value will render the sale subject to attack. But the fraud must be clearly proved. A purchase of corporate property by a majority of the stockholders at a foreclosure sale, if made

spiracy whereby a syndicate of the bondholders foreclosed and bought the property at a small valuation cannot claim a lien on the property. His remedy is a bill to set aside the foreclosure. Richter v. Jerome, 123 U.S., 233 (1887); St. Louis, etc., Co. v. Sandoval, etc., Co., 116 Ill., 170 (1886), holding that where the foreclosure or dissolution sale was irregular and void, but the reorganized company in good faith had expended large sums on the property, the court will protect the latter as far as possible. Where the reorganization agreement allows all unsecured creditors to come in and participate in the purchase and reorganization, the scheme is legal. Hancock v. Toledo. etc., R. R. Co., 14 Chic. L. News, 153 (U S. C. C., 1882). See, also, Shaw v. Railroad Co., 100 U.S., 605 (1879), where the legality of the ordinary method of reorganization was fully discussed and sustained and a bill of certain bondholders attacking it was dismissed; Matthews v. Murchison, 15 Fed. Rep., 691 (1883); S. C., 17 Fed. Rep., 760 (1883); Bliss v. Matteson, 45 N. Y., 22 (1871), holding that a special agreement with an influential bondholder, giving him an advantage over other similar bondholders, is void: Child v. N. Y., etc., R. R. Co., 129 Mass., 170 (1880), where a strict foreclosure and reorganization was provided for in the deed of trust. An agreement that the stockholders shall share in the proceeds of a foreclosure sale, the sale being to another railroad, the agreement being for the purpose of preventing a defense to the foreclosure suit, is void as to the general creditors of the insolvent railroad. Railroad v. Howard, 7 Wall., 393 (1868). A combination of part of the bondholders for the purpose of purchasing the property at foreclosure sale is

legal. Terbell v. Lee, 40 Fed. Rep., 40 (1889). It is legal for a party who intended to bid to refrain upon an agreement that he will be allowed to participate in the purchase by a competing Id. On a resale a syndicate agreed not to bid but to purchase from the purchaser at the price of the first sale. Held, that the defaulting first purchaser could not attack the resale although such resale was at a lower figure. Bondholders may combine in their bid. Where the trustee, under the power to sell, does sell the property at public auction, the bondholders or their representative may purchase. Payment may be made by crediting the company on the bonds with the proportionate amount thus paid. Easton v. German-American Bank, 127 U.S., 532 (1888). If an exchange of old for new bonds is set aside by one bondholder it must be set aside as to all. Chicago, etc., Land Co. v. Peck, 112 Ill., 408 (1885). On a reorganization it is legal for a bank owing some of the bonds to take part in such reorganization and accept stock in the new company. Deposit Bank v. Barrett, 13 S. W. Rep., 337 (Ky., 1890). A bondholder who takes part in the reorganization waives his objections to the sale. Crawshay v. Soutter, 6 Wall., 739 (1867). A purchase of a railroad by a reorganization committee of the first-mortgage bondholders will not be set aside at the instance of its second-mortgage bondholders, although the trust company that was trustee in the first was also trustee in the second mortgage, where no actual fraud was alleged, no offer made to redeem, no claim made that the property was sold at a sacrifice, no attempt made by the second-mortgage bondholders to intervene in the suit, no defense to the foreclosure suit appears to have existed, and an agreement of the in good faith and without oppression or undue advantage being taken of the minority, is legal and valid. It is not constructive fraud. The purchase may be objected to and set aside only when it is actually fraudulent. The rule, however, is different where the purchaser at the foreclosure sale was a director of the old corporation. Such a purchase is fraudulent as a matter of law, even though made in good faith and a full price paid for the property.2 The corporation or a dissenting stockholder may cause the sale to be set aside, or may claim for the corporation the property itself, upon repayment to the director of the price he paid therefor. It is important to mention, in this connection, that a collusive foreclosure, whereby the corporate directors who might make a valid defense do not do so, but allow judgment to be taken by default, may be impeached and set aside by a stockholder on the ground of fraud.3

There may be a valid agreement between a railway corporation, the mortgagees in trust of its road and the bondholders that after a sale under the mortgage the company should be so reorganized that the stockholders and unsecured creditors of the old company should become stockholders in the new company. Such an agreement would modify to that extent the effect of the mortgage sale.4

It is fraudulent for the trustee to enter into an agreement with a part only of the bondholders to get control of the property to the injury of the other bondholders. It has been held that where a part of the bondholders have formulated a plan for purchasing and reorganizing the company, the other bondholders may apply to the court to be allowed to participate in such plan, and the court will grant the application if it is made before the sale takes place.

purchaser to allow the second-mortgage bondholders to participate in the reorganization was without consideration, and the purchaser was not made a party to this suit. Robinson v. Iron R'y, 135 U. S., 522 (1890). A reorganization agreement is stated and upheld in Carey v. Houston, etc., R'y, 45 Fed. Rep., 438

¹ See Carter v. Ford Plate Glass Co., 85 Ind., 180 (1882), where the offer was made to all the stockholders to come into the reorganization on equal terms. And see § 662.

² See § 653, supra.

3 See § 659, supra.

⁴ Smith v. Chicago, etc., R. R. Co., 18

is illegal if it is for the benefit of stockholders to the injury of bondholders.

⁵ A sale may be set aside where the trustee of the mortgage entered into a combination with part of the bondholders to purchase at the sale at a small price and reorganize at a sacrifice to minority bondholders. Sahlgard v. Kennedy, 1 McCrary, 291 (1880).

⁶ In the case of Duncan v. Mobile, etc., R. R., 3 Woods, 597 (1879), the minority bondholders, prior to the sale, applied to the court to order the majority bondholders, who intended to purchase the property at the sale, to let the minority participate if the latter applied to do so before the sale. The court so ordered. Wis., 17 (1864). But such an agreement Where the corporation is insolvent, and Parties who object to such a purchase on the ground that it is unfair, illegal or fraudulent must apply for relief promptly or their objections will be overruled.¹

§ 887. The court may allow the purchasing bondholders to turn in their bonds at a proper value in payment—Bondholders not participating must be paid in cash.—This is substantially the same thing as requiring the purchasers at the sale to pay the price in cash and then distributing to the purchasers the proportionate part of the cash that goes to pay their holdings of bonds. The court will not require this useless form to be gone through with, especially as the tieing up of a large amount of money, even for a short time, is a serious thing and would embarrass and prevent many reorganizations.² Bondholders who do not participate in the reorganiza-

a stockholder and bondholder places his bonds in the hands of the others to use in keeping the corporation affoat, and the latter allow a foreclosure to take place and bid the property in at a fair valuation, the former may have an accounting for his bonds, but he cannot necessarily participate in the reorganization, the chief object of his parting with his bonds being to avoid personal liability on debts he had guarantied for the company. Appeal of Huston, 18 Atl. Rep., 419 (Pa., 1889). As an instance of a reorganization where the decree of foreclosure provides for allowing the old stockholders, etc., to come in, see Wood v. Dubuque, etc., R. R. Co., 28 Fed. Rep., 910 (1886).

¹ Bondholders who do not come into the reorganization, nor bid at the sale, nor become parties to the suit, cannot long after the reorganization is completed and new bonds issued cause the sale to be set aside for fraud in the reorganization. Wetmore v. St. Paul. etc., R. R., 1 McCrary, 466 (1880). A reorganization agreement cannot be successfully attacked by stockholders two years after it was made, especially where the stockholders do not offer to pay the debt due nor the expenses of foreclosure, and where "the relief they ask under their bill, if granted, would not only be valueless to them and other stockholders, but would saddle the company with a vast debt of nearly \$25,000,000, wholly due, and bearing a high rate of interest." Carey v. Houston & T. C. R'y Co., 52 Fed. Rep., 671 (Tex., 1892). In the case Ashhurst's Appeal, 60 Pa. St., 290 (1869), there had been various attempts to keep the corporation going and to avoid a foreclosure. Foreclosure took place, however, and directors participated in the purchase. The court refused to set the sale aside, more than six years having elapsed before complaint was made. See, also, 146 U. S., 88.

²The court may decree that bonds may be turned in in payment of the purohase price at a valuation determined by the amount of cash which such bonds would be entitled to on the final distribution. Duncan v. Mobile, etc., R. R., 3 Woods, 597 (1879). The court may allow the purchasers to pay in receiver's certificates and bonds at such a figure as they would be entitled to in money. Reorganization agreements are legal. Kropholder v. St. Paul. etc., R'y, 1 McCrary, 299 (1880). The terms of the decree as to allowing the purchaser at the foreclosure sale to turn in bonds in payment proportionately may be worded as the court sees fit, and may be in general terms with power reserved to modify it. Provisions in the mortgage relative to this are not binding upon the court. Farmers' L. & T. Co.

tion must be paid in cash to an amount ascertained by the proportion which the sum realized by the foreclosure bears to all the bonds, unless such sum exceeds the amount of bonds, in which case the latter are paid in full, principal and interest.¹

§ 888. Limiting the time within which bondholders may come into the reorganization — Applications during that time — Varying the reorganization agreement — Trustees' temporary certificates. — The usual reorganization agreement specifies a certain time within which any stockholders or bondholders who desire to participate in the reorganization may do so by depositing their securities and signing an agreement. This provision is legal, and those stockholders or bondholders who do not come in within that time are excluded from the reorganization. They are entitled to their proportion of the money realized from the foreclosure sale and that is all.² But where a bondholder or stockholder has applied to come

v. Green B., etc., R. R., 6 Fed. Rep., 100 (1881). See Sage v. Central R. R., 99 U. S., 335 (1878). The mortgage itself often provides for the bonds being turned in in payment. Child v. N. Y., etc., R. R., 129 Mass., 170.

¹ Brooks v. Vermont, etc., R. R., 22 Fed. Rep., 211 (1884).

² A person who fails, even through ignorance, to avail himself of the privilege to take part in a reorganization is barred out therefrom. Landis v. Western Pa. R. R., 19 Atl. Rep., 556 (Pa., 1890). Although \$2,000,000 of the \$5,500,000 complain as to the plan of reorganization in a foreclosure case by the trustees and petition to be allowed to come in, yet the court will refuse. Skiddy v. Atlantic, etc., R. R., 3 Hughes, 320 (1878). A bondholder who signs the reorganization agreement but does not deposit his bonds is not entitled to come in. Carpenter v. Catlin, 44 Barb., 75 (1865). See, also, Vatable v. New York, etc., R. R., 96 N. Y., 49 (1884); Zebley v. Farmers', etc., Co., N. Y. L. J., July 1, 1889. Thus where, in order to quiet opposition to a foreclosure, the bondholders offer to the stockholders a plan of reorganization whereby the foreclosure is to proceed, a sale be made, a new corporation formed to take the property, and the old stockholders to be allowed to come in if they apply within a certain time, and this plan is carried out, a stockholder who had no knowledge of the plan until after the limited time had expired cannot compel the new corporation to admit him. His remedy, if he has any, is to impeach the foreclosure. Thornton v. Wabash R'v Co., 81 N. Y., 462 (1880). Where part of bondholders purchase at foreclosure sale, the other bondholders cannot claim the right to participate in the purchase. Vose v. Cowdrey, 49 N. Y., 336 (1872). Where a member of a syndicate selling property to a corporation for stock delays applying for his part thereof until the company is reorganized, and then reorganized again, an assignee of a part of his interest cannot claim the stock. delay is too long and the claim indefinite. Zuccani v. Nacupoi, etc., Co., 61 L. T. Rep., 176 (1889); affirmed, 60 id., 23. Where the corporation offers to exchange preferred for common stock upon the payment of an additional sum of money, a stockholder who delays for thirty years to avail himself of the privilege cannot claim the right thereto. The fact that the corporation had taken in some of the common stock on a new basis of exchange is immaterial. Holland v. Cheshire R'y, 24 N. E. Rep., 206 (Mass., 1890).

into the reorganization and has complied with the requirements laid down in the offer, he may insist upon being admitted, unless he has been guilty of laches.¹

1 Equity will protect and enforce an agreement of the purchaser at the foreclosure sale to allow other holders of securities to participate with him in the purchase. Cornell v. Utica, etc., R. R. Co., 61 How. Pr., 184 (1881). See, also, Penn, Trans, Co.'s Appeal, 101 Pa. St., 576 (1882); Sage v. Central R. R. Co., 99 U. S., 334 (1878); Wetmore v. St. Paul. etc., R. R. Co., 5 Dill., 531 (1880); S. C., 3 Fed. Rep., 177. Where upon a reorganization an old stockholder is wrongfully refused his stock in the new, he may recover the highest market price of the same up to the time of the insolvency of the corporation. Reading, etc., Co. v. Reading, etc., Works, 21 Atl. Rep., 169 (Pa., 1891). Cf. Schorestine v. Iselin, N. Y. L. J., July 5, 1893. A full statement of the details of a plan of reorganization is given in Riker v. Alsop, 27 Fed. Rep., 251 (1886), holding that a bondholder who has assented to the plan and deposited part of his securities cannot afterwards be excluded. If two stockholders agree that the one purchasing the corporate property at a foreclosure sale thereof shall allow the other to participate in the benefits and profits of the purchase, and the purchaser refuses to live up to the agreement, the other may collect damages at law. Harris v. Davis, 44 Fed. Rep., 172 (1890). Although a reorganization agreement is broken and violated by the party who buys for the reorganizers, yet one of them cannot on that account have the sale set aside where he, with knowledge of the facts, delays two years in making his application and does not offer to bid for the property upon a resale any more than the price for which it was sold, and does not show that any one else would bid any more, and the property meantime has passed into the hands of a new corporation and bonds and stock issued thereon. Farmers', etc., and the probabilitied by Wicrosoft®

T. Co. v. Bankers', etc., Tel. Co., 119 N. Y., 15 (1890). See, also, Cox v. Stokes. N. Y. Supr. Ct., Spec. T., March 31, 1888. Where in a reorganization scheme one of the purchasers makes payment by causing the reorganized corporation to make the payments for him, the court will interfere in behalf of other stockholders. Huiskamp v. West, 47 Fed. Rep., 236 (1891). A purchase of a railroad by a reorganization committee of the firstmortgage bondholders will not be set aside at the instance of its second-mortgage bondholders, although the trust company that was trustee in the first was also trustee in the second mortgage. where no actual fraud was alleged, no offer made to redeem, no claim made that the property was sold at a sacrifice, no attempt made by the second-mortgage bondholders to intervene in the suit, no defense to the foreclosure suit appears to have existed, and an agreement of the purchaser to allow the secondmortgage bondholders to participate in the reorganization was without consideration, and the purchaser was not made a party to this suit. Robinson v. Iron R'y, 135 U, S., 522 (1890). the stockholders enter into an agreement whereby a person is to purchase at foreclosure sale and allow them to participate, such agreement may be enforced. Marie v. Garrison, 83 N. Y., 14 (1880). Where a reorganization agreement does not specify who shall bid, but a hondholder does bid up to the limit fixed by the agreement, and an outsider bids more and takes the property, but subsequently turns it over to the bondholder who had bid, other bondholders cannot enforce the reorganization agreement where they had refused to pay their proportional part of the money paid by the purchasing bondholder to liquidate the expenses of the litigation and the proportional amount of money

The various provisions of the reorganization agreement are strictly construed. General powers in behalf of the committee of reorganization are not implied and express powers are not extended by construction. Compliance and good faith are exacted. Where trustee's certificates are issued to the bondholders or stock-

due to those bondholders who did not come in. Appeal of Fidelity, etc., Co., 106 Pa. St., 144 (1884).

I The provision that a majority in interest of the bondholders might alter the plan of reorganization is strictly construed and does not authorize a change in the character of the securities to be issued. Dutenhofer v. Adirondack R'v, 14 N. Y. Supp., 558 (1891). Where by the plan of reorganization assessments on the stock are to be determined by the trustee after an examination of certain accounts, etc., an assessment will be set aside if such examination by the trustee is perfunctory and not properly made. Gernsheim v. Olcott, N. Y. L. J., May 21, 1890. The prior phases may be found in Development Company v. Railway Company, 27 Fed. Rep., 344; Steamship Company v. Railway Company, 32 Fed. Rep., 525; Gernsheim v. Olcott, 7 N. Y. Supp., 872; reversed in 10 N. Y. Supp., 438. A reorganization committee, under a clause giving it power to arrange details, may provide that bonds shall be payable on or before maturity. Lehigh, etc., Co. v. Central R. R., 34 N. J. Eq., 88 (1881). Under a reorganization agreement the committee may turn out to the old bondholders \$994,000 of the whole \$2,000,000 of stock, leaving \$1,006,000 unissued stock, instead of turning out the whole \$2,000,000 of stock, where the agreement gives them final construction of its terms, there being no bad faith in the matter. White v. Wood, 129 N. Y., 527 (1892). The lower court held that where the purchasing committee are to organize a new corporation and distribute its stock among the old bondholders, it is a breach of trust for them to distribute less than half of the stock, leaving the rest unissued. Their

powers to modify the reorganization agreement refer only to incidental mat-A bondholder may recover from the trustees the value of his honds. 13 N. Y. Supp., 631 (1891). A reorganization plan, to be valid if assented to by all bondholders by a certain date, is void and binds no one if all do not come in by that date. Martin v. Somerville, etc., Co., 27 How, Pr., 161 (U. S. C. C., 1863). The subscribers to the reorganization fund may compel the committee to account for the subscriptions. Where the plan contemplated the consolidation of two railroads, and of three if the third obtained legislative consent thereto, an advance of the reorganization funds to such third road, which never obtains such legislative consent, is a breach of trust, and the committee are liable for the funds so advanced. Gould v. Seney, 9 N. Y. Supp., 818 (1890). If there is a material change made in the terms of a * reorganization agreement, a subscribing bondholder may withdraw. Miller v. Rutland, etc., R. R., 40 Vt., 399. A bondholder cannot set aside a contract made by the reorganization committee where the committee was authorized to take action for a reorganization, and for the payment of outstanding obligations, and such committee agreed to issue to certain contractors a part of the bonds and stock of a new corporation to be organized for the purpose of purchasing the property, even though it is alleged that some of the obligations so paid were debts owned by members of the committee, and that other obligations were fictitious in whole or in part, no fraud being proved. No cause of action is shown as against contractors. Brooks v. Dick, 135 N. Y., 652 (1892).

holders in exchange for their securities, the certificate is considered the same as the stock or bonds.1

§ 889. Reorganization in accordance with and under a statute.— As will be shown hereafter a new railroad corporation which purchases directly or indirectly the railroad and property of an insolvent railroad company at a foreclosure sale does not purchase and succeed to the various special powers and privileges of the old corporation. The only things that pass by the sale are the railroad, property and right to operate the railroad. But it often happens that valuable powers and privileges exist under the old charter and that the new corporation desires to succeed to them also. Hence many of the states have passed statutes conferring on the reorganized company all the powers and privileges of the old company. These statutes also provide that such of the bondholders and stockholders as apply to give up their holdings in the old company and take in place thereof holdings in the reorganized company shall be allowed so to do. Generally the statute prescribes the procedure to be followed in allowing the stockholders of the old corporation to become members of the new corporation. Where such a procedure is prescribed and a newspaper advertisement is made as required by statute, limiting the time within which the old stockholder must apply for admission into the new corporation, a stockholder of the old corporation who fails to apply within the prescribed time is barred of all right to come into the new corporation, and a court of equity cannot give him any relief.2

trustee for purposes of reorganization. and transferable certificates are issued therefor by the trustee, a claimant of stock which another person has deposited, and for which such other person has the trustee's certificate, cannot compel the trustee to deliver up the stock until the trustee's certificate is returned. even though the party holding it is a party defendant. Bean v. American L. & T. Co., 122 N. Y., 622 (1890). Where upon reorganization the committee issue transferable certificates exchangeable into stock of the new corporation when it is formed, the new corporation is liable for allowing an exchange by a person to whom a trustee has illegally transferred the certificates issued to him. Mobile, etc., R'y v. Humphries, 7 S, Rep., 522 (Miss., 1890).

Where stock is deposited with a N. Y., 49 (1884), the court saving: "It would lead to intolerable inconvenience. confusion and difficulty if the stockholders of the old company could in such a case take their own time to assent to the plan of reorganization, and to assert their right to become members of the new company upon such facts as they would be able to establish in a court of equity." Reversing 11 Abb. N. C., 133. Concerning the New York statutes on reorganization, see, also, Pratt v. Munson, 84 N. Y., 582 (1881). For various statutes relative to reorganizations, see Jones on Corporate Bonds. etc., § 698. A bondholder who participates in a reorganization under the Maine statutes may enjoin an excessive issue of the reorganization securities to another bondholder. Lincoln Nat'l Bank v. Portland, 19 Atl. Rep., 102 (Me., 1889). ² Vatable v. N. Y., etc., R. R. Co., 96 Where reorganization is under a statute

In England there is no such thing as the foreclosure of a railroad mortgage. A plan of reorganization is submitted to the court upon the application of a certain part of the interested persons, and if the court approves of the plan it is binding upon all stockholders and creditors. This is a statutory reorganization pure and simple. It is simple, effective, and in the end is substantially the same as American reorganizations, except that the latter involve prolonged litigation, delay, expense and loss out of any proportion to the results effected. The English decisions on the statutes for reorganizations are instructive and are given in the notes below.

whereby mortgages of the reorganized company are to be subordinate to all subsequent judgments of a certain class, such a judgment has no precedence if the reorganized company's mortgage has been foreclosed and sale made before such judgment. Reorganization need not be under the statute. Jeffrey v. Moran, 101 U. S., 285 (1879).

¹ See Cook on The Corporation Problem, p. 65.

² A reorganization by a transfer of all the assets to a new company on the approval of the court is allowed by statute in England, and a dissenting stockholder cannot prevent it. Nicholl v. Eberhardt Co., 61 L. T. Rep., 489 (1889); Re Callao Bis. Co., id., 534. A person having the right to take part in a reorganization and not doing so, but objecting thereto, cannot long subsequently after the stock has risen bring suit to be allowed to take stock, under the English act. Weston v. New Guston, etc., Co., 60 L. T. Rep., 805 (1889). Reorganization may be compelled in England on a certain vote and with the approval of the court, and even the secured creditors may be compelled to take stock in payment. Re Empire, etc., Co., 62 L. T. Rep., 493 (1890). For an instance and full discussion of a plan of reorganization opposed by unsecured creditors, but approved by the court, see Re East, etc., Co., 62 L. T. Rep., 239 (1890). a plan of voluntary reorganization is adopted and carried out, a party who refuses to go into it canuot claim that creditors prior to him have lost

such priority by reason of their accepting subordinate securities under the reorganization scheme. He cannot take advantage of that fact. Stevens v. Mid-Hants R'y, L. R., 8 Ch., 1064 (1873). Where, upon a voluntary dissolution of a corporation, a reorganization scheme is carried out by which the property is turned over to a new company for its shares, and a reasonable time is fixed within which the old stockholders must exercise their option to take stock or have it sold by the liquidator, a stockholder cannot exercise his option after that time, although he was ignorant of the whole matter, nor can he have the scheme set aside. Postlewaite v. Port Philip, etc., Co., 62 L. T. Rep., 60 (1889): Weston v. New Guston Co., id., 275. As to the rights of creditors, see, also, Re Cambrian R'y, L. R., 3 Ch., 278 (1868); Re Devon, etc., R'y, L. R., 6 Eq., 610 (1868); London, etc., Assoc. v. Wrexham, etc., R'y, L. R., 18 Eq., 566 (1874). Concerning the provision in the English statutes for buying out dissenting stockholders by paying an amount fixed by arbitrators, see Re Mysore, etc., Co., 61 L. T. Rep., 453 (1889). For a case of a complicated reorganization under the English statutes, see Re The Neath, etc., Co., 66 L. T. Rep., 40 (1892). In the case Re Alabama, etc., R'y Co., 63 L. T. Rep., 578 (1890); aff'd, 64 id., 127, a reorganization scheme was approved by the court and became effective, although it deprived former debenture holders of their security. The property of the company consisted of stock in American

In Canada also the statutes provide that upon corporate insolvency a certain proportion of the security-holders may agree upon a plan, subject to the approval of the court, whereby the interests of all the security-holders may be arbitrarily reduced in value. This is legal and binds all parties. Even in the United States if a legislature authorize a reorganization without foreclosure, and the bondholders are given a certain time to consent, those who do not act within that time are held to have assented. After a strict foreclosure the legislature may authorize the trustee to convey the property to a new corporation on certain terms. All the bondholders and stockholders are bound.

§ 890. Status of a purchaser of the property at foreclosure sale—He takes the property free from claims of unsecured creditors and the contracts and liabilities of the old company—His duty as to completing and operating the road—He may operate the road, but does not succeed to the corporate existence—Exemptions from taxation—The purchaser takes with notice of certain claims.—The foreclosure cuts off the rights of the unsecured creditors as well as the stockholders of the old company. Junior liens are also cut off. The purchaser takes the property free and clear of all claims and debts excepting liens subject to which he buys. He is not liable for the debts of the old company, unless he purchases expressly subject to those debts.

railroad companies, the purpose being to acquire the control of the American companies. The scheme of reorganization is given in the report. The approval of the court was in accordance with the A reorganization under the English statute will not be sustained as against American stockholders, where the entire business of the English company is to own and work American mines, and the by-laws of the company provide for a longer notice than is specified in the English statute. The notice of the meeting to reorganize not having reached the American stockholders in time to attend the meeting, the American courts will not sustain the reorgan-Brown v. Republican, etc., Mines, 55 Fed. Rep., 7 (Col., 1893). The American stockholders in an English company organized to own and work mines in America may by suit in an American court cause to be set aside a reorganization made in England in vio-

lation of the by-laws of the company. Brown v. Republican, etc., Mines, 55 Fed. Rep., 7 (Col., 1893).

¹ Canada Southern R'y Co. v. Gebhard, 109 U. S., 527 (1883). See, also, § 883, *supra*, notes.

² Gilfillan v. Union Canal Co., 109 U. S., 401 (1883). The legislature may by statute allow stockholders to vote on a plan to relieve the corporation from its embarrassments, and may prescribe that votes not cast within three months shall be counted in the affirmative. Union Canal Co. v. Gilfillan, 93 Pa. St., 95.

³ Gates v. Boston, etc., R. R., 53 Conn., 333 (1885); Middletown v. Same, id., 351.

4 See §§ 860 and 669, supra.

⁵ See § 643, supra. A tax on the capital stock is a tax on personalty, and is cut off by a foreclosure of a mortgage executed and recorded before the tax was levied. The purchaser at the foreclosure sale takes the property free from such tax. Cooper v. Corbin, 105 Ill., 224

The legislature may prescribe that a purchaser at the foreclosure sale of a railroad shall be liable for the debts and obligations of that road. but the legislature cannot release the former company from such obligations.² The purchaser is not bound to carry out the contracts which the mortgagor made, unless he accepts and adopts Where the purchaser ratifies a contract previsuch contracts.3

(1883). Cf. Osterberg v. Union T. Co., 93 U.S., 424 (1876). The purchasers at foreclosure sale take subject to a debt created by order of the court for the purpose of purchasing rolling stock: the rolling stock being part of the property sold at the foreclosure sale. "The court was not divested of its power and duty of managing the property by reason of a sale which the purchasers delayed or neglected for many years to complete." The debt created for rolling stock will be paid out of the proceeds of the sale. unless bonds are turned in in payment; in the latter case the purchasers must pay such debt. Vilas v. Page, 106 N. Y., 439 (1887). Where in the decree of sale to a reorganization company it is expressly provided that the old indebtedness is not cut off, the new company is liable for breach of warranty of title by the old company. Wood v. Dubuque, etc., R. R., 28 Fed. Rep., 910 (1886). Unsecured creditors who are given an opportunity to come into the reorganization, but do not do so, are also cut off entirely by the foreclosure. Hancock v. Toledo, etc., R. R., 11 Biss., 148. The purchaser is not liable for accidents which occurred after the sale, but before the consummation of the same. Stratton v. European, etc., R'y, 74 Me., 422 (1883). The purchaser at the foreclosure sale is not liable for the debts or obligations of the company which has been foreclosed. Menasha v. Milwaukee, etc., R. R., 52 Wis., 414 (1881); Cook v. Detroit, etc., R'y, 43 Mich., 349 (1880); Hopkins v. St. Paul, etc., R. R., 2 Dill., 396 (1872); Secombe v. Milwaukee, etc., R. R., 2 Dill., 469 (1873); Gilman v. Sheboygan, etc., R. R., 37 Wis., 317 (1875); Vilas v. Milwaukee, etc., R'y, 17 Wis., 497 (1863); Wright v. Milwaukee,

etc., R'v, 25 Wis., 46 (1869); Smith v. Chicago, etc., R'v, 18 Wis., 17 (1864); Penn, Trans. Co. Appeal, 101 Pa. St., 576 (1882): also \$ 669, supra.

¹ St. Louis, etc., R. R. v. Miller, 43 Ill., 199 (1867): County Com'rs Case, 143 Mass., 424 (1887); Hatcher v. Toledo, etc., R. R., 62 Ill., 477 (1872), where the statute was construed not to have a retroactive effect.

² Bruffett v. Great, etc., R. R., 25 Ill., 353 (1861).

³ The purchaser at foreclosure sale who, instead of abandoning a leasehold right which the mortgagor possessed, took possession of the leased railroad and operated it, is liable for the rental while in possession, but may abandon the property at any time. By agreement between lessor and lessee the rental may be reduced and the mortgagee not yet in possession cannot complain. Frank v. N. Y., etc., R. R., 122 N. Y., 197 (1890). A lease made by the mortgagor pending foreclosure may be repudiated by the purchaser at the foreclosure sale. cepting rent for thirty days is no waiver. Farmers' L. & T. Co. v. Chicago, etc., R'y, 44 Fed. Rep., 653 (1890). As to leases, see, also, §§ 873-875. The purchaser of a railroad at a foreclosure sale is not bound to perform its contract to construct a siding or branch road. v. Chesapeake, etc., R'y, 123 U. S., 222 (1887). Where the purchaser of a railroad on foreclosure confirms, ratifies and adopts a telegraph contract made by the old company he is bound by it. Western, etc., T. Co. v. Atlantic, etc., T. Co., 7 Biss., 367 (1877). The purchaser of a railroad and franchises at an execution sale takes it free from any contract to maintain a depot at a certain place. Gulf, etc., R'y v. Newell, 11 S. W. Rep.,

ously made with the company, such contract has been held to continue and not to be affected by the foreclosure proceedings. The new company may assume such obligations as it desires. But a contract to assume such obligations does not arise from the acts of the secretary of the company.

A purchaser at a foreclosure sale of a system of railroads is not bound to pay underlying mortgages on separate divisions before taking possession.⁴

If the purchaser with the consent of the court delays the completion of his purchase, the income during that time coming in to the receiver goes to the receiver's fund and not to the purchaser.⁵

Where a company owing debts allows a foreclosure of a mortgage, and buys in the property and holds it secretly in the name of a trustee, an execution may be levied on it by a judgment creditor of the company. The decree of foreclosure may leave the purchaser at foreclosure sale liable for part or all of the debts, or for receiver's certificates. Although the purchaser is bound to pay outstanding claims, yet the court will first pass upon them. It will enjoin a suit in the state court relative thereto.

A purchaser at a foreclosure sale takes the rolling stock, but not the money and surplus earnings in the receiver's hands. These belong to the bondholders or general creditors. A purchaser

342 (Tex., 1889). The purchaser at foreclosure sale is not liable on an agreement to pay part of the cost of a station, even though he continues to use that station. The agreement of the purchasers to set aside a certain sum for small claims gives no right to any particular claimant. Mayer v. Fort Wayne, etc., Co., 31 N. E. Rep., 567 (Ind., 1892). The question of what the purchaser takes by his purchase and what he takes subject to is also considered elsewhere. See §§ 859, 860.

¹ Western U. Tel. Co. v. Atlantic, etc., Tel. Co., 7 Biss., 367 (1877).

² Lake, etc., R'y v. Griffin, 92 Ind., 487 (1883); Taylor v. Atlantic, etc., R. R., 57 How. Pr., 26 (1878).

³ American, etc., R'y v. Miles, 52 Ill., 174 (1869).

⁴ Central T. Co. v. Wabash, etc., R'y, 30 Fed. Rep., 332 (1887). The income during receivership will be apportioned for the payment of taxes and interest on underlying mortgages, but the court may vary the amount to be paid to a particular division. Debts for labor, etc., have a preference, and are a lien on the whole system, though incurred by one division. Id.

⁵ Osterberg v. Union Trust Co., 93 U. S., 424 (1876). If the mortgagee assents to release certain property and it is sold, and is not included in the fore-closure sale, the purchaser is not entitled to that fund. Id.

⁶State v. McBride, 15 S. W. Rep., 72 (Mo., 1891).

⁷Wood v. Dubuque, etc., R. R., 28 Fed. Rep., 910 (1886).

8 See ch. LI, supra; Central Nat'l Bank v. Hazard, 30 Fed. Rep., 484 (1887).

⁹ Jesup v. Wabash, etc., R'y, 44 Fed. Rep., 663 (1890).

¹⁰ Strang v. Montgomery, etc., R. R., 3 Woods, 613 (1879). at the foreclosure sale may contest the validity of a prior mort-gage.1

The purchaser is not liable in damages for accidents occurring while the old company or receiver was in possession unless he purchased the property expressly subject to such damages.²

¹ Hackensack, etc., Co. v. De Kay, 36 N. J. Eq., 548 (1883).

² A purchaser who takes subject to liens must pay. Swann v. Wright's Ex'r, 110 U. S., 590 (1884). Where the purchaser takes a deed subject to liabilities incurred during the receivership, the mortgagee of the purchaser takes subject to the same liabilities. Central Trust Co. v. Sloan, 65 Iowa, 655 (1885). A statute allowing the purchasers at foreclosure sale to organize as a corporation which shall have all the powers of the old corporation does not render the new corporation liable for the debts of the old. Morgan County v. Thomas, 76 Ill., 120 (1875). Although the purchaser of a road is vested with all the corporate power of the mortgagor corporation, yet damages for an accident occurring after the purchase cannot be collected from him in a suit brought against the old corporation. Wellsborough, etc., Co. v. Griffin, 57 Pa. St., 417 (1868); Metz v. Buffalo, etc., R. R., 58 N. Y., 61 (1874). The court in confirming a sale on foreclosure may insert a provision that the purchaser shall be liable for all liabilities incurred during the receivership. The purchaser is bound by such a provision. Farmers' L. & T. Co. v. Central R. R., 5 McCrary, 421 (1883); Schmid v. N. Y., etc., R. R., 33 Hun, 335 (1884). Where the court, upon confirming a sale of the property and discharging the receiver, retains the suit in order to provide for damage suits, and makes an order that the damages shall be a lien upon the property, the property will be subject thereto even in the hands of the purchaser. Farmers' L. & T. Co. v. Central R. R., 17 Fed. Rep., 758 (1883). Where the party purchasing at foreclosure sale takes expressly subject to liabilities incurred during the receiver-

ship, such liabilities may be enforced against him. Sloan v. Central Iowa R'v. 62 Iowa, 728 (1883). Where an injury is done during the receivership and afterwards the property is sold under foreclosure and the grantee takes subject to liability for all disabilities incurred during the receivership, the remedy of the person injured is not by a bill in equity against the grantee. Brown, Adm'r, v. Wabash R'y, 96 Ill., 297 (1880). Where the receiver has been discharged and the purchaser placed in possession subject to liabilities incurred during the receivership, the court will try the cases with or without a jury according to the claim, upon notice to the purchaser, and if the purchaser does not pay the amount will sell the property itself. Farmers' L. & T. Co. v. Central R. R., 2 McCrarv. 181 (1881). Receivers are not liable for the loss of baggage where such loss occurred after the property had been deeded and presumably delivered to the purchaser at foreclosure sale. Corser v. Russell, 20 Abb. N. C., 316 (1887). After a receiver has been discharged he is not liable for damages accruing during his receivership, although he may continue liable for any personal fault. The purchaser of property at a foreclosure sale is not liable for damages occurring during a receivership. But where the purchaser gives a bond of indemnity to the receiver, this bond inures to the benefit of persons damaged during the receivership. Although a receiver has been discharged, yet damages occurring during the receivership are a lien on the income received during the receivership. Ryan v. Hays, 62 Tex., 42 (1884). The new company operating the road and also the purchasing committee may be jointly liable for accidents occurring after the purchase but before a final

Where the old company had completed but part of its road, and this part was sold under foreclosure, the purchaser is not bound to go on and complete the whole road; but it must obey an order of the court against the old company that the whole road be operated. It is clearly established that the purchasers at the foreclosure sale do not succeed to the corporate capacity and franchise of the old corporation; but the purchaser succeeds to the right to operate the road and collect tolls.

An exemption from taxation contained in the old charter does not pass to the new corporation, even though it succeeds to the rights of the old, unless the legislature, by the words used, showed a clear intent that the exemption should continue. The reason of this rule is that exemptions from taxation are not favored by the courts.⁵

The reorganized company is not a bona fide purchaser of the property. It is bound to take notice of all equities connected with the property. So, also, a mortgagee of the purchasing company is

carrying out of the decree. Lockhart v. Little Rock, etc., R. R., 40 Fed. Rep., 631 (1889). Where a mortgage on a plankroad is foreclosed and the property is purchased by an individual, damages for an accident occurring subsequently while he is operating it cannot be recovered from the old company. Wellsborough, etc., Co. v. Griffin, 57 Pa. St., 417 (1868). The purchasers at the foreclosure sale are liable for damages done by the railroad, the same as common carriers are. Rogers v. Wheeler, 43 N. Y., 598 (1871).

¹Where a railroad company mortgages such part of its road as is completed, and the mortgage is foreclosed, the purchasers are not bound to go on and complete the road. Failure on their part to complete it is no defense to an action on a subscription. Chartiers R'y v. Headgene, 85 Pa. St., 501 (1877).

² A purchaser of a road at foreclosure sale in the federal court must obey a decree in the state court against the old company ordering it to operate the whole of its line. State v. Iowa, etc., R'y, 50 N. W. Rep., 280 (Iowa, 1892).

3 See § 790, supra.

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⁵See ch. XXXIV, supra. Exem

tion from taxation does not pass to the succeeding corporation. Louisville, etc., R. R. v. Palmer, 109 U. S., 244 (1883): Memphis, etc., R. R. v. Railroad Com'rs. 112 U. S., 609 (1884). An exemption from taxation of a corporation does not pass to a company succeeding to all of its "franchises, rights and privileges." Chesapeake, etc., R'y v. Miller, 114 U.S., 176 (1885). See, also, Picard v. East Tenn., etc., R. R. Co., 130 U. S., 637 (1889). A purchaser at a mortgage sale does not take the property with an exemption from taxation given by the old charter. State v. Chicago, etc., R'y, 14 S. W. Rep., 522 (Mo., 1886).

to go on their abona fide purchaser of the property as against judgment creditors of the insertions of the insertions. Tenn., etc., R. R., 12 S. W. Rep., 537 (Tenn., 1889). Where the purchasers of a road pay only a part of the purchaser set the old perate the lowa, etc., ject to a purchase-money lien. North Car. R. R. v. Drew, 3 Woods, 691 (1879). A fractional interest in a reorganization will be protected by the courts as a lien prior to the reorganization mortgage.

chargeable in certain cases with notice of the facts.¹ Although the new company is given all the property, rights and privileges of the old company, yet it is a new corporation.² Yet irregularities in the organization of the new company are not fatal to the organization, even where they would be fatal in the case of a corporation organized to build a railroad.³ After foreclosure and sale quo warranto lies at the instance of the state to dissolve the old corporation.⁴

Blair v. St. Louis, etc., R. R., 23 Fed. Rep., 524 (1885). See, also, cb. XL, supra.

¹See ch. XL, supra. A company taking a railroad from parties purchasing it at foreclosure sale takes it subject to any vendor's lien. North Car. R. R. v. Drew, 3 Woods, 692 (1879). A corporation is chargeable with notice of facts known to its directors whereby the corporation acquired title to a large property from the bondholders of a foreclosed company. Rogers v. New York, etc., Land Co., 134 N. Y., 197 (1892).

² People v. Schurz, 110 N. Y., 443 ⁴ Peop (1888). A reorganization under the Y., 217.

usual statute has the effect of creating a new corporation. It is not a mere amendment of the old charter. Marshall v. Western N. C. R. R. Co., 92 N. C., 322 (1885).

³ Under a statute authorizing the purchaser to organize a new corporation having the powers of the old, mere irregularities in organizing are no grounds for forfeiture of the new charter, since the individual who purchased at the sale may perhaps be looked upon as the new corporation. Commonwealth v. Central P. R'y, 52 Pa. St., 506 (1866).

⁴ People v. Northern R. R. Co., 42 N. Y., 217.

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PART VI

RAILROADS—STREET RAILROADS—TELEGRAPH, TELE-PHONE, GAS, ELECTRIC LIGHT, WATER-WORKS AND OTHER QUASI-PUBLIC CORPORATIONS.

CHAPTER LIII.

RAILROADS.

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896. Consolidation, lease or sale under an amendment to the charter or under a general statute passed subsequent to the charter.

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§ 891. A railroad corporation as a quasi-public corporation.— A railroad corporation is not a public corporation, like a municipality, inasmuch as it is run for the profit of its stockholders. Nor

is it a private corporation, like a manufacturing company, inasmuch as a railroad is under public obligation to continue to operate its Hence a railroad corporation, being private in its carrying on business for gain, and being public in its duty to serve the public, is sometimes called a quasi-public corporation. The quasipublic features of railroads are the ones which are now to be con-The things which railroads have in common with other corporations, such as issuing stock, electing directors, borrowing money, etc., have been considered above. It is now necessary to consider certain principles of law which apply to quasi-public corporations alone.

§ 892. Leases, sales and consolidations of railroads without express power so to do.— A railroad company has no implied power to lease or sell its railroad to another company or to consolidate with another company. Such power never exists unless it is given expressly by the legislature. Notwithstanding this well-settled principle of law, the interests and demands of trade have been such that leases, sales and consolidations are often made without reference to the law. Most of the states now have statutes expressly allowing such sales, leases and consolidations. There is a rapid tendency on the part of the railroads towards the creation and unification of trunk lines and the absorption of the smaller companies by the large ones. In Europe this stage of railway development has been passed through, and it is there generally found that in each country a few great systems control all the railways. America the past twenty years have brought about the creation of semi-transcontinental lines, and the consolidation, absorption and disappearance of large numbers of local or branch lines. But the American movement towards systems of railways which will traverse the entire continent is already clearly outlined and at hand. The changes which are impending will lead to the disappearance of existing short lines and even systems of railways. Large interests require and in some way obtain a removal of the legal right of stockholders to object to the changes which are rapidly going on. The principles of law protecting the rights of stockholders in these attempted consolidations or leases are of vital importance both to the railroads and to the stockholders themselves.2

¹ Black v. Delaware, etc., Co., 24 N. J. Eq., 455, 469 (1873). But see § 1, supra. ² Mr. Charles Francis Adams, president of the Union Pacific Railroad, and one of the most profound thinkers on railway problems, said on December 15, 1888, in an address at Boston: "The

rapidly toward some great system of consolidation. I do not know when or how it will come about: nor is it necessary now to consider this. Neither do I believe it will become an evil when it does come. Nevertheless, it is a matter of common notoriety that such a result railroads of this country are moving is viewed with grave popular apprehenThere is a large number of cases which consider in its various phases the power or want of power of a railroad corporation to lease or sell its railroad to another company. These cases are given at length in the notes below, arranged under the headings of the various states.

We have seen what the progress of the last twenty years has been in this Crystallization has gone on during those years, so that while then a railroad of two hundred or three hundred miles was considered large, one of five thousand or six thousand miles is now far from being the largest. As I have pointed out the movement is today going forward more rapidly, much more rapidly, under the artificial imnetus given to it by the interstate commerce act than ever before. The next move will be in the direction of railroad systems of twenty thousand miles each under one common management. The interstate commerce act, acting on the tendency of natural forces, is at this inoment rapidly driving us forward toward some grand railroad trust scheme. Even this, from my point of view, I cannot regard as a thing to be dreaded. I am very sure now, as I have been for the last twenty years, and as I long ago expressed myself, that a great consolidated corporation or even trust can be held to a far stricter responsibility to the law than numerous smaller and conflicting corporations. Under the existing system no one can be held to account. Evasion is always possible; and invariably it is the other man who is responsible for the wickedness. With one large corporation or trust it would be otherwise. Both law and popular opinion could, and-certainly would, be directed against it." Mr. Justice Brewer has said on this subject (50 Fed. Rep., 42): "It may be true, as contended and, not disturbed by the common hue and cry about monopoly. I am disposed to believe that it is true - that the real interests of the public are subserved by the consolidation of the various transportation systems, and that the putting into the hands and under the control of one corporation the telegraphic business of the country would secure to the public cheaper and better service."

¹The decisions on this subject are given under the heading of the state in which they were rendered, or whose laws were under consideration. The decisions of the federal courts are also so distributed, although many of the federal decisions turn upon commonlaw principles which govern all of this class of cases. In addition to the cases below, the cases on the power of railroad companies to give a mortgage should also be consulted (see §§ 780-786, supra), inasmuch as the objections to a mortgage are the same as those to a sale.

Alabama: The power of a railroad company to sell its property, real and personal, does not give power to sell the railroad, where certain portions of the charter indicate that the latter power is not conferred. Spence v. Mobile, etc., R'y, 79 Ala., 576 (1885). In the case of Meyer v. Johnston, 53 Ala., 237 (1875), it seems to be held that a consolidation of an Alabama corporation with two Georgia corporations, all three companies having power to unite and consolidate their stock with the others, left the Alabama corporation still in existence, and that the two Georgia corporations were merged into it. Affirmed in Mever v. Johnston, 64 id., 603 (1879).

California: The question of whether a street railway company may sell a part of its railway is one which the state alone can raise. Oakland R. R. v. Oakland, etc., R. R., 45 Cal., 365 (1873).

Colorado: If a lease is void, the lessee cannot be compelled by mandamus to

§ 893. The reason of this rule.—A railroad differs from manufacturing or business enterprises in that it owes certain duties to the public. It resembles in many respects an ordinary highway.

operate the road. People v. Colorado, etc., R. R., 42 Fed. Rep., 638 (1890).

Connecticut: In Bishop v. Brainerd. 28 Conn., 289 (1859), the court said it was questionable whether power "to connect and make joint-stock or common interest with any other railroad company" authorized a consolidation with a Rhode Island railroad company: but the legislature having ratified the agreement, a subscriber to the original corporation is not released. The legislature under the reserved right to amend a charter may authorize a consolidation even against the dissent of minority stockholders. In Buck v. Seymour. 46 Conn., 156 (1878), the court held that where a railroad company, under its special charter power to lease any other connecting railroad, took a lease of another road with which it connected by means of an intervening railroad over which the lessee railroad had a power by contract to runs its trains. such lease was subject to a mortgage given by the lessor railroad on all its property, whether such lease was valid or not. In New York, etc., R. R. v. N. Y., N. H., etc., R. R., 52 Conn., 274 (1884), where the controversy was whether certain land belonged to the vendee of the railroad and property of a company, or was subject to a subsequent condemnation proceeding against the vendor corporation, the court held that the charter power of the vendee company to buy the railroad and property of the vendor company gave by implication power to the vendor company to sell, although the latter had no express power to sell. In Town of Middletown v. Boston, etc., R. R., 53 Conn., 351 (1885), where the charter authorized a lease on a three-fourths vote of the stockholders, a lease was sustained, although the rental was enough to pay dividends on prefered stock alone, leaving nothing for the common stockholders.

Florida: A railroad corporation has no right to lease the terminal point of its railroad track and terminal facility on a navigable stream to a steamboat company, and thereby defeat the ingress and egress to and from said railroad track on the part of other competing lines of steamboat companies. Indian River, etc., Co. v. East Coast Transp. Co., 10 S. Rep., 480, 481 (Fla., 1891).

Georgia: Under a power to sell the railroad and its franchises to any other railroad corporation, the road cannot be advertised to be sold at auction in parcels, nor for the sale of the iron separately. A stockholder may enjoin the sale. Upson, etc., R. R. v. Sharman, 37 Ga., 644 (1868). The important case of Branch v. Jesup, 106 U. S., 468 (1882), arose in Georgia. In that case the court held that power of one company to incorporate its stock with the stock of any other company gives power to sell to any other company. "The greater power of alienating or extinguishing all its franchises, including its own being and existence, contains the lesser power of alienating its road." The company under this power may sell a part of its road and may consolidate the stock issued in constructing that part with the stock of the vendee, by exchanging such stock for the stock of the latter. Stockholders who assented to such exchange and made it cannot afterwards attack A company incorporated to build a railroad between certain points has power to buy a railroad already constructed between those points, instead of building a new line. Concerning the consolidation of competing lines, etc., see § 315, supra.

Illinois: A stockholder is not released from his subscription by the fact that an amendment to the charter authorizes and differs from it chiefly in the fact that it may charge toll instead of being free, and may exclude all cars from its tracks except its own. But a railroad is bound to serve the public and to carry

the company to consolidate with intersecting railroads. Sprague v. Ill., etc., R. R., 19 Ill., 174 (1857); but see Ill., etc., R. R. v. Cook. 29 id., 237 (1862). Under the Illinois statutes a consolidated railroad is liable for the obligations of the constituent companies. Peoria, etc., R'y v. Coal, etc., Co., 68 Ill., 489 (1873). It is no defense to a subscription that the company has made an ultra vires lease of its railroad. The subscriber's remedy is to file a bill to set the lease aside. Hays v. Ottawa, etc., R. R., 61 Ill., 422 (1871); Ottawa, etc., R. R. v. Black, 79 Ill., 262 (1875). In Archer v. Terre Haute. etc., R. R., 102 Ill., 493 (1882), the court said that the statute of 1865 requiring the consent of all resident stockholders to a lease to a foreign corporation would call for clear proof of ratification if such consent was not obtained. Under the act of 1867 authorizing an Illinois railroad company to "consolidate and connect its railroad with any other continuous line of railroad either in this state or in the state of Indiana," the court in a dictum said that this did not authorize a lease, and then proceeded to hold that a lease of an Illinois railroad to an Indiana railroad company for nine hundred and ninety-nine years. the rent to be thirty-five per cent. of the gross receipts, was valid as a "contract for connecting the railroads." lessee had agreed to pay all taxes. Hence its bill to enjoin the collection of taxes on the capital stock as well as tangible property of the lessor was dismissed. A statute authorizing the transfer of all the corporate franchises, etc., does not include the franchise to be a corporation. Snell v. Chicago, 24 N. E. Rep., 532 (Ill., 1890). "Two or more railway companies, whose railways form a continuous line, may enter into a joint arrangement for operating their railways as one line, and to become jointly

liable for money borrowed to be used in furtherance of the business of such line." A creditor may sue them jointly. Chicago, etc., R'y v. Ayers, 30 N. E. Rep., 687 (Ill., 1892). The act of February 12, 1855, authorizing contracts with foreign railroad companies for leasing or running the roads, does not constitute a waiver by the state over railroad companies chartered by the state. Illinois. etc., Co. v. People, 33 N. E. Rep., 173 (Ill., 1892). The Illinois statute of February 16, 1865 (now repealed), requiring the unanimous consent of resident stockholders to any consolidation or lease of a domestic with or to a foreign railroad corporation, and declaring the consolidation or lease "null and void" without it, was nevertheless for the benefit of stockholders only. They might waive it or be estopped by lapse of time from setting it up. St. Louis, etc., R. R. v. Terre Haute, etc., R. R., 145 U. S., 393. 403 (1892), distinguishing Archer v. Same. 102 Ill., 493. The Illinois statute of February 12, 1855, authorizing domestic railroad corporations to make "contracts and arrangements with each other and with railroad corporations of other states, for leasing or running their roads or any part thereof," authorizes domestic corporations to lease to or take a lease from other domestic or foreign railroad corporations. Id. In the case Pittsburgh, etc., R'y v. Keokuk, etc., Bridge Co., 131 U.S., 371 (1889), the various statutes of Illinois relative to leases, sales and consolidations are reviewed, and a contract for the use of a bridge by an Illinois railroad corporation was sustained. The railroad bridge company was held to be a railroad company. The act of February 12, 1855, giving domestic corporations power to make "contracts and arrangements with each other, and with railroad corporations of other states, for leasing or runfreight and passengers if a reasonable compensation therefor is offered. Such was the old turnpike law in England; and when railroads began to come into use, about the year 1830, the rules of law

ning their roads, or any part thereof," gives power to lease to a foreign corpoporation. Penn. R. R. v. St. Louis, etc., R. R., 118 U. S., 290, 309 (1886). The general law in Illinois allowing leases of railroads does not seem to require that they be continuous or connected. Humphreys v. St. Louis, etc., R'y, 37 Fed. Rep., 307 (1889). In the case Hervey v. Ill. Md. R'v. 28 Fed. Rep., 169 (1884), the charter of a company authorized it to unite its railroad with any other continuous lines of railroad, and to purchase any other roads or parts of roads, either wholly or partly constructed, which might constitute or be adopted as part of its main line. Under this power the company purchased a line of road with which it connected only by a road which had been leased to the first-named company, and also by another road which had been leased to the vendor company. Both companies by their charters were to terminate in Decatur, but both reached Decatur by leased lines instead of by their own lines. The court held the sale to be good as against holders of bonds which were issued by the vendor road before the sale took place. A third road which began at the outside end of the vendor road was also purchased by the vendee company. The court said as to the whole transaction: "I incline to think that its charter authorized the purchase of any road which, from its location, would be fairly deemed a continuation of the main line of the purchasing company. The effect of the arrangement between the three companies was to establish a continuous line from Peoria, via Decatur, to Terre Haute. That small parts of that line were and are owned by other companies does not affect the substance of the transaction, whereby with the knowledge and approval of the great body of the bondholders and stockholders of the

three roads, they were operated as one line, under a common management. . . . Those who were parties to the arrangement in question, those who acquiesced in it, and those who failed in due time, by some proper proceeding, to question its validity, should be held to be estopped to raise any such point in these causes." This decision was affirmed under title Union Trust Co. v. Ill. Mid. R'y, 117 U. S., 434, 467 (1886), approving the opinion of the court below.

Indiana: A consolidation under a general act existing at the time a subscription for stock is made does not release the subscriber from his obligation to pay. Sparrow v. Evansville, etc., R. R., 7 Ind., 369 (1856). But if the consolidation was authorized after his subscription was made he is released. McCray v. Junction R. R., 9 id., 358 (1857): Booe v. Same, 10 id., 93. A contrary rule was adopted in Hanna v. Cincinnati, etc., R. R., 20 id., 30 (1863). The doctrine of Sparrow v. Evansville, etc., R. R., supra, was again applied in Bush v. Johnson, 21 id., 299 (1863). A consolidated company must respond to the liabilities of the old companies, even though the statutes do not so provide. Indianapolis, etc., R. R. v. Jones, 29 id., 465 (1868). The consolidated company succeeds also to the rights and claims of the old companies. Paine v. Lake Erie, etc., R. R., 31 id., 283 (1869). The doctrine laid down in 29 id., 465, supra, is again applied in Columbus, etc., R'y v. Powell, 40 id., 37 (1872), and Jeffersonville, etc., R. R. v. Hendricks, 41 id., 48 (1872). The doctrine laid down in 9 id., 358, supra, was applied to turnpike companies in Shelbyville, etc., T. Co. v. Barnes, 42 id., 498 (1873). The act of February 23, 1853, authorizing "railroad companies to consolidate their stock with the stock applicable to turnpike and stage lines were applied so far as possible to the railroads. In addition to this, the *quasi*-public nature of railroads, in that they were necessarily used daily by great num-

of railroad companies in this or in an adjoining state, and to connect their roads with the roads of said companies," does not authorize a lease or sale. Much less does it authorize a lease or sale of a part of a railroad, the main body of it. "The words cannot fairly mean the transfer of one division of a road to the injury of another division of the same road, thus putting the two divisions in direct antagonism, both in their interests and connection." The acts of March 3, 1865, and December 20, 1865, refer to judicial sales only. The stockholders in this case caused the lease or sale of a part of their company's road to an Illinois corporation to be set aside. Laches was held not to apply to such a case. No demand to the directors to bring suit is necessary in such a case as this. The lease or contract involved in this case is given in full. Board, etc., v. Lafayette, etc., R. R., 50 Ind., 85 (1875). This is the only case in the Indiana reports that really considers of the power of a railroad corporation to make a lease or Where a railroad corporation has power to consolidate with another, it may purchase the stock of that other with a view to consolidation. Hill v. Nisbitt, 100 Ind., 341 (1884). Under the Indiana statute of February 23, 1853, authorizing railroad corporations "to intersect, join and unite its railroad with any other railroad" of another state which meets it at the state line; also to consolidate the stock of the two companies; also "to make such contracts and agreements with any such road constructed in an adjoining state, for the transportation of freight and passengers or for the use of its said road, as to the board of directors may seem fit," one railroad company cannot lease its railroad to another with a right of perpetual renewal. "To connect one road with another does not fairly mean to lease or sell it to another." Hence a lease of an Indiana railroad corporation under this statute for nine hundred and ninety-nine years to an Illinois corporation is illegal. St. Louis, etc., R. R. v. Terre Haute, etc., R. R., 145 U. S., 393, 404 (1892). court, however, held that both companies were in pari delicto, and hence that a bill in equity by one party to have the lease declared void will be dismissed. In this case the Illinois corporation was willing to continue to pay rent. In the case Penn. R. R. v. St. Louis, etc., R. R., 118 U.S., 290 (1886), the court held that a lease of an Illinois railroad to an Indiana corporation was void because the Indiana corporation had no power to take it. The act of December 18, 1865, did not authorize it, because a general statute referring to leases does not impliedly waive the state's objection to leases. Nor did the act of February 23, 1853, authorize it. The power there given to contract "for the use of its said road" does not authorize a lease. The lease is void although the Indiana corporation becomes an Illinois corporatian two years after. A guaranty of the rental by the Pennsylvania R. R. Co. and the Lake Shore & Michigan Southern R. R. Co. is also void because neither of them had power to make it, and neither of them connected with the Illinois railroad sufficiently for such a traffic contract as this guaranty. A bill in equity by the lessor to collect the rental and have an accounting is the proper remedy, but the suit fails because the lease is invalid. A part of the lease is given in full in the decision. The court held that the fact that the roads connected a few miles east of the state line was equivalent to connecting at the state line. (See 145 U. S., 404, on this point.) On a mobers of people, soon made it necessary that railroads should be held to far greater obligations in transporting passengers and freight than was the case with a business which the public might patronize

tion for a rehearing the court held that the Indiana statute of February 23, 1853, did not sustain the lease, and the court so held irrespective of the Indiana decisions. (See 145 U.S., 405.) A subscriber to stock is not released by a consolidation which is authorized by the charter and also by a general statute existing at the time when the charter was granted. Nugent v. Supervisors. 19 Wall., 241 (1873). In Hostrup v. Madison City, 1 Wall., 291 (1863), it was held that a statute authorizing a municipality to take stock in any company for making "a road or roads to said city" authorized the city to take stock in a road that connected with the city by another road. A consolidation without statutory authority is void. Pearce v. Madison, etc., R. R., 21 How., 441 (1858). Although a special charter contains a provision that it may be amended or repealed, yet a subsequent general statute authorizing consolidations does not apply to such special charter. A stockholder in such a corporation may enjoin a consolidation attempted under such general act. Mowry v. Ind., etc., R. R., 4 Biss., 78 (1866). Where at the time of incorporation the general statutes authorize the consolidation of railroads, a subscriber to stock is not released by a consolidation that is made after he has subscribed. Pope v. Board of Commissioners, 51 Fed. Rep., 769 (1892).

Iowa: Where a lease of one railroad to another railroad is assumed by still another railroad, the remedy of the first to compel the third railroad to perform its assumed contract is in a court of equity. Jesup v. Ill. Central R. R., 43 Fed. Rep., 483 (1890). A railroad company taking a lease of another railroad for a stated term, together with a lease to the latter railroad of still another railroad for a longer term, is not liable ou the latter lease after the former lease

terminates. Id. A railroad may be required to operate a part of its line, even though that part has been leased to another company and the former will lose the rent if it operates the line. State v. Iowa, etc., R'y, 50 N. W. Rep., 280 (Iowa, 1891).

Kansas: In Atchison, etc., R. R. v. Fletcher, 35 Kan., 236 (1886), the charter authorized the company to make "contracts and arrangements with other railroads which connect with or intersect the same, . . . for leasing or running their roads, or any part thereof. in connection with roads in other states. and to consolidate their property and stock with each other." It was also authorized to consolidate with or give a lease to or take a lease of a connecting road (L. 1870, ch. 92); also to guaranty stocks and bonds. Under these powers it could take a lease of road with which it was connected by another leased road. "Each road so leased would form. within the terms of the statute, in the operation thereof, a continuation and extension of the Atchison road." Even a mere right to run trains for one hundred and seventy-four miles over the Southern Pacific is a sufficient link to sustain a lease of a road beginning at the further end of that distance. Moreover, four years' delay in complaining bars a stockholder's action. In Chicago, etc., R. R. v. Board of Com'rs, 36 Kan., 121 (1887), the court held that a subscriber for stock must pay, although a consolidation has been made under the statutes of the state (L. 1870, ch. 92; L. 1886, ch. 62). In the case of Venner v. Atchison, etc., R. R., 28 Fed. Rep., 581 (1886), the court held that it was bound by the decision in Atchison, etc., R. R. v. Fletcher, supra, and hence held that a stockholder's action for an injunction would not lie. A Kansas railroad corporation, authorized to lease its lines, or not. Another distinguishing feature was the fact that a railroad was built only by consent of the government. A charter had to be obtained. And in addition to the charter, power had to be obtained

cannot lease its line of railroad in the Indian Territory, unless congress authorizes such a lease. Briscoe v. Southern Kan. R'y, 40 Fed. Rep., 273 (1889).

Kentucky: In Fry's Ex'rs v. Lexington, etc., R. R., 2 Metc. (Ky.), 314 (1859), the court said that an amendment to the charter authorizing a consolidation is a good defense to a subscription, but not until the company accepts and acts thereon. In Botts v. Simpsonville, etc., T. Co., 88 Ky., 54 (1888), a stockholder enjoined a consolidation between his own and another turnpike company under an amendment to the charter. A consolidation of railroads under an amendment to the charter may be prevented by a single stockholder. But several years' delay in complaining is fatal. stockholder then can only recover the value of his stock and past dividends. Deposit Bank v. Barrett, 13 S. W. Rep., 337 (Ky., 1890). The Kentucky statute of January 22, 1858, authorizing leases where the two roads will form a continuous line, authorizes a road to take a lease of branch roads, which thereby became continuous lines from their several termini to the terminus of the main line. It is not necessary that the leased line be an extension of the terminus of the other company's line. Hancock v. Louisville, etc., R. R., 145 U. S., 409 (1892).

Louisiana: In Fee v. Gas Co., 35 La. Ann., 413 (1883), where, under an amendment to the charters, two gas companies consolidated, the court held that a person claiming stock in one of the old companies might waive his objections to the legality of the consolidation and might compel the consolidated company to issue stock to him in exchange for his old stock.

Maine: The minority stockholders are bound by a sale or lease authorized by the majority of stockholders where the statutes expressly authorize such sale. Inhabitants of Waldoborough v. Knox, etc., R. Co. et al., 24 Atl. Rep., 942 (Me., 1892). This case seems to hold also that a majority of the bondholders might authorize an assignment of the mortgage and compel the minority to abide by their decision.

Maryland: In Mayor, etc., v. Balt. & O. R. R., 21 Md., 50, 89 (1863), a stockholder failed in its suit to enjoin the company from subscribing to the stock of a railroad company whose line connected with the B. & O. line by a spur of the B. & O. not one-third of a mile in length and then a steam ferry-boat operated to carry goods and passengers, The B. & O. company had power to subscribe to the stock of connecting lines.

Massachusetts: In Langley v. Boston & M. R. R., 76 Mass., 103 (1857), the court held the vendor of a railroad to a New Hampshire company liable for damage occurring on such road, the sale being unauthorized, even under the statute allowing a sale where one of the parties is organized by concurrent acts of the legislatures of both states (L. 1838. ch. 99). In McCluer v. Manchester, etc., R. R., 79 Mass., 124 (1859), the court held that a lessee of a railroad could not avoid liability for loss of freight on the ground that the lease was unauthorized. In Durfee v. Old Colony, etc., R. R., 87 Mass., 230 (1862), it was held that a railroad company having power to extend its road to the Rhode Island line might take a lease of a Rhode Island road which it would meet at the state line. the lease being authorized by the general statute then existing (Gen. Stat., ch. 63, § 115), that "two corporations created by this state, or by the concurrent acts of this and an adjoining state, whose roads enter upon or connect with each other, may contract that either corporation shall perform all the transto condemn land under the power of eminent domain, in order to acquire the right of way for the road-bed of the railroad. Without this charter and power to condemn land a railroad could not be built.

portation of persons and freight upon or over the road of the other." The lease was upheld though made before the extension or the Rhode Island road was built. The lessee was to furnish the money to build the Rhode Island road. A stockholder's action to enjoin the extension on the ground that the amendment to the charter was illegal failed. A street railroad company has no power to mortgage its railways and property to another company unless the legislature has expressly authorized it. A creditor of the mortgagor may levy upon the property and disregard the mortgage. Richardson v. Sibley, 93 Mass., 65 (1865). Where a street railway leases its railway, property and franchises to another company, without express authority so to do, the lessee cannot recover from the lessor the expense of renewals and repairs of the road. Middlesex R. R. v. Boston, etc., R. R., 115 Mass., 347 (1874).

Michigan: In Tuttle v. Mich. Air L. R. R., 35 Mich., 247 (1877), it was held that a subscriber to stock of a railroad, when sued thereon by a consolidated company that claimed to succeed to his company, might attack the incorporation of the consolidated company and show that the notice to stockholders of the old companies had not been published as required by statute. A stockholder who knows of and approves of a proposed sale of a railroad by a stockholders' vote as allowed by statute cannot have the sale set aside on the ground that he was not notified of the meeting voting the sale, but he is entitled to be paid the value of his stock. Young v. Toledo, etc., R. R., 43 N. W. Rep., 632 (Mich., 1889). A railroad corporation may purchase the stock of another railroad company with a view to buying the railroad itself, where the sale of the railroad is authorized. Dewey v. Toledo, etc., R'y, 51 N. W. Rep., 1063 (Mich., 1892)

Missouri: A consolidation of two noncompeting railroads under the Missouri statutes is legal, and the failure to file a copy of the stockholders' resolutions to that effect is not fatal. Leavenworth v. Chicago, etc., R'y, 134 U.S., 688 (1890); affirming 25 Fed. Rep., 219 (1885). See, also, Humphreys v. St. Louis, etc., R. R., 37 id., 307 (1889). Although competing railroads are consolidated under a statute authorizing consolidation of only non-competing roads, vet until the state complains and the fact is judicially determined at the instance of the state, the consolidation stands. County of Leavenworth v. Chicago, etc., R. R., 25 Fed. Rep., 219 (1885). The provision prohibiting the consolidation of competing lines of railroad does not apply to two roads running through different states and competing only for forty miles, the traffic involved in the competition being unimportant. Kimball v. Atchison, etc., R. R., 46 Fed. Rep., 888 (1891). In the case of Humphreys v. St. Louis, etc., R'v Co., 37 Fed. Rep., 307, the court said in regard to the Missouri statute: "The only condition required as to Missonri and Ohio is that the roads should be continuous or connected; and none appears to be required as to Illinois. At the time of the lease trains of all the roads ran to and from a union depot in St. Louis. To do this, trains of the defendant crossed a track of the Missouri Pacific Railway Company, running in the same direction, by being switched onto it from one side and passing along on it one hundred and thirtyfour feet, and then being switched off on the other side; and trains of that part of the roads of the Wabash, St. Louis & Pacific Railway Company east Hence it was that on account of the extraordinary powers conferred on railroads, and on account of their obligation to serve everyone who offered to pay toll, and on account of their close relations

of the Mississippi river passed over the track of a bridge and tunnel company across the Mississippi river to the depot, by right acquired by lease. They connected otherwise by their own tracks. These breaks, such as they were, separated parts of their own roads, and not the roads of these parties, from one another. These methods of crossing the track of another road and the river do not appear to break the connection between the two roads, within the meaning of these statutes; and these lines are found upon the evidence of this situation and these circumstances, as a matter of fact, to have been connected and continuous."

Mississippi: Where a subscriber to stock is sued for his subscription by a company that has bought out his company, he may defeat the action by showing that the sale of the road was made under an amendment to the charter made after he had subscribed. New Orleans, etc., R. R. v. Harris, 27 Miss., 517 (1854).

Nebraska: In Clarke v. Omaha, etc., R. R., 4 Neb., 459 (1876), where two lines had been projected and incorporations had and survey made, a contract of the president to sell such rights as the companies had to a new company to be organized was held not enforceable, and his suit to enforce failed. The court said that the statutes of Nebraska authorizing sales, consolidations, etc., did not apply to roads not yet constructed. In State v. Atchison, etc., R. R., 24 Neb., 144 (1888), the court held that a constitutional prohibition against a consolidation of competing lines prohibited a lease of competing lines; also that a statute authorizing a lease of one road to another where thereby they would form a continuous line (Com. Stat., cb. 16. § 89 and § 94) did not authorize a lease where the lessor's line was between

the two lessee lines and competed with them, even though all three lines ended at Lincoln, Nebraska. In Farmers' L. & T. Co. v. St. J., etc., R. R., 2 Fed. Rep., 117 (1880), a lease made without the assent of the stockholders as required by the statutes was declared void, and a receiver of the lessee was ordered to pay only a reasonable sum for the past use of the railroad. In the case of Peters v. Lincoln, etc., R. R., 12 id., 513 (1881), a lease was declared void for the same reason. So also same case, 14 id., 319 (1882).

New Hampshire: Where the lessor company is to receive a proportion of. the net profits as rent, and the lessee is misapplying that proportion in collusion with the board of directors of the lessor, a stockholder in the lessor may compel an accounting. March v. Eastern R. R., 40 N. H., 548 (1860). Under a power to lease "to such person or corporation, and upon such terms, as they may deem proper," a New Hampshire corporation may lease its road to a Massachusetts railroad corporation. The lease was made before the New Hampshire road was completed. A lease on the basis of a proportion of the net profits of the combined roads gives no claim on new roads built or acquired by the lessee. Id., 43 id., 515 (1862). Any citizen may file a bill in equity to restrain the consolidation of competing railroads in violation of the act of July 5, 1867, to prevent railroad monopolies, the act itself allowing any citizen to file such a Carrier v. Concord R. R., 48 N. H., 321 (1869). A statute authorizing railroad companies to purchase a railroad at foreclosure sale extends the right to foreign as well as domestic corporations. The court declines to consider whether the charter of the foreign corporation gave it the power to purchase. A statute authorizing any "railroad" to purwith the daily life, comfort and prosperity of the whole people, the courts held, on grounds of public policy, that where a railroad had

chase a specified railroad on foreclosure sale authorizes two or more railroads to join in purchasing the railroad and owning and operating it as joint owners. A lessor's bill to declare a lease illegal. brought three years after the lease was made, will fail. The lessor is estopped. Three years' delay by a stockholder in complaining of an alleged ultra vires lease is fatal. The carrying on of auother action involving the same principle of law is no excuse. Under a statute authorizing railroad companies "operating" a railroad to take a lease of another railroad, a company which owned an undivided one-half of a railroad, and was operating it jointly with the owner of the other balf, "operates" a railroad within the meaning of the statute. The lessor cannot maintain a bill in equity to cancel a lease because the lessee has sublet the road contrary to the coverants of the lease. The remedv is at law. Under a writ of entry the lessor may obtain possession. ton, etc., R. R. v. Boston, etc., R. R., 65 N. H., 393 (1888). Where one railroad has for a long time leased the road-bed, rolling stock and equipments of another railroad it cannot avoid payment for such use by setting up that the contract was illegal. Not even a statute prohibiting the consolidation of competing lines will defeat a recovery for past use. contract between rival and competing lines to prevent competition is legal if rates are not unreasonably raised. Under a statute prohibiting the leasing of competing lines one to the other, leases of that nature existing prior to the statute are thereby rendered illegal and void as to the future. The lessee, however, must account for sums due, after such statute, to the lessor. Manchester, etc., R. R. v. Concord R. R., 20 Atl. Rep., 383 (N. H., 1890).

New Jersey: In Kean v. Johnson, 9 N. J. Eq., 401 (1853), a stockholder enjoined

a sale of the road owned by his company to another company under an amendment to the charter authorizing the sale, but providing that stockholders' rights in the vendor company should not be affected. A statute authorizing a lease of an existing railroad is unconstitutional as against dissenting stockholders. They may prevent the lease. A statute authorizing a lease to any other railroad "in this state or otherwise" does not authorize a lease to a foreign railroad. Quære, whether power to lease to a connecting road authorizes a lease to a road connected only by an intervening road and bridge. Black v. Delaware, etc., Co., 24 N. J. Eq., 455, 475 (1873); rev'g 22 id., 130. In Mills v. Central R. R., 41 N. J. Eq., 1 (1886), it was held that a single stockholder might enioin a lease of the railroad of his company to another company under an amendment to the charter authorizing such lease. The court held, also, that power to merge or consolidate does not give power to lease. Power to take a lease does not give power to give a lease. Three months' delay after the lessee took possession is not laches on the stockholder's part in commencing suit. The court cannot compel a dissenting stockholder to take the value of his stock and thus allow the lease to stand. In the case of Camden, etc., R. R. v. May's Landing, etc., R. R., 48 N. J. L., 530 (1886), a lessee of a railroad. after paying rent for eight years, repudiated the lease as ultra vires, discontinued operating the road and refused to pay rent. The lessor sued for the The charter of the lessor road provided that the company was authorized to lease its railroad to, or consolidate with, any other railroad company, which is hereby authorized to take such lease and operate the same. The court said this provision would give sufficient power to the lessee, but the act was unbeen trusted by the government with the extraordinary power to condemn land for use as a railway, and the power to exact toll for

constitutional because its title was deficient. Power to construct a road gives power to purchase or lease a road on the same route. The lessee was held liable for the rent on the ground that this was not a mere lease of an existing road, but the road has been built under an express contract that the lessee would take a lease and guaranty certain bonds. Being an executed ultra vires contract, the lessee could not repudiate. In Bell v. Penn., etc., R. R., 10 Atl. Rep., 741 (N. J., 1887), the court held that after foreclosure had been commenced on a mortgage given by a consolidated company, a stockholder in one of the old companies could not attack the existence of the consolidated company on the ground that oue of the old companies never legally existed. Only the state could do that. A lease by a domestic railroad company of its railroad to a foreign railroad corporation is illegal, especially where it is expressly prohibited by statute. The court will enjoin the lease upon the application of the attorney-general, where the effect of the lease would be to create a combination in the transportation of coal and to destroy competition in production and sale. Stockton, Att'y-Gen., v. Central R. Co. of N. J., 24 Atl. Rep., 964 (N. J., 1892). In Thomas v. Railroad, 101 U.S., 71 (1879), the leading case in America on the invalidity of a railroad lease made without authority, the court held that power to contract for the mutual transfer of goods and passengers over each other's road did not give power to lease. An amendment to the charter limiting the fares which the company or its lessees might charge is not a ratification of the lease. Where the lessors have resumed possession and past rent paid, no more rent can be collected on such an ultra vires lease.

New Mexico: In Southern Pac. R'y v. Esquibel, 20 Pac. Rep., 109 (N. M., 1889),

the court held that power to mortgage did not give power to sell; and power to consolidate did not give power to sell, where the act expressly said that upon consolidation all rights and property should vest in the company whose charter contained this power.

New York: In 1839 the legislature authorized "any railroad corporation to contract with any other railroad corporation for the use of their respective roads, and thereafter to use the same in such manner as may be prescribed in such contract," (L. 1839, ch. 218, § 1.) This meagre statute was the basis of leases of railroads in New York state for over fifty years. It was re-enacted in the Revision of 1890. In Beveridge v. N. Y. El. R. R., 112 N. Y., 1, 21, 23 (1889), the court held that the directors might make a lease under this statute. court said: "We do not think the concurrence of stockholders to be an essential condition to the validity of a lease by a railroad corporation of its road to another railroad corporation. . . . The power to make it is, like all other general powers of management, lodged in the directors." The directors may also modify the lease. In People v. O'Brien. 111 N. Y., 1, 64 (1888), it was held that although the leasing of competing lines was not permitted, vet where only a part of two street railroads were competing roads, the parts not competing might be leased one to the other. A lease of a railroad, a part of which was constructed and a part not yet commenced, was involved in Atlantic, etc., R. R. v. Johnson, 134 N. Y., 375 (1892), but the court refused to pass upon its legality, that being unquestioned. In Day v. Ogdensburgh, etc., R. R., 107 N. Y., 129 (1887), it was held that under this statute a New York railroad company might take a lease of a Vermont railroad. The contract to make a lease was made before the Vermont road was transportation over that which was in law a public highway, these powers and the railroad itself could not be sold, assigned or trans-

constructed. The lease itself was made after the construction was completed. In Woodruff v. Erie R'v. 93 N. Y., 609 (1883), the court held that, whether a lease of a railroad was legal or not under the above statute, an assignee of the lease could not refuse to pay rent on that ground. A railroad corporation organized to construct and operate a road may purchase an existing road instead of constructing a new one. Resort need not be had to a company reorganized under the statutes. People v. Brooklyn, etc., R. R., 89 N. Y., 75 (1882). See Troy, etc. R. R. v. Boston, etc., R. R., 86 N. Y., 107 (1881). The court held that a lease of that part of a road which had been taken up was invalid, and that another company might proceed to construct a new road on the road-hed. The lease was also invalid as being of a road not completed. Where a road by the charter is to be commenced within a certain time, but instead of that the company leases a part of its road before construction and the lessee is to do the constructing, this is not a compliance with the statute. In the Matter of the Brooklyn, etc., R. R., 81 N. Y., 69 (1880). In Abbott v. Johnstown, etc., H. R. R., 80 N. Y., 27 (1880), the court held the lessor liable for an accident occurring while a lessee was in charge. the lease being to an individual, which was not authorized by the statute. A statute requiring lessees to do certain things does not impliedly authorize leases. In People v. Albany, etc., R. R., 77 N. Y., 1232 (1879), where the state sought to forfeit the charter of a railroad company because it had leased a part of its line, the court held that the lessee was entitled to apply and be admitted as a party defendant. In Matter of Prospect, etc., R. R., 67 N. Y., 371 (1876), the court held that where one railroad has power to consolidate with any other (L. 1874, ch. 448, pp. 591, 592),

this gives by implication the power to any other corporation to consolidate with the former company, although the charter of the latter company contains no such power. In Fisher v. N. Y. C., etc., R. R., 46 N. Y., 644 (1871), a lease was upheld under the statute of 1839, and a consolidation was held to be effected where the lessee afterwards acquired all the stock of the lessor and then filed papers under the statute of 1855, chapter 517. Where a proposed consolidation is attacked by a stockholder, a preliminary injunction granted so as not to render useless the whole suit in case it is successful will not be disturbed by the court of appeals. Young v. Rondout, etc., Co., 129 N. Y., 57 (1891). A subscriber for stock who has paid ten per cent. cannot sue a consolidated company, into which his company has been merged, for a certificate, even though the articles of consolidation provide for the issue of one share of the latter company for every two shares of the old company, unless he has first demanded the certificate and has offered to pay the remaining ninety per cent. or asks for a certificate of stock not paid up. Babcock v. Schuylkill, etc., R. R., 133 N. Y., 420 (1892). In Gere v. N. Y. Central, etc., R. R., 19 Abb. N. C., 193 (Supr. Ct., Sp. T., 1885), the validity of the lease of the West Shore Railroad to the New York Central & Hudson River Railroad Company was upheld, although the lease was for four hundred and seventy-five years, while the corporate existence of the lessor was to be only one hundred years, and although the roads were parallel and competing. Another statute of the state prohibiting the consolidation of competing lines does not prevent a leasing of competing liues under the statute of 1839. The lessor may guaranty the payment and agree to pay and guaranty the payment of the interest and principal of

ferred to another party or corporation unless the government expressly allowed the sale to be made.

\$50,000,000 of bonds of the lessor. \$25,000,000 to go to the holders of old mortgage bonds upon which foreclosure was had, and \$25,000,000 for improvements. A stockholder's suit to enjoin the above transaction failed. Central, etc., R. R. v. Twenty-third St. R. R., 54 How, Pr., 168, 183 (Supr. Ct., Sp. T., 1877), a lease of one horse railroad to another was upheld under the act of 1839. A lease of a bridge to a railroad company, by which bridge the company goes farther than its charter provides, is ultra vires. The bridge company may have the contract canceled but cannot collect for past use. President, etc., Co. v. Trov. etc., R. R., 7 Lans., 240 (1872). A parol agreement whereby one road builds a connection with another road on the grounds of the latter under a statute authorizing roads to intersect, join and unite their railroads is void by the statute of frauds and may be repudiated at any time, even though rent has been paid for a long time. Port, etc., R. R. v. N. Y., etc., R. R., 132 N. Y., 439 (1892). Where the charter gives the company power to take a lease of any "connecting" road, an intersecting road is a connecting road at the terminus. "It is enough that they are united so as to be capable of forming continuous lines." The fact that they are competing roads is no objection, not even though a general statute on consolidations excepts from its provisions all competing roads. Wallace v. Long Island R. R., 12 Hun, 460 (1877). In New York one railroad may be leased to another. Fisher v. Metropolitan El. R'y, 34 Hun, 433 (1885).

CH. LIII.]

Ohio: In Ohio & M. R. R. v. Indianapolis, etc., R. R., 5 Am. L. R. (N. S.), 733 (Cin. Sup. Ct., 1866), in regard to a contract whereby a foreign railroad corporation was authorized to lay down a third rail and use the tracks and depot of a domestic railroad, a suit of the lat-

ter for specific performance failed. A subscriber to stock cannot defeat an action to collect his subscription by the defense that a consolidation has taken place since he subscribed. The statutes authorizing the consolidation existed when the subscription was made. He may, however, question the regularity of the consolidation. Mansfield, etc., R. R. v. Brown, 26 Ohio St., 223 (1875). A statute authorizing the consolidation of roads "so constructed as to admit the passage of burden or passenger cars over any two or more of such roads continuously, without break or interruption." does not authorize a consolidation of companies whose termini are twentyfour miles apart, even though they are connected by another road, which is leased in perpetuity to one of the firstmentioned roads. "The power to lease does not imply the power to consolidate. nor does the power to consolidate imply the power to lease, but these powers are distinct and independent." A statute authorizing the consolidation of lines which can carry freight and passengers "continuously" does not authorize the consolidation of competing lines, even though they meet at one point. State v. Vanderbilt, 37 Ohio St., 590 (1882). Where the lessor refuses to appeal from a decree canceling the lease, a stockholder may intervene and appeal. Henry v. Jeanes, 47 Ohio St., 116 (1890). A sale of the road under statutes existing at the time a subscription was made is valid and does not release the subscriber. Armstrong v. Karshner, 24 N. E. Rep., 897 (Ohio, 1890).

Oregon: In the important case of Oregon R'y v. Oregonian R'y, 130 U. S., 1 (1889), the court held that the statutes of Oregon did not authorize a lease of a railroad by a domestic corporation to a foreign corporation, in this case an alien corporation. The use of the words "successors or assigns" in various stat-

Soon, however, it became evident that in many cases the interests of the public would be advanced rather than injured by a sale

utes does not give such a power. A statute authorizing a foreign corporation to construct a road in the state does not give it power to take a lease of a railroad in the state. Hence, although the lease was for ninety-nine years and rent has been paid for three years, yet the lessee may repudiate the lease and cannot be held for further rent.

Pennsulvania: An amendment to the charter authorizing a consolidation is constitutional and a stockholder cannot object, but he cannot be compelled to go into the consolidation, and may insist on being paid the value of his stock. Lauman v. Lebanon, etc., R. R., 30 Pa. St., 42 (1858). Power to make a contract "having relation to the completion, the working of, or to the traffic originating on or passing over" a railroad, authorizes a lease of the road. A lease is also authorized by the act of April 23, 1861. Gratz v. Pennsylvania R. R., 41 Pa. St., 447 (1862). Under the statutes of April 23, 1861, and February 17, 1870, authorizing leases, the words used in the statutes plainly indicate that only a finished road may be leased. Wood v. Bedford. etc., R. R., 8 Phila., 94 (1871). A lease even when authorized cannot be made by the directors alone. The stockholders must vote it. Martin v. Continental, etc., R'y, 14 Phila., 10 (1880). The Pennsylvania statute authorizing railroad companies "to enter into contracts for the use or lease of any other railroads" refers to foreign as well as domestic railroads. Pittsburgh, etc., R'y v. Keokuk, etc., Bridge Co., 131 U.S., 371 (1889). In Central Trans. Co. v. Pullman's, etc., Co., 139 U. S., 24 (1891), the court held that a lease by a car manufacturing and renting corporation of all its personal property to another corporation, with an agreement to cease manufacturing, was invalid and the lessor could not collect Even the charter power to lease its "railway cars and other personal

property" did not validate such a lease as the above. The company had no power to abandon its duty to the public. The above company was a quasi-public corporation. The creditors of the consolidated company may enforce subscriptions to the stock of the constituent companies, and the irregularity of the incorporation of the consolidated company is no defense. Hamilton v. Clarion, etc., R. R., 23 Atl. Rep., 53 (Pa., 1891).

Rhode Island: Although a sale of a railroad to another company is illegal, and although a dissenting stockholder may set it aside, yet where the legislature subsequently ratifies the sale and stockholders do not object for twelve years, and after a mortgage on all the property of the vendee has been foreclosed, the court will not set the sale aside. Boston, etc., R. R. v. N. Y., etc., R. R., 13 R. I., 260 (1881); Emerson v. N. Y., etc., R. R., 14 id., 555 (1884).

Tennessee: Power to "farm out their rights of transportation on the said road" does not give power to lease the road. Where leases of competing lines are prohibited, a lease of roads which compete on interstate traffic is illegal although they do not compete on traffic in the state. A stockholder may enjoin the lease in order to protect the charter from forfeiture. Where the control of both companies is owned by the same party and the companies have the same directors, a minority stockholder may object. Thouron v. East Tenn., etc., R'y. 5 R'y & Corp. L. J., 77 (Tenn., 1888). A statute authorizing any railroad to purchase any other railroad necessarily gives power to every other railroad to sell. But a stockholder may cause to be set aside a sale of the railroad where such sale is made under a statute that was passed after the stockholder acquired his stock. He may also set aside a mortgage given on the property by the vendee. A delay of two years in of one railroad to another or by a consolidation of the two. It was found that two connecting railroads by combining were able to

complaining was held not fatal. City of Knoxville v. Knoxville, etc., R. R., 22 Fed. Rep., 758 (1884). A sale of a railroad on condition that certain work shall be done within a certain time cannot be avoided although such work is not done. Foster v. Chesapeake, etc., R'y, 47 Fed. Rep., 369 (1891).

Texas: Although a consolidation is unauthorized, yet where it is subsequently legalized, a stockholder in one of the old companies who has delayed two years in complaining cannot cause it to be set aside. Nor can he hold the directors personally liable. But he may sue for his interest in the consolidated company. International, etc., R. R. v. Tavlor, 53 Tex., 96 (1880). Power to construct and operate a railroad does not give power to purchase a road covering the same route. The general statute of Texas not authorizing the sale, a creditor of the vendor may levy on its road. Gulf, etc., R'y v. Morris, 4 S. W. Rep., 156 (Tex., 1887). A prohibition against selling, leasing, etc., to a competing railroad does not impliedly give power to sell, lease, etc., to a noncompeting railroad. Railroads may be competitors although not connecting in any way. Power to consolidate with roads running in the same general direction means a road which is capable of constituting a part of the line which the former company is authorized to construct. Power to buy connecting roads is not power to buy a road which connects with a third road, which latter is being operated by the first road or has been purchased by it. The charter of the railroad company making an illegal lease will be forfeited and a receiver appointed. The court will not merely enjoin a continuation of the lease. East Line, etc., R. R. v. State, 12 S. W. Rep., 690 (Tex., 1889). A stockholder in a street railway may bring suit to set aside an illegal consolidation

with another company fraudulently brought about by the officers, the latter company being insolvent and the former liable to become so. A receiver may be appointed. Becker v. Directors, etc., 15 S. W. Rep., 1094 (Tex., 1891).

Vermont: In Vermont at an early day a decision was rendered which probably would not now be sustained. A lease of a railroad to an individual without statutory authority was upheld in Bank of Middlebury v. Edgerton, 30 Vt., 182 (1858). The court said: "The right to build, own, manage and run a railroad and take the tolls thereon is not of necessity of a corporate character or dependent upon corporate rights. It may belong to and be enjoyed by natural persons, and there is nothing in its nature inconsistent with its being assignable." A bondholder of the lessor who took his bond and recognized the validity of the lease cannot afterwards attack it. Vermont, etc., R. R. v. Vermont, etc., R. R., 34 Vt., 1 (1861). Where one road has been leased to another, the two roads may subsequently be consolidated, and consolidated mortgage bonds issued, of which a part shall go to the former lessor company in extinguishment of its claim to rent under the old lease. If the transaction is a fair one towards the stockholders of the lessor. the court will not disturb it. Hazard v. Vermont, etc., R. R., 17 Fed. Rep., 753 (1883). In the same case the court held that subsequently to the making of a lease the amount of rental might be changed. In this case the lease was made before the road was completed. The lease was in futurity. It appears also from the case Codman v. Vermont. etc., R. R., 16 Blatch., 165 (1879), that the above-mentioned lease was made before the road was completed, and the court upheld the lease.

Virginia: In Stevens v. Davison, 18 Gratt. (Va.), 819 (1868), the court, with-

give much lower rates and better service than when operated apart. Accordingly the jealousy with which the consolidation or sale of

out passing upon the question whether a lease without legislative authority was valid, held that a lease made by the directors alone was illegal, inasmuch as it could be made only by the stockholders

Wisconsin: A sale of a part of a road under a statute was upheld in Wright v. Milwaukee, etc., R'y, 25 Wis., 46 (1869).

England: A stockholder's bill to enjoin the payment of a subscription by the company to another company, and the purchase by the former of a railway owned by the latter, shows equity in both instances, but is multifarious, since the parties affected and relief granted in the two cases are different. Solomans v. Laing, 12 Beav., 339 (1849). An action by the plaintiff to recover of the defendant the expenses of bills introduced into parliament to authorize a lease of the plaintiff to defendant, failed, although defendant had agreed to pay such expenses. East Anglian R'v v. Eastern, etc., R'y, 11 C. B., 775 (1851). In Great Northeru R'y Co. v. Eastern, etc., R'y Co., 9 Hare, 306 (1851), the court refused to enjoin the defendant from obstructing a crossing which it made with the lessor of the complain-The lease was ultra vires. In Beman v. Rufford, 6 Eng. L. & Eq., 106 (1851), a stockholder restrained his company from constructing narrow-gauge tracks for the sole purpose of turning them over to another company to operate on an ultra vires lease. A single stockholder may obtain an injunction against an unauthorized lease, or, if the lease is already made, may go into a court of equity and have it set aside. Winch v. Birkenhead, etc., R'y, 5 De G. & Sm., 562 (1852), where the lease was for ninety-nine years; Simpson v. Denison, 10 Hare, 51 (1852), where a stockholder enjoined his company from operating another road and guarantying

a fixed dividend to it. In this case there was power in one road to allow the other to run over it. In the case of Bryson v. Warwick, etc., Co., 1 Sm. & G., 447 (1853), it was held that a stockholder in a corporation might sue in equity to recover back for the corporation forfeit money paid by it to another corporation on an ultra vires contract to purchase the latter. In this case a railroad company had contracted to purchase two canals. An amalgamation by which all property is to become joint property, and each company is to take a certain percentage of the receipts, after operating expenses have been paid is illegal. Charlton v. New Castle, etc., R'v. 5 Jur. (N. S.), 1096 (1859). Where one of two companies which are using a third road jointly leases still another road without express power to do so, the other company may enjoin it from carrying the new traffic over the line used jointly by them. London, etc., R'y Co. v. London, etc., R'y Co., 4 De G. & J., 362 (1859). "When parliament, acting for the public interest, authorizes the construction and maintenance of a railway, both as a highway for the public and as a road on which the company may themselves become carriers of passengers and goods, it confers powers and imposes duties and responsibilities of the largest and most important kind, and it confers and imposes them upon the company which parliament has before it, and upon no other body of persons. These powers must be executed and these duties discharged by the company. They cannot be delegated or transferred." Gardner v. London, etc., R'y, L. R., 2 Ch. App., 201 (1867). A railroad using a depot jointly with another cannot exclude the lessee of that other. Midland R'y v. Great Western R'y, L. R., 8 Ch., 841 (1873). It appears in this case that parliament was applied to for power to lease. It was not

railroads had been guarded against was relaxed.¹ Special statutes were passed authorizing sales in special cases. Then general statutes began to be enacted to the same effect, until to-day there are few states in the Union which do not have general statutes authorizing the consolidation, lease or sale of connecting lines of railroad. These statutes, of course, vary largely in their terms and liberality. Some allow any railroad to consolidate with or lease or sell to any other. Some allow it only with a connecting line. Sometimes the words of the statute are so vague or ambiguous that they are capable of various constructions. All these peculiarities of this class of statutes have given rise to much litigation. The cases on this subject have been given in full below. A few of their most salient features may be summarized as follows:

§ 894. Various statutory provisions construed.— Where one railroad corporation has express power to consolidate with or buy another corporation, the latter is thereby given by implication the power to consolidate or sell.² Where the word "railroad" is used in the statute without restricting it to domestic railroads, it includes foreign railroad corporations as well.³ A railroad corpora-

granted. A contract of "running arrangement" was then made. By it one company was allowed to run trains over the railroad of the other; to csrrv on a local husiness; to carry local husiness for the latter; to place its agents in charge of stations; to fix rates; to keep the track in repair; to pay therefor by a percentage of receipts. The contract was very much of a lease. The lower court held that it was ultra vires and illegal. The upper court held that it was legal and intra vires. A lessee of a canal from the canal company, the latter having no statutory power to lease, takes nothing, and cannot collect tolls. Hinckley v. Gildersleeve, 19 Grant's Ch. (U. C.), 212 (1872). In the case of McDowell v. Grand Canal Co., 3 Ir. Ch. (N. S.), 578 (1853), the purchase of a canal was enjoined. In Bird v. Bird's, etc., Sewage Co., L. R., 9 Ch., 358 (1874), it was held that the charter power of a business corporation to sell out to another company did not give power to sell to an individual. In Clinch v. Financial Corp., L. R., 5 Eq., 450 (1868), the company, a business

company, had power to consolidate with another company if the liabilities of the stockholders were not increased. A stockholder enjoined a consolidation in which such liabilities would be increased. In Dongan's Case, 28 L. T. (N. S.), 60 (1878), a stockholder of an insurance company was relieved of his subscription where the company had consolidated with another insurance company without authority so to do.

¹ Concerning the advisability from a public point of view of aiding the consolidation of railroads, see Cook on The Corporation Problem, pp. 166–181.

²In Matter of Prospect, etc., R. R., 67 N. Y., 371 (1876); New York, etc., R. R. v. N. Y., N. H., etc., R. R., 52 Conn., 274 (1884). Power to purchase gives power to other railroads to sell. City of Knoxville v. Knoxville, etc., R. R., 22 Fed. Rep., 758 (1884).

³ Pittsburgh, etc., R'y v. Keokuk, etc., Bridge Co., 131 U. S., 371 (1889); St. Louis, etc., R. R. v. Terre Haute, etc., R. R., 145 U. S., 393, 403 (1892); Day v. Ogdensburgh, etc., R. R., 107 N. Y., 129 (1887); Boston, etc., R. R. v. Boston, etc., tion organized to construct a railroad may purchase one instead, if it covers the same route.¹ Power to consolidate with a road has been held to give power to sell to that road;² but the weight of authority is to the contrary, especially in the case of interstate railroads, where a lease would turn the property over to a foreign corporation.³ A mere reference in a statute to the "assigns" or "lessee" of a company does not give power to lease.⁴ Under the usual statute the sale or lease is held to refer to a completed and not to an uncompleted railroad.⁵ Where a lease or sale is allowed a part of the line may be leased or sold instead of the whole.⁶ Power to contract for the use of a road gives power to lease the same.¹ But power to contract for transfer of goods does not give power to lease.⁵

Where the statute authorizes a consolidation, lease or sale of con-

R. R., 65 N. H., 393 (1888); March v. Eastern R. R., 43 N. H., 515 (1862). Contra, Black v. Delaware, etc., Co., 24 N. J. Eq., 455 (1873).

¹Branch v. Jesup, 106 U. S., 468 (1882). Power to construct gives power to buy. Camden, etc., R. R. v. May's Landing, etc., R. R., 48 N. J. L., 530 (1886); People v. Brooklyn, etc., R. R., 89 N. Y., 75 (1882). Power to construct does not give power to take a lease. Oregon R'y v. Oregonian R'y, 130 U. S., 1 (1889). Power to construct does not give power to purchase. Gulf, etc., R'y v. Morris, 4 S. W. Rep., 156 (Texas, 1887).

²Power to consolidate gives power to sell. Branch v. Jesup, 106 U. S., 468 (1882).

³ Power to consolidate does not give power to lease. St. Louis, etc., R. R. v. Terre Haute, etc., R. R., 145 U. S., 393, 404 (1892); Archer v. Terre Haute, etc., R. R., 102 Ill., 493 (1882); Mills v. Central R. R., 9 N. J. Eq., 1 (1886); State v. Vanderbilt, 37 Obio St., 590 (1882). Power to consolidate does not give power to lease or sell. Board, etc., v. Lafayette, etc., R. R., 50 Ind., 85 (1875).

⁴ Oregon R'y v. Oregonian R'y, 130 U. S., 1 (1089); Penn. R. R. v. St. Louis, etc., R. R., 118 U. S., 290 (1886); Thomas v. Railroad, 101 U. S., 71 (1879).

⁵ A lease of an uncompleted road was held not good in Troy, etc., R. R. v. Bos-

ton, etc., R'v. 86 N. Y., 107 (1881); and In the Matter of the Brooklyn, etc., R. R., 81 N. Y., 69 (1880). Sale of uncompleted road not good. Clarke v. Omaha, etc., R. R., 4 Neb., 459 (1876). Lease of uncompleted road good. Codman v. Vermont, etc., R. R., 16 Blatch., 165 (1879). Lease before completion allowed. March v. Eastern R. R., 43 N. H., 515 (1862). Lease of unfinished road good. Durfee v. Old Colony, etc., R. R., 87 Mass., 230 (1862). No lease of unfinished road. Wood v. Bedford, etc., R. R., 8 Phil., 94 (1871). The contract to make a lease may be entered into before-the road is constructed. Day v. Ogdensburgh, etc., R. R., 107 N. Y., 129 (1887).

⁶People v. O'Brien, 111 N. Y., 1, 64 (1888). A lease of part of the line is legal. State v. Iowa, etc., R'y, 50 N. W. Rep., 280 (Iowa, 1891). Cannot lease a part. Board, etc., v. Lafayette, etc., R. R., 50 Ind., 85 (1875). As to a sale in parcels at auction, see Upson, etc., R. R. v. Sharman, 37 Ga., 644 (1868). A lease of part of a line was involved in People v. Albany, etc., R. R., 77 N. Y., 232 (1879). As to sale of part of road only the state can complain. Oakland R. R. v. Oakland, etc., R. R., 45 Cal., 365 (1873).

⁷See decisions in note *supra* under the heading "New York."

⁸Thomas v. Railroad, 101 U.S., 71 (1879).

necting or continuous roads only, a substantial connection is all that is required, except where the state or a dissenting stockholder objects, and then an actual connection of the lines must be shown.¹ Frequently the statute prohibits the consolidation, lease or sale of competing roads.² Where a lease is invalid the lessee may turn back the property and refuse to pay the rent.³ The lessor's remedy for rent may be in equity.⁴ But he cannot collect if the lease is invalid. Nor can he get the property back if the lessee continues to pay the rent. The court will not aid either party.⁵

Where a lease may legally be made, it is made by the directors, and a vote of the stockholders is not necessary. Sometimes, how-

The details of the following cases are given in the note to the preceding section. That a substantial connection is sufficient, see Buck v. Seymour, 46 Conn., 156 (1878): Union Trust Co. v. Ill. Mid. R'y, 117 U. S., 434, 467 (1886); Penn. R. R. v. St. Louis, etc., R. R., 118 U. S., 290 (1886); Humphreys v. St. Louis, etc., R'v Co., 37 Fed. Rep., 307; Atchison, etc., R. R. v. Fletcher, 35 Kan., 236 (1886); Mayor, etc., v. Balt. & O. R. R., 21 Md., 50. 89 (1863). Continuous road need not be at terminus. Hancock r. Louisville, etc., R. R., 145 U. S., 409 (1892). The connecting line may be an intersecting line. Wallace v. Long Island R. R., 12 Hun, 460 (1877). The continuous line provision was strictly construed in State v. Vanderbilt, 37 Ohio St., 590 (1882). The connecting link must be a substantial one, and a leasehold is insufficient. Id. The continuous line must be substantial. State v. Atchison, etc., R. R., 24 Neb., 144 (1888). The clause as to connecting roads is strictly construed. East Line, etc., R. R. v. State, 12 S. W. Rep., 690 (Tex., 1889).

² People v. O'Brien, 111 N. Y., 1 (1888). Consolidation of competing railroads contrary to statute. County of Leavenworth v. Chicago, etc., R. R., 25 Fed. Rep., 219 (1885); Kimball v. Atchison, etc., R. R., 46 Fed. Rep., 888 (1891); Carrier v. Concord R. R., 48 N. H., 321 (1869); State v. Atchison, etc., R. R., 24 Neb., 144 (1888); Manchester, etc., R. R. v. Concord R. R., 20 Atl. Rep., 383 (N. H., 1890); Thouron v. East Tenn. etc.. R'v 5 R'y &

Corp. L. J., 77 (Tenn., 1888); State v. Vanderbilt, supra; Gere v. N. Y. Central, etc., R. R., 19 Abb. N. C., 193 (Supr. Ct., Sp. T., 1885). Two or more railroads may buy a road in common. Beston, etc., R. R. v. Boston, etc., R. R., 65 N. H., 393 (1888).

³ Oregon R'y v. Oregonia R'y, 130 U. S., 1 (1889); Thomas v. Railroad, 101 U. S., 71 (1879). Contra as to past rent. Manchester, etc., R. R., 20 Atl. Rep., 383 (N. H., 1890). The lessee cannot refuse to pay when the road was built on the agreement of lease and that alone. Camden, etc., R. R. v. May's Landing, etc., R. R., 48 N. J. L., 530 (1886).

⁴ Pcnn. R. R. v. St. Louis, etc., R. R., 118 U. S., 290 (1886); Jesup v. Ill. Central' R. R., 43 Fed. Rep., 483 (1890).

⁵ St. Louis, etc., R. R. v. Terre Haute, etc., R. R., 145 U. S., 393, 404(1892); Boston, etc., R. R. v. Boston, etc., R. R., 65 N. H., 393 (1888).

6 Where a lease of a railroad may legally be made, the directors and not the stockholders make the lease. The directors, subsequently, may modify it and reduce the rental; and they may do so though the stock recites the amount of the original rental. Beveridge v. N. Y. El. R. R. Co., 112 N. Y., 1 (1889). Cf. Metropolitan, etc., R. R. Co. v. Manhattan, etc., R. R. Co., 11 Daly (N. Y. Com. Pl.), 373, 468 (1884), setting aside a modification of a lease, where the modification was made by the directors only. In this same famous elevated road litigation the above rule was laid down in

ever, the statutes expressly require the stockholders' assent and vote.¹ A stockholder may enjoin an illegal consolidation, lease or salc.² But unreasonable delay on his part in commencing his suit is a bar to the suit itself.³

§ 895. Consolidation, lease or sale under express power in the charter itself or a general statute existing at the time of incorporation.— If the charter of a corporation expressly authorizes a lease or sale of the corporate property, such a lease or sale may be made by a majority of the directors in meeting assembled, and the minority are bound thereby. It is immaterial what the terms of the sale or lease may be, or whether they be advantageous or disadvantageous to the stockholders. The dissenting minority have no remedy unless fraud can be shown. Thus, a lease made under such a charter provision has been upheld, although the rental from the lease will pay dividends only on the preferred stock, leaving nothing whatsoever for the common stockholders.

There seems to be little doubt that if, at the time of the incorporation of a company, there is a general statute on the statute book authorizing the consolidation, sale or lease of one railroad to an-

Flagg v. Manhattan R'y Co., 10 Fed. Rep., 413 (1881); People v. Metropolitan R'y Co., 26 Hun, 82 (1881). Subsequently the cancellation of the lease was duly made by a majority of the stockholders. See Harkness v. Manhattan R'y Co., 22 J. & S. (N. Y. Super. Ct.), 174 (1886). The fact that directors own a majority of the stock does not obviate the necessity for meeting of stockholders, when lease can be authorized by them only. Martin v. Continental, etc., R. R. Co., 14 Phil., 10 (1880). Stockholders' vote necessary. Stevens v. Davison, 18 Gratt. (Va.), 819 (1868).

¹This statutory requisite that the stockholders consent may be waived. St. Louis, etc., R. R. v. Terre Haute, etc., R. R., 145 U. S., 393, 403 (1892); Archer v. Terre Haute, etc., R. R., 102 Ill., 493 (1882). See, also, Farmers' L. & T. Co. v. St. Joe R. R., 2 Fed. Rep., 117 (1880); Peters v. Lincoln, etc., R. R., 12 id., 513 (1881). See, also, same case, 14 id., 319 (1882); Young v. Toledo, etc., R. R., 43 N. W. Rep., 632 (Mich., 1889). Concerning the protection of the rights of mi-

nority stockholders in cases of leases of railroads, see Cook on The Corporation Problem, p. 95.

² Kean v. Johnson, 9 N. J. Eq., 401 (1853); Mills v. Central R. R., 41 N. J. Eq., 1 (1886). Especially so where it is a fraud on him, as where both companies are controlled by the same party. Thouron v. East Tenn., etc., R'y, 5 R'y & Corp. L. J., 77 (Tenn., 1888).

Boston, etc., R. R. v. N. Y., etc.,
R. R., 13 R. I., 260 (1881); Emerson v.
N. Y., etc., R. R., 14 id., 555 (1884). Two
years' delay not fatal. City of Knox-ville v. Knoxville, etc., R. R., 22 Fed.
Rep., 758 (1884). Three months' delay not fatal. Mills v. Central R. R., 9 N. J.
Eq., 1 (1886). See ch. XLIV, supra.

⁴Middletown v. Boston, etc., R. R. Co., 53 Conn., 351 (1885), where the charter allowed leases on a three-fourths vote of the stockholders. It may be remarked that when such acts can be done under the sanction of the law there is occasion for protection of the minority's rights by legislative enactment.

other, then such consolidation, sale or lease may be made even against the dissent of a minority of the stockholders.¹

Thus it has often been held that a stockholder is not released from his subscription by reason of a consolidation.²

The question whether a railroad may be sold in consideration of the bonds and stock of the vendee corporation is considered elsewhere.³ Sometimes the statute which authorizes the sale, lease or consolidation of railways provides for the payment of money to a dissenting stockholder who prefers to close out his interest rather than take part in the new enterprise.⁴

§ 896. Consolidation, lease or sale under an amendment to the charter or under a general statute passed subsequent to the charter. It has already been shown in a preceding chapter that an amendment to a charter whereby a consolidation of the corporation with another corporation is authorized can be accepted and acted upon by the corporation only by the unanimous consent of the stockholders. A single dissenting stockholder may enjoin a consolida-

¹ Wilson v. Salamanca, 99 U. S., 499 (1878); Sparrow v. Evansville, etc., R. R. Co., 7 Ind., 369 (1856), where a stockholder was defeated upon setting up the defense of illegal consolidation; Mansfield, etc., R. R. Co. v. Brown, 26 Ohio St., 223 (1875), where the court say "their contract of subscription must be construed as having been made with reference to the consolidation act, by which they are bound as fully as if its provisions had been copied into their contract of subscription; "Bish v. Johnson, 21 Ind., 299 (1863), where the subscriber to stock subscribed after the amendment authorizing the consolidation was passed. A stockholder in the old company may sue the consolidated company for the stock to which he is entitled in exchange. Fee v. Gas Co., 35 La. Ann., 413 (1883). For a case of lease of a railroad under the Pennsylvania statute, the lessee paying the rent by turning over a part of the gross receipts, etc., see Gratz v. Penn. R. R., 41 Pa. St., 447 (1862), where a stockholder's action for an injunction failed.

Sprague v. Ill., etc., R. R., 19 Ill., 174 (1857); Hays v. Ottawa, etc., R. R., 61 Ill., 422 (1871); Ottawa, etc., R. R. v. Black, 79 Ill., 262 (1875); Pope v. Board

of Com'rs, 51 Fed. Rep., 769 (1892); Nugent v. Supervisors, 19 Wall., 241 (1873); Armstrong v. Karshner, 24 N. E. Rep., 897 (Ohio, 1890); Bishop v. Brainerd, 28 Conn., 289 (1859); Chicago, etc., R. R. v. Board of Com'rs, 36 Kan., 121 (1887). Contra, McCray v. Junction R. R., 9 Ind., 358 (1857).

³ See § 668, supra.

⁴ See First Nat. Bank v. Breneman, 7 Atl. Rep., 910 (1886), a national bank case; Trask v. Peekskill, etc., Co., 6 Hun, 236 (1875), under the New York Manufacturing Company's Act; Exparte Fox, L. R., 6 Ch., 176 (1871), under the English act.

⁵See §§ 499, 500, supra; City of Knoxville v. Knoxville, etc., R. R., supra. Mansfield, etc., R. R. Co. v. Brown, 26 Ohio St., 223 (1875), holds that the stockholder who is sued on calls may attack the regularity of the consolidation. But a municipality giving honds to one of the old companies cannot attack such regularity. Chicago, etc., R. R. Co. v. Putnam, 12 Pac. Rep., 593 (Kan., 1887). In Illinois it is very properly held that a stockholder cannot defend against calls by alleging an ultra vires consolidation. His remedy is by injunction. Ottawa, etc., R. R. Co. v. Black, 79 Ill., 262 (1875).

There is a conflict of authortion made under such circumstances. ity as to whether this rule prevails where the legislature has reserved the right to alter or amend the charter. The weight of authority holds that a dissenting stockholder cannot prevent the sale, lease or consolidation. Moreover, the legislature, corporation and majority are not entirely subject to the will of dissenting stockholders. Under the power of eminent domain the legislature may, in a statute authorizing consolidations, leases or sales of railroads, provide therein that a dissenting stockholder's stock shall be appraised and condemned, thereby removing all obstacles to the proposed act. Such a condemnation proceeding is legal and constitutional.² But a statute giving authority to condemn stock for the purpose of effecting a consolidation of corporations is no authority for the condemnation where only a lease is being effected; nor have the courts any power to award damages to the dissenting stockholder, and then take from him his stock.3

In England there is no restriction on the power of parliament to amend a charter; and the courts will not enjoin an application to parliament for an amendment, but will enjoin any use of corporate funds to aid and further that application.

§ 897. Joint use of track, bridge or depot by two or more railroads—Traffic contracts—"Pools."—The courts are inclined to hold that a railroad company has power to allow other roads to use a reasonable portion of its tracks, especially on bridges or at terminal points. Such contracts are held to be not leases, but mere contracts. Being favored by the courts and public policy they are upheld and enforced.

Cf. § 111, supra. A stockholder cannot enjoin a consolidation on the ground that one of the consolidating companies was illegally organized. Bell v. Peru, etc., R. R. Co., 10 Atl. Rep., 741 (N. J., 1887). In New Jersey a lease may be enjoined by a single stockholder. Black v. Delaware, etc., Co., 24 N. J. Eq., 455 (1873).

¹ Durfee v. Old Colony, etc., R. R., 87 Mass., 230 (1862); Bishop v. Brainerd, 28 Conn., 288 (1859). See § 501. Cf. Buffalo, etc., R. R. Co. v. Dudley, 14 N. Y., 336, 354 (1856); Mowry v. Indiana, etc., R. R., 4 Biss., 79 (1866).

² Black v. Delaware, etc., Canal Co., 24 N. J. Eq., 455 (1873); rev'g 22 N. J. Eq., 130. See, also, Lauman v. Lebanon, etc., R. R. Co., 30 Pa. St., 42 (1858). ³ Mills v. Central R. R. Co., 41 N. J. Eq., 1 (1886).

⁴ Heathcote v. North Staffordsbire R'y Co., 2 Macn. & G., 100. See, also, McDonnell v. Grand Canal Co., 3 Ir. Ch. Rep. (N. S.), 578 (1853).

⁵ Simpson v. Denison, 10 Hare, 51 (1852); Maunsell v. Midland, etc., R'y Co., 6 Hem. & M., 130 (1863); Great Western R'y Co. v. Rushout, 5 De G. & Sm., 290 (1852).

⁶ In Chicago, etc., R'y n. Rio Grande, etc., R. R., 143 U. S., 596 (1892), the court considered an agreement whereby one company had the right to run its trains over the tracks and into the depot of another company as not a lease, and the depot cannot be used except for trains brought in over the tracks specified in

A court of chancery cannot grant relief which would in effect be legislative. Hence, where one company refuses to agree with another owning a connected road to form a through line or to do a

the contract. For the form of an agreement to allow one company to use another company's tracks, see Chicago, etc., R'y v. Rio Grande R. R., 143 U. S., 398 (1892). "Two or more railway-companies, whose railways form a continuous line, may enter into a joint arrangement for operating their railways as one line, and to become jointly liable for money borrowed to be used in furtherance of the business of such line." A creditor may sue them jointly. Chicago, etc., R'y v. Ayers, 30 N. E. Rep., 687 (Ill., 1892). For a case involving the construction of a contract whereby one railroad runs over the tracks of another railroad, see Chicago, etc., R'v v. Denver. etc., R. R., 45 Fed. Rep., 304 (1891). In the case of Chicago, etc., R'y v. Denver, etc., R. R., 46 Fed. Rep., 145 (1890), the court held that where the contract so provided, an assignee of a right to use the tracks of the defendant would be protected by injunction. A railroad company may enter into a contract whereby another railroad company obtains the right to a joint use with the former company of a line of railroad. Chicago, etc., R'v. v. Union Pac. R'v. 47 Fed. Rep., 15 (1891). A right to use a right of way under a traffic agreement may be enforced and a violation prevented by a suit in equity. Joy v. St. Louis, 138 U.S., 1 (1891). It is legal for a railroad company to contract to allow another railroad to run over the former's bridge, use seven miles of track and also a depot in common. Union Pac. R'y v. Chicago, etc., R'y, 51 Fed. Rep., 309 (1892). Equity has power to grant specific performance of a contract whereby one railroad is to be allowed the joint use of a bridge and terminal facilities belonging to another company. Id. Where, by its charter, a terminal and union depot company is obliged to allow new roads to demand and pay for a propor-

tional part of the former company's capital stock, the price is par, even though it is worth more. St. Paul. etc., Co. v. Minn., etc., R. R., 49 N. W. Rep., 646 (Minn., 1891).

Where a railroad completes another railroad under an agreement that the former shall run it, there can be no recovery by the former for the work done and money expended, the charter of the former road not authorizing such acts. As to whether the former road could continue to run the latter was not involved in the suit. Great W. R'v v. Preston, etc., R'y, 17 U. C., Q. B., 477 (1859). A stockholder may enjoin his corporation from allowing another corporation to lay rails and do business over the former company's right of way. Beman v. Rufford, 6 Eng. L. & Eq., 106 (1851). For breach of a contract by a railroad company whereby it agrees to give its transfer business to a ferry company in consideration of the free use of land, the remedy is not for rent but for breach of covenant. Wiggins Ferry Co. v. O. & M. R'y, 142 U. S., 396 (1892). Where a railroad has the right to run into a union depot, and it subsequently purchases another railroad which also runs into the union depot, but is paving rent therefor, the former road may run both its trains and the trains of the purchased road over the line of the former into the union depot without paying the rent which the latter company has been paying. Union, etc., Co. v. Chicago, etc., Co., 20 S. W. Rep., 792 (Mo., 1892). traffic contract whereby one road has the right to run its trains over another road does not create a partnership or make one road the agent of the other. Hence a person shipping freight by the former road cannot hold the latter road liable for not keeping the track in condition as called for by the contract. St. Louis, etc., R'y Co. v. Neel, 19 S. W.

connecting business, it is not competent for chancery to order that such a business be done and to fix the terms.¹

A traffic contract gives rise to questions of more difficulty and doubt. These contracts are of two kinds: first, where two connecting railroads divide such earnings as arise from traffic which passes over both lines; second, where two or more competing lines divide all their earnings in excess of a certain proportion which goes to pay operating expenses. The first class of contracts has been uniformly upheld.²

Rep., 963 (Ark., 1892). Where a contract runs to a corporation and its assigus. and both parties treat another company as an assignee in fact of one of them, possessed of the rights and charged with the obligations of the original party to the contract, a court of equity will consider it the assignee in law. Chicago. etc., R'y v. Rio Grande, etc., R. R., 143 U. S., 596 (1892). A railroad company under certain circumstances may pay part of the expense of a depot beyond its own line and in a different state. Nashua, etc., R. R. v. Boston & L. R. R., 132 U. S., 356 (1890). In Bartlett v. Norwich, etc., R. R. Co., 33 Conn., 560 (1866), a contract whereby several roads jointly constructed a line to connect them was assumed to be legal. Under the English statute one railroad may make a traffic arrangement to run over another, and pay a sum which will pay dividends on the stock of the latter. South Yorkshire, etc., Co. v. Great Northern R'y Co., 9 Ex., 55 (1853). This case illustrates how closely allied a traffic contract is with a consolidation and guaranty contract. See, also, Charlton v. Newcastle, etc., R'y Co., 5 Jur. (N. S.), 1096 (1859), where a contract for the division of earnings which was practically a consolidation of the two companies was declared void at the suit of a stockholder. See, also, cases in sections supra; Stanley v. Cleveland, C. & C. R. R. Co., 18 Ohio St., 552 (1869), involving an agreement to run sleeping-cars on through express trains over two railroads. In Olcott v. Tioga R. R. Co., 27 N. Y., 546 (1863), a contract for the joint

purchase and use of engines by connecting railroads was held lawful. In Columbus, Piqua & I. R. R. Co. v. Indianapolis & B. R. R. Co., 5 McLean, 450 (1853), an injunction was grauted to prevent a railroad, which had contracted with another to build a connecting line and to carry through freight and passengers, from changing its gauge.

¹ Atchison, T. & S. F. R. R. v. Denver & N. O. R., 110 U. S., 667, 682 (1884), reversing S. C., 15 Fed. Rep., 650 (1883). But a stockholder in a belt line may enjoin one of the connecting railroad corporations from excluding the belt line from its grounds. Lathrop v. Junction R. R., 4 Fed. Rep., 41 (1880).

² Hartford, etc., R. R. Co. v. New York, etc., R. R. Co., 3 Rob. (N. Y.), 411 (1865); Columbus, etc., R. R. Co. v. Indianapolis, etc., R. R. Co., 5 Ind., 450 (1853); Sussex R. R. Co. v. Morris, etc., R. R. Co., 19 N. J Eq., 13 (1868); S. C., 20 id., 542 (1869), holding that the contract did not apply to newly-constructed branches. The case of Shrewsbury, etc., R'y Co. v. London, etc., R'y Co., was before the different courts seven times. 14 Jur., 921; 2 M. & G., 324 (1850); 17 Q. B. D., 652 (1851); 3 M. & G., 70 (1850); .16 Beav., 441 (1852): 4 De G., M. & G., 115; 6 H. L. C., 113. It was an attempt to enforce an agreement of two railways to divide arbitrarily such part of their earnings as arose from connecting parts of their lines. The contract was not enforced because inequitable, but its legality seems to have been conceded. In Midland R'y Co. v. London, etc., R'y The second class is called a "pool." They have been the subject of considerable litigation, and yet while their illegality seems to be clear, there are only a few common-law decisions to the effect that they are illegal.¹

Co., L. R., 2 Eq., 524 (1866), it was held that a pooling contract between two competing roads did not include a new route acquired subsequently by one of the roads. A traffic arrangement was involved in Jourdan v. Lang. etc., R. R., 115 N. Y., 380 (1889). In Minnesota it has been held that traffic arrangements between two railroads are not ultra vires and illegal as a matter of law, but that the question is a mixed one of law and fact. A stockholder who objects must bring suit within a reasonable time or he will be denied relief. Stewart v. Erie, etc., Trans. Co., 17 Minn., 372 (1871). A railroad may make a traffic contract with one out of several connecting lines, and need not give the same terms to the other lines. Atchison, etc., R. R. Co. v. Denver, etc., R. R. Co., 110 U. S., 667 (1884); rev'g Denver, etc., R. R. Co. v. Atchison, etc., R. R. Co., 15 Fed. Rep., 650; Tonawanda R. R. Co. v. New York, etc., R. R. Co., 42 Hun, 496 (1886). But see Missouri Pacific R'v Co. v. Texas, etc., R'y Co., 30 Fed. Rep., 2 (1887), and § 902, infra; Eclipse, etc., Co. v. Pontchartrain R. R. Co., 24 La. Ann., 1. See, also, in general, Pierce on Railroads (2d ed.), 491; Wood on Railroads, 590; Arnot v. Erie R'y Co., 5 Hun, 608 (1875); affirmed, 67 N. Y.. 315. Where a contract between a domestic railroad company and a foreign railroad company is declared illegal and void by the court on the ground that it seeks to create a monopoly in the coal business, and the court orders the domestic railroad company to cease complying with such contract, the court will appoint a receiver of such company if it attempts to evade the decree, but upon proof that no evasion has been attempted the court will refuse to appoint a receiver. Stockton, Att'y-Gen'l, v.

Central R. Co. of N. J., 25 Atl. Rep., 942 (N. J., 1893).

1 Hare v. London, etc., R'y Co., 2 J. & H., 89: 1 id., 252 (1860), where a stockholder's action failed: dictum in Lancaster, etc., R'y Co. v. Northwestern R'y Co., 2 K. & J., 293 (1856). Railroad pools are not contrary to public policy in England: but quære as to whether a stockholder may not set them aside. See 3 R'v & Corp. L. J., 144. For a pooling contract between a steamship company and a railroad, see Cutting v. Florida, etc., Co., 43 Fed. Rep., 743 (1890). A pooling arrangement between rival railroad companies fixing freight rates is prima facie illegal. Cleveland, etc., R'y v. Closser, 26 N. E. Rep., 159 (Ind., 1890). A pooling contract between two railroads competing for business between the same points is void as against public policy. The court will leave the parties where they are. The arrangement in this case was for a division of earnings. Texas, etc., R'v v. Southern Pac. R'y, 6 S. Rep., 888 (La., 1889). agreement of two companies to have the same management and divide their earnings in a certain proportion is invalid. Burke v. Concord, etc., R. R. Co., 61 N. H., 161 (1881); State v. Same, 13 Am. & Eng. R. R. Cas., 94 (N. H., 1883). Cf. 23 Fed. Rep., 306. A combination of two railroads under one management, and a division of joint proceeds upon fixed percentages, and the making of improvements at a common expense, have been held legal and binding on stockholders, though the contract was made by the directors only. Nashua, etc., R. R. Co. v. Boston, etc., R. R. Co., 27 Fed. Rep., 821 (1886). For the construction of the terms of an agreement of two railroads to divide the receipts. one road furnishing the track, etc., and

§ 898. A railroad cannot be sold under levy of execution.— This rule also is an outgrowth of the principle of law and rule of public policy that a railroad must be operated and hence will not be allowed to pass into the sheriff's hands nor be sold in parcels and thus disrupted. The creditor's remedy is a receiver. He cannot levy execution on the railroad itself or any part of it unless the statute expressly allows him to do so.¹

the other the rolling stock, see Blossburg, etc., R. R. Co. v. Tioga R. R. Co., 1 Abb. Ct. of App., 149 (1864). Where one railroad company operates its road with another railroad jointly on an agreement to divide the profits, it cannot use the profits to purchase still another railroad unless the stockholders of the second railroad assent thereto. Nashua, etc., R. R. v. Boston & L. R. R. 132 U. S., 356 (1890). A stockholder cannot enjoin his company from paying a rival company a certain sum for discontinuing its boats. Leslie v. Lorillard, 110 N. Y., 519 (1888). A contract of two railroads to keep out of each other's territory has been held not to be void. Ives v. Smith, 3 N. Y. Supp., 645 (1888). Under the Texas constitution prohibiting railroad corporations from controlling competing lines a pooling arrangement is void. Gulf. etc., R'y Co. v. State, 10 S. W. Rep., 81 (Tex., 1888). In Morrill v. Boston, etc., R. R. Co., 55 N. H., 531, a stockholder enjoined a pooling contract which was prohibited by statute. In the case of United States v. Trans-Missouri Freight Assoc., 53 Fed. Rep., 440 (1892), the court held that an agreement between several competing railway companies that an association be formed for the purpose of maintaining just and reasonable rates, preventing unjust discriminations by furnishing adequate and equal facilities for the interchange of traffic between the several lines, without preventing or illegally limiting competition, is legal, and is not in violation of the federal statute against trusts. The court said: "The rule of law which recognizes the rights of the public to have the benefit of fair and healty competi-

tion, and to require that equal facilities and reasonable rates shall be secured to all, does not condemn a contract between railroad companies operating competing lines, which is made for the sole purpose of preventing strife, and preventing financial ruin to one or the other, so long as the purpose and effect of such an agreement is not to deprive the public of its right to have adequate facilities and fixed and reasonable prices. . . . The object and purpose of the agreement, and the formation of the association thereunder, was to maintain just and reasonable rates, and to prevent unjust discriminations, in compliance with the terms of the act regulating commerce by furnishing equal facilities for the interchange of traffic between the several lines." A copy of the agreement itself was given in this report. It is an agreement to regulate rates, but does not provide for a division of the traffic.

¹ Randolph v. Larned, 27 N. J. Eq., 557 (1876), involving a railroad franchise; Louisville, etc., R'y v. Boney, 117 Ind., 501 (1888). The rule that execution cannot reach the right to operate a railway is based on the wise policy that any other rule would result in the breaking of roads into many pieces. See Redfield v. Wickham, 58 L. T. Rep., 455 (1888), distinguishing County of Drummond v. S. E. R'y, 24 L. C. Jurist. A railroad company's right of way cannot be sold on execution, nor can the company itself sell it apart from the operation of the road upon it. even though the company has the fee. East Alabama R'y v. Doe, 114 U. S., 340, 350 (1885); Buncombe, etc., Commis899. Rates charged by railroads may be reduced by the legislature if they are unreasonably high.— It formerly was believed that a state legislature could not, by an arbitrary statute, reduce railroad charges for the transportation of freight and passengers. But the famous Granger Cases in the supreme court of the United States completely overthrew this doctrine, and sustained the power of a state legislature to order railroads to reduce their rates where those rates were unreasonably high.¹

sioners v. Tommey, 115 U. S., 122, 135 (1885); Youngman v. Elmira, etc., R. R., 65 Pa. St., 278 (1870). The case of State v. Rives, 5 Ired. L. (N. C.), 297 (1844), sustained a sale under execution of a railroad, and held that the purchaser was not criminally liable for tearing up the track. In Louisiana railroad franchises may be sold under execution, though no statute authorizes it. Lawrence v. Morgan's, etc., S. S. Co., 2 S. Rep., 69 (1887); Stewart v. Jones, 40 Mo., 140 (1867), where a sale on execution of a franchise to be a college was held void. Where the right to sell a railroad under levy of execution exists, such levy may be made subject to mortgages, where such mortgage is not being foreclosed. Eells v. Johann, 27 Fed. Rep., 327 (1886). In England prior to the act of 1867, a judgment creditor might issue a ft. fa., and seize all the rolling stock and other chattels and goods of a railroad company, but by the act of 1867 he is now compelled to apply for a receiver and manager of the road. Re The Eastern, etc., R'y Co., 63 L. T. Rep., 181 (1890); aff'd, id., 604, and aff'd, 64 id., 669.

¹ Munn v. Illinois, 94 U. S., 113 (1876), and the various cases in 94 U. S., at pp. 155, 164, 179, 180, 181; Ruggles v. Illinois, 108 U. S., 526 (1883); aff'g 91 Ill., 256 (1878); Shields v. Ohio, 95 U. S., 319 (1877); Farmers' Loan, etc., Co. v. Stone, 20 Fed. Rep., 270 (Miss., 1884); Louisville & N. R. v. Tenn. R. R. Co., 19 Fed. Rep., 679 (1874); Ill. Cent. R. R. v. People, 95 Ill., 313 (1880); Chicago & Alton R. R. v. Chicago, V. &

W. Coal Co., 79 Ill., 121 (1875): Chicago & Alton R. R. v. People, 67 Ill., 11, 16 (1873); Railroad Co. v. Richmond, 19 Wall., 584 (1873); Railroad Commission Cases, 116 U.S., 307 (1886). Cf. with the case Killmer v. N. Y. C. & H. R. R., R., 100 N. Y., 395 (1885); Georgia R. R. v. Smith, 70 Ga., 694 (1883); Laurel Fork, etc., R. R. Co. v. West Va., etc., Co., 25 W. Va., 324 (1884). legislative reduction of railroad rates is constitutional, though thereby the road will pay but one and one-half per cent. on its original cost and only two per cent, on its bonded debt, there being no evidence as to the "water" in the bonds or of the cost of the road to the present owner. Rates may be regulated to correspoud to gross earnings. Dow v. Beidelman, 125 U.S., 680 (1888). road rates may be reduced by statute and made to depend upon the length of the road. Dow v. Beidelman, 5 S. W. Rep., 298 (Ark., 1887). The following decisions have been made: Where for a certain period rates were to be fixed in the discretion of corporate authorities, the legislature cannot regulate before the expiration of that period. Sloan v. Pacific R. R., 61 Mo., 24 (1875). But (dictum) nevertheless the courts have the right to limit the tolls to reasonable ones. Attorney-General v. Railroad Cos.. 35 Wis., 425, 588 (1874). The legislature cannot repeal a charter provision allowing a railroad to charge certain rates. Hamilton v. Keith, 5 Bush (Ky.), 458 (1869). Where, by charter, rates are left to the discretion of corporate officers, the legislature cannot regulate them. Phil., etc., R. R. Co. v. Bowers, 4 Houst.

The question of whether the reduction is a reasonable one is a question of fact which must be determined by proper, proof, the burden of proof being upon the railroad which complains.¹

The legislature may delegate to a board of railroad commissioners

(Del.), 506 (1873), Though a railroad charter gives directors right to fix rates. vet the legislature may regulate under its power to prohibit and punish extortion. Ill., etc., R. R. Co. v. People, 95 Ill., 313 (1880). Though under the decisions in the "Granger Cases" the legislature may regulate railroad rates and reduce them to a point where the road does not pay on its capitalization if the legislature chooses, yet where the state constitution, as in Oregon, reserves this right with the proviso "but not so as to impair or destroy any vested corporate right," then the regulation must be reasonable, and the courts may pass on its reasonableness. Ex parte Koehler, 23 Fed. Rep., 529 (1885). A contract between two railroads not to reduce rates below a certain figure becomes inoperative and ceases when the legislature reduces the rates below that figure. Buffalo, etc., R. R. Co. v. Buffalo, etc., R. R. Co., 111 N. Y., 132 (1888). The state may regulate joint rates over several railroads. Burlington, etc., R'y v. Dey, 48 N. W. Rep., 98 (Iowa, 1891). A statute fixing maximum passenger rates of railroads, according to a classification varying the rate with the gross annual passenger earnings of each road, is constitutional even though the rate allowed is higher in one part of the state than another. Wellman v. Chicago, etc., R'v, 47 N. W. Rep., 489 (Mich., 1890). Under a former statute in Ohio, now repealed, rates were to be reduced where the profits had been ten per cent, on the capital for ten years prior to the statute. Iron R'y v. Lawrence F. Co., 30 N. E. Rep., 616 (Ohio, 1892). Under the constitutional reserved right to alter, revoke or annul a charter, the legislature may reduce rates where no injustice is done to stockholders. St. Louis, etc., R'y Co. v. Ryan, 19 S. W. Rep., 839 (Ark., 1892).

See, also, on this subject, § 501, etc., supra. Concerning the controversy between the people and the railroads resulting in the legislature reducing rates, see Cook on The Corporation Problem, pp. 11-24.

¹ In Chicago, etc., R'v v. Wellman, 143 U. S., 339 (1892), the court said, in reference to the Michigan statutes reducing railroad rates, "The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates." The court will not decide the rate unreasonable on evidence taken in a "friendly suit," especially where the alleged operating expenses of the railroad are not given in detail; affirming Wellman v. Chicago, etc., R'y, supra. Although a legislature has power to reduce railroad rates, vet it cannot reduce them so as to practically destroy the value of the railroad property. The courts will review the reduction and prevent it if excessive. Chicago. etc., R'y v. Minnesota, 134 U.S., 418 (1890); Minneapolis R'y v. Minnesota, id., 467 (1890). Where a state statute delegates to state railroad commissioners the power to reduce railroad rates, a reduction is unconstitutional where there has been no proper investigation as to their reasonableness. Mercantile T. Co. v. Texas, etc., R'v. 51 Fed. Rep., 529 (1892). Stated in chronological order the cases in the supreme court of the United States, to the effect that the legislature may reduce railroad rates when such rates are unreasonably high, are as follows: Munn v. Illinois, 94 U. S., 113-181 (1876); Spring Valley W. W. v. Schottler, 110 id., 347 (1883): Miss. R. R. Cases, 116 id., 307, 347, 352 (1886); Wabash, etc., R'v v. Illinois, 118 id., 557 (1886); Chicago, etc., R'y v. Dey, 35 Fed. Rep., 866 (1888); Chicago, etc., R'y v. Minnesota, 134 U.S., 418 (1839);

the right to reduce rates where the existing rates are unreasonably high.1

§ 900. Regulation of railroads in other respects by the legislature. A legislature may compel railroad companies to construct bridges, build fences, improve crossings, erect danger signals, regulate speed and comply with many other police regulations for the convenience or safety of the public. This police power of the legislature is very great, and extends to all classes of corporations.²

Budd v. New York, 143 id., 517 (1891); Chicago, etc., R'y v. Wellman, 143 id., 339.

Georgia, etc., Co. v. Smith, 128 U. S., 174 (1888); Railroad Commission Cases, 116 U.S., 307 (1886), rev'g 20 Fed. Rep., 270. To same effect. State v. Chicago, etc., R'y, 37 N. W. Rep., 782 (Minn., 1888); State v. Fremont, etc., R. R., 35 N. W. Rep., 118 (Neb., 1887); Railroad Com'rs v. Oregon, etc., Co., 19 Pac. Rep., 702 (Oreg., 1888). State railroad commissioners may determine railroad rates in Nebraska: but where the railroad denies the reasonableness of the reduction there arises a question of fact for the courts. State v. Fremont, etc., R. R., 36 N. W. Rep., 305 (Neb., 1888). The legislature may delegate to commissioners the power to fix railroad rates, but the courts will restrain the commissioners from reducing the rates to a ruinously low figure. Chicago, etc., R'y v. Dey, 35 Fed. Rep., 866 (1888); Chicago, etc., R'y v. R. R. Com'rs, id., 883 (1888); 5 S. Rep., 833. Cf. 38 Fed. Rep., 656. See, also, Mercantile T. Co. v. Texas, etc., R'y, supra. The state may compel the railroad companies to pay the expense of its railroad commission. Charlotte, etc., R. R. v. Gibbes, 142 U. S., 386 (1892). Where the railroad commissioners are given power to regulate rates and do so, the courts will not review by injunction the reasonableness of the reduction. It will be left to the test of experiment. Storrs v. Pensacola, etc., R. Co., 11 S. Rep., 226 (Fla., 1892). In regard to the power of the railroad commissioners in Massachusetts to fix rates on milk, see Littlefield v.

Fitchburg R. Co., 32 N. E. Rep., 859 (Mass., 1893). In the case of Richmond, etc., R. R. v. Trammel, 53 Fed. Rep., 196 (1892), it was held that a statute authorizing railroad commissioners to reduce rates, and making their decision couclusive as to the reasonableness of the reduction, was unconstitutional, but the court held that it would not enjoin suits in the state courts to collect penalties for the violation of the orders of the commissioners unless it was shown that the railroad company was not allowed to show that the reductions were unreasonable.

² Kansas Pac. R'y v. Mower, 16 Kan., 573 (1876), requiring fences and citing To same effect, Nelson v. Vermont, etc., R. R., 26 Vt., 717 (1854); Gorman v. Pacific R. R., 26 Mo., 441 (1858). Legislature may compel a railroad to ring bell or blow whistle before reaching cross-roads. Galena, etc., R. R. Co. v. Loomis, 13 III., 548 (1852). May require cattle-guards. Thorpe v. Rutland, etc., R. R., Co., 27 Vt., 140 (1854). May require all regular passenger trains to stop at county seats for passengers. Chicago & A. R. R. Co. v. People, etc., 105 Ill., 657 (1883). To same effect, and requiring them to stop at a particular station, State of Conn. v. New Haven, etc., Co., 43 Conn., 351 (1876). Under its reserved power the legislature may require street railways to pave. Sioux City, etc., R'y v. Sioux City, 39 N. W. Rep., 498 (Iowa, 1888). Legislature may require erection of sign-boards at crossings, and may impose fines for non-conformity. May regulate speed through municipalities.

This class of cases is based on the police power of the state, and is to be clearly separated from cases where the legislature amends

Mobile, etc., R. R. Co. v. State. 51 Miss.. 137 (1875). Same as to regulation of When the statute prescribes speed the municipality cannot change it. Horn v. Chicago, etc., R'v Co., 88 Wis., 463 (1875). May require trains to stop at stations. Penn. Co. v. Wentz. 37 Ohio St., 333 (1881). May compel a railroad to deliver grain at any elevator along the road specified by the shipper. Hoyt v. Chicago, etc., R. R. Co., 93 Ill., Cannot compel railroads 601 (1879). crossing each other to have trains due at the same hour wait for each other twenty minutes. State v. Noves, 47 Me., 189 (1859). May authorize railroad commissioners to compel railroads to make a station and erect depots at such places as the commissioners deem proper. R. R. Com'rs v. Portland, etc., R. R. Co., 63 Me., 277 (1874). May inflict severe penalties on a railroad for charging rates in excess of its charter rate. Camden. etc., R. R. v. Briggs, 22 N. J. L., 623 (1850). May prohibit railroad crossing a city street unless city authorities consent and prescribe the character of the crossing. Veazie v. Mayo, 45 Me., 560 (1858). May make railroad liable for pay of day-laborers, whether employed by railroad or contractors or subcontractors. Bramin v. Conn., etc., R. R. Co., 31 Vt., 214 (1858); Peters v. St. Louis, etc., R. R. Co., 23 Mo., 107 (1856). May make railroad liable for damages by fire communicated by locomotives. Lyman v. Boston, etc., R. R. Co., 4 Cush., 288 (1849). May impose penalties on railroad for violation of charter duties. Mobile, etc., R'y v. Steiner, 61 Ala., 559 (1878). May make the company liable for fires caused by its engines. Rodemacher v. Milwaukee, etc., R. R., 41 Iowa, 301 (1875). May regulate a crossing of one road by another. Pittsburg, etc., R. R. v. South, etc., R. R., 77 Pa. St., 173 (1874). May compel a road to put in and maintain its crossing with a street.

Portland, etc., R. R. v. Deering, 4 East. Rep., 97 (Me., 1885). May require a change of grade. Fitchburg R. R. v. Grand, etc., Co., 86 Mass., 198 (1862). May order roads to unite in a union depot. Worcester v. Norwich, etc., R. R., 109 Mass., 103 (1871). May delegate to commissiouers the power to determine mutual rights and duties at railroad crossings. Portland, etc., R. R. v. Grand. etc., R. R., 46 Me., 69 (1858). And may regulate railroad crossings and provide for the safety of the public. Lake Shore R'y v. Cincinnati, etc., R'v 30 Ohio St., 604 (1876). And in general, also, see cases in the preceding section. compel railroad engineers to be examined for color blindness. Nashville. etc., R'y v. State, 3 S. Rep., 702 (Ala., 1888); Smith v. Alabama, 124 U.S., 465 (1888); McDonald v. State, 2 S. Rep., 829 (Ala., 1887). May prescribe penalty if a railroad charges more than bill of lading calls for. Little Rock, etc., R'v v. Hanniford, 5 S. W. Rep., 294 (Ark., 1887). May empower railroad commissioners to direct railroads to establish new stations, and to apply to the courts for the enforcement of such directions. Railroad Com'rs v. Portland, etc., R. R. Co., 63 Me., 269 (1874). May regulate the transfer of goods and freight from one road to another within its own limits. City of Council Bluffs v. Kansas City, St. J. & C. B. R. R., 45 Iowa, 338 (1876). But, as stated supra, the legislature cannot compel passenger trains on roads crossing each other to wait twenty minutes for passenger trains on the other line so crossing. State v. Noves, supra.

Where a charter authorizes a railroad to build a bridge obstructing commerce, the river being entirely in one state, a subsequent statute making the railroad liable for damages to those thereby cut off from navigation was held unconstitutional. Bailey v. Phil., etc., R. R. Co., 4 Harr. (Del.), 389 (1846). But the legis-

a charter at the request of a majority of the stockholders in order to enlarge, diminish or change the charter itself.¹

The old theory that a railroad is similar to a turnpike, in that any person may run his cars over it, has long since been abandoned.²

lature may require a railroad to construct a specified bridge so as to cross another railroad in a certain way. People v. Boston, etc., R. R. Co., 70 N. Y., 569 (1877). A state cannot prohibit an interstate railroad from delivering intoxicating liquor to a resident. Bowman v. Chicago, etc., R'y, 125 U.S., 465 It may prohibit manufacture (1888).and sale of liquor, and thereby affect a corporation previously incorporated to manufacture the same, though there was no reserved right of repeal. Commonwealth v. Intoxicating Liquors, 115 Mass., 153 (1874). May limit hours of work of women and children, even as against corporations. Commonwealth v. Hamilton Mfg. Co., 120 Mass., 383 (1876). But cannot prohibit cemetery corporation from using its grounds already purchased for burial purposes. Lake View v. Rose Hill Cem. Co., 70 Ill., 191 (1873). May repeal clause in college charter prohibiting sale of liquor within mile. Diugham v. People, 51 Ill., 277 (1869). Municipality may prohibit company selling milk unless license is obtained from the city. People v. Mulholland, 82 N. Y., 324 (1880). State may prohibit banks from transferring, by indorsement or otherwise, notes, bills of exchange, etc. Payne v. Baldwin, 11 Miss., 661 (1844). May impose penalties on banks for refusing payment of its bank-bills. Brown v. President, etc., 8 Mass., 445 (1812). May require bank to redeem its notes in gold, though the charter did not so require. Com. Bank v. State of Miss., 14 Miss., 599 (1846). But cannot provide that a bank presenting notes (money) issued by another bank for payment can be paid in notes of former bank. Bank of State v. Bank of Cape Fear, 13 Ired. L. (N. C.), 75 (1851). A charter exemption of railroad em-

ployees from doing road-work is beyond the reach of the legislature. Zimmer v. State, 30 Ark., 680 (1875). The legislature cannot arbitrarily name and appoint trustees of an educational corporation, the charter providing that vacancies shall be filled by the remaining trustees. Sheriff v. Lowndes, 16 Md., 357 (1860). It cannot give to the city of Louisville the power to elect the trustees of University of Louisville, an educational corporation. City of Louisville v. President, etc., 15 B. Monr., 642 (1855). It cannot vest the government of an incorporated academy in a new board of trustees. Norris v. Trustees, etc., 7 Gill & J., 7 (1834). A statute rendering railroads liable for injuries to employees, though such injuries are due to fellowservants, is constitutional. Missouri R'v Co. v. Mackey, 127 U.S., 205 (1888). And may extend the statute of limitations as to suits for compensation for land taken by railroad. It may change "the mode. the time when and the courts where they should be enforced; " i. e., rights and liabilities of corporations. Gowen v. Penobscot R. R. Co., 44 Me., 140 (1857). May order wires under ground. 38 Fed. Rep., 552. The legislature may require railroads to fence in their right of way. Buffalo, etc., Co. v. Delaware, etc., R. R., 130 N. Y., 152 (1891). Under its reserved power the legislature may compel a railroad to construct a bridge over its tracks. Inhabitants, etc., v. N. Y., etc., R'y, 18 Atl. Rep., 242 (N. J., 1889). Legislature may order railroads to have gates at crossings. People v. Long I. R. R., 134 N. Y., 506 (1892). A state may make railroad corporations liable in all cases for property injured by fire from locomotives. McCandless v. Richmond, etc., Co., 16 S. E. Rep., 429 (S. C., 1892).

² Some of the earliest English railway

§ 901. The rates charged by railroads must be reasonable — Discriminations and rebates.— A railroad is bound by old and well-established legal principles of law to furnish transportation for persons and freight at a reasonable eharge.¹

It has been held that it is legal for a railroad to give a reduced rate to particular persons.² There is strong authority to the contrary,

acts gave free liberty to all persons to use the railways with properly-constructed carriages upon payment of certain tolls and subject to the company's regulations. Queen v. London & S. W. R'y, 1 Q. B., 558, 591 (1842); Queen v. Grand Junction R'v, 4 Q. B., 18, 37 (1844). The idea that railways are public highways in that sense has thoroughly disappeared in the development of our modern system. They are public highways, and while they must serve the public on the pain of forfeiting domain and franchise, yet they are not open to all suitable vehicles. See Beekman v. Saratoga. etc., R. R., 3 Paige, 45, 74 (1831); Camblos v. Phil. & R. R. R. 4 Brewster (Pa.), 563, 597 (1873). The old theory has au advocate in Hudson on the Railways and the Republic, ch. X.

1 Where a shipper has for a number of years paid the schedule rates without objecting, he will be deemed to have assented to the charge as reasonable, and cannot recover on the ground of extortion, Killmer v. N. Y. C. & H. R. R. R., 100 N. Y., 395 (1885). A railroad will not be permitted to wrongfully send freight by a roundabout way instead of over its direct lines, and thus increase the cost of transportation. Burlington, etc., R. R. v. Chicago Lumber Co., 15 Neb., 390 (1884). A shipper may sue at common law to recover damages for unreasonable charges and need not bring his action under the interstate commerce act. Lowry v. Chicago, etc., R. R., 46 Fed. Rep., 83 (1891). Where a remedy is given by statute it supersedes the shipper's right to sue at law for an unreasonably high charge by a railroad. Winsor, etc., Co. v. Chicago, etc., R. R., 52 Fed. Rep., 716 (1892).

² Root v. Long, etc., R. R. Co., 21 N. E. Rep., 403 (N. Y., 1889). Johnson v. Pensacola, etc., R. R., 16 Fla., 623, 656 (1878), is an exhaustive opinion reviewing the cases, and ruling that, in the absence of statute, variances in rates are only evidence as to the reasonableness of the compensation, and not per se unjust discriminations. A rebate may be recovered, there being no evidence of discrimination against others. It is presumed that others get the same. Christie v. Missouri P. R'v. 7 S. W. Rep., 567 (Mo., 1888). A rebate contract to a single shipper is not necessarily invalid. Cleveland, etc., R'v v. Closser, 26 N. E. Rep., 159 (Ind., 1890). An agreement to give a reduced rate is legal and allowable. Boyles v. Kansas, etc., R'v. 22 Pac. Rep., 341 (Col., 1889). In New York it has been held that although a reduced special rate is given to certain shippers, yet another shipper cannot recover the difference between that rate and the rate charged him, unless he can show that the latter rate was unreasonable. Langdon v. N. Y., etc., R. R., 9 N. Y. Supp., 245 (1890). In England the mere giving of better rates is not an illegal discrimination if the shipper furnishes a consideration, as by agreement to ship a certain amount delivered in a certain manner at stated intervals. Nicholson v. G. W. R'y, 4 Jur. (N. S.), 366 (1858).

Where a circuit court gave judgment ousting a railroad company of its franchises for a breach of a law which prohibited all discriminations, the supreme court of the state reversed the judgment on the ground that the law was unconstitutional in the arbitrary and conclusive presumption of guilt and the severity of the penalty. On the merits

however, and in America the weight of authority seems to be that although it is legal for a railroad to reduce its rates, yet that it must reduce them for all alike, and hence that a contract for a reduced rate is legal only when it is free from any clause that the rate shall be lower than the rate given to other shippers. The interstate commerce act is substantially to this effect.¹

of the case the court were of the opinion that discriminations were unjust which gave smaller rates from competing points than from intervening non-coinpeting points. Chicago, etc., R. R. v. People, 67 Ill., 11 (1873). Either of two competing carriers, with a view of increasing its business, may extend more favorable terms to all shippers, although the other carrier (in this case a river steamboat company) may incidentally be injured thereby, so long as the public does not in any manner suffer. Munhall v. Pennsylvania R. R., 92 Pa. St., 150 (1879). Under the tonnage commutation act of 1861, the Pennsylvania Railroad was held empowered to adopt one tariff of rates for interstate trade and another for trade which came from extraterritorial points, even although the shippers of this latter brought it at their own cost within the state. Shipper v. Pennsylvania R. R., 47 Pa. St., 338 (1864). Different rates on different branches of a railroad have been held not to constitute an unjust discrimination. Caterham R'y v. London & Brighton R'y, 40 Eng. L. & Eq., 259 (1857); S. C., 1 C. B. (N. S.), 410. And see Chicago & Alton R. R. v. People, 67 Ill., 11, 24 (1873). A carrier may discriminate at common law in favor of persons living at a distance from the end of the route in order to secure business which would otherwise take a different course. Other shippers not in such condition may not object if the carrier's charges to them are reasonable. Ragan v. Aiken, 9 Lea (Tenn.), 609 (1882). In the following cases the rule against discriminations has been qualified, and apparent discriminations have been held allowable is founded on grounds consistent with public inter-

est: Ragan v. Aiken, 9 Lea (Tenn.), 609 (1882): Houston, etc., R. R. v. Rust, 58 Tex., 98 (1882); Chicago, etc., R. R. v. People, 67 Ill., 11 (1873); Hersh v. Northern, etc., R. R., 74 Pa. St., 181 (1873); Concord, etc., R. R. v. Forsaith, 59 N. H., 122 (1879): Fitchburg R. R. v. Gage, 78 Mass., 393 (1859); Eclipse Tow-boat Co. v. Pontchartrain R. R., 24 La. Ann., 1, 13 (1872); Garten v. B. & E. R. R., 1 B. & S., 112, 154, 165 (1861; McDuffee v. Portland, etc., R. R., 52 N. H., 430 (1873); Evershed v. London & N. W. R'v. L. R.. 3 Q. B. Div., 134 (1877); London & N. W. R'y v. Evershed, L. R., 3 App. Cas., 1029 (1878); Munhall v. Pennsylvania, 92 Pa. St., 150 (1879), where several roads combined and lowered rates to all in order to crush competing roads; Nicholson v. Great West. R'y, 5 C. B. (N. S.), 366 (1858); Ransome v. East Co.'s R'v. 1 Nev. & Mac., 63, 71 (1857); Southern R'y v. Internat. Bridge, L. R., 8 App. Cas., 723 (1883); Campbell v. Marietta, etc., R. R., 23 Ohio St., 168 (1872); State v. Mobile. etc., R. R., 59 Ala., 321 (1877); Mobile, etc., R. R. v. Steiner, 61 Ala., 559 (1878); Strick v. Swansea Canal, 16 C. B. (N. S.). 245 (1864).

1 The leading case is Scofield v. L. S., etc., R'y, 43 Ohio St., 571 (1885), which is thoroughly considered, and holds that a contract to make a rebate by reason of larger freightage is void, if others are not to have the rebate, and a party to whom the rebate is not given may have an injunction in equity. In a suit by a shipper on a contract with a railroad, whereby the former was in every case to receive cheaper rates for the same transportation than should be given by this or any of certain other trunk lines, it was held that the contract was illegal

In most of the states this whole subject is now generally regulated by statutes which prohibit unjust discriminations, and the

and void. Messenger v. Penn. R. R., 36 N. J. L., 407 (1873); S. C., 37 id., 531 (1874). Cf. Stewart v. Lehigh Val. R. R., 38 N. J. L., 505, 520 (1875). Where a secret rebate has been given to a shipper, other shippers may sue the railroad company for the difference between the rates which they have paid and the rate which was given to the favored shipper. The statute of limitations does not commence to run until the secret rebate came to the knowledge of the plaintiff. Cook v. Chicago, etc., R. R., 46 N. W. Rep., 1080 (Iowa, 1890). Where a railroad company contracts to carry for one shipper crude petroleum or other artiticles at half the rate it agrees to charge all others for the same service, and at the same time, and as part of the agreement, binding itself to charge all others double the amount as a fixed open rate. and to pay such favored shipper onehalf of it when collected, in consideration of his agreeing to establish and maintain a system of pipe lines to its road, such railroad company may be made to repay to any shipper the money paid by the latter in ignorance of such contract, so far as such money went to the favored shipper. It may be collected also from the favored shipper Brundred v. Rice, 32 N. E. himself. Rep., 169 (Ohio, 1892). Where a person receives a rebate on shipments and obtains that rebate on goods belonging to another and shipped in the name of the former, the former is not liable to the latter for such rebate. Hawley v. Kausas, etc., Coal Co. et al., 30 Pac. Rep., 14 (Kan., 1892). See, also, 145 U.S., 275.

A rebate contract on railroad traffic is illegal and the Interstate Commerce Act made it still more illegal. Fitzgerald v. Grand Trunk R. R., 22 Atl. Rep., 76 (Vt., 1891). Discriminations in rates based simply ou the amount of freight shipped are held to be in favor of capital, contrary to sound public

policy and a wrong to the disfavored party, for which the courts are competent to give redress. Havs v. Pennsylvania Co., 12 Fed. Rep., 309 (Ohio, 1882). Cf. Concord, etc., R. R. v. Forsaith, 59 N. H., 122; 47 Am. Rep., 122; Ransome v. East. Co.'s R'y, 1 C. B. (N. S.), 437; Menacho v. Ward, 27 Fed. Rep., 529, 532 (1886). And under the English statute, 1 Nev. & McN., 63, 155; id., 121; 16 C. B. (N. S.), 245; 2 Nev. & McN., 319. It is an unjust discrimination for a carrier to attempt to compel a shipper, under penalty of a higher rate, to ship his freights to a particular consignee. St. Louis, A. & T. H. R. R. v. Hill, 14 Bradw. (Ill.), 579 (1884). And see this case for a discussion of common-law authorities on discrimination. state by quo warranto may oust a railroad from discriminations in favor of oil shipped in tank cars. State v. Cincinnati, etc., R. R., 23 N. E. Rep., 928 (Ohio, 1890). The discrimination cases, both in their reasoning and citation of authority, often fail to distinguish sharply between rulings under the common law and under statutes. would appear that the English view considers the common-law obligation to be only to carry for a reasonable compensation, and not to prohibit all discrimination. On the other hand, the weight of American authority is that even at common law the carrier's obligation is to give like rates on like goods under like circumstances to all shippers. Great West. R'y v. Sutton, L. R., 4 Eng. & Ir. App., 226, 237; Exparte Benson, 18 S. C., 38 (1882); Baxendale v. East. Co.'s R'y, 4 C. B. (N. S.), 63; Branley v. Southeast. R'y, 12 C. B. (N. And see Menacho v. Ward, 27 Fed. Rep., 529 (N. Y., 1886); Johnson v. Railroad, 16 Fla., 623 (1878); Spofford v. Boston, etc., R. R., 128 Mass., 326 (1880); McDuffee v. Portland, etc., R. R., 52 N. H., 430; 13 Am. Rep., 72; St. Louis, etc., only difficulty remaining to be determined under the various acts is what are and what are not such discriminations.

§ 902. A railroad must operate its line, and for refusal to do so is liable to indictment, mandamus, injunction or forfeiture of franchises.— The usual remedy of the state to compel a railroad to operate any portion of its line which the railroad has ceased to use

R. R. v. Hill, 14 Bradw. (Ill.), 579 (1884); Hays v. Pennsylvania Co., 12 Fed. Rep., 309 (Ohio, 1882); Messenger v. Pennsylvania R. R., 36 N. J. L., 407; S. C., 37 id., 531 (1874); Scofield v. Railroad, 43 Ohio St., 571 (1885): State v. Railroad, 17 Neb., 647 (1885); New Eng. Exp. Co. v. Maine Cent. R. R., 57 Me., 188: Sinking Fund Cases, 99 U. S., 719; Mich., etc., R. R. v. Burrows, 33 Mich., 6: Evershed v. Lond. & N. W. R'y, L. R., 3 Q. B. Div., 144 (1877); S. C., L. R., 3 App. Cas., 1029; Lancashire R'y v. Gidlow, L. R., 7 H. L. Cas., 517 (1875); Parker v. Great West. R'v. 7 Man. & G., 253 (1844); Great West, R'v v. Sutton, 3 H. & C., 800; S. C., L. R., 4 H. L. Cas., 226 (1869); Pickford v. Grand Junction R'y, 10 M. & W., 399; London & N. W. R'v v. Evershed, 26 W. R., 863; Baxendale v. London & S. W. R'y, L. R., 1 Ex., 137. A railroad company cannot legally discriminate between elevators. State v. Missouri, etc., R'v, 45 N, W. Rep., 785 (Neb., 1890). A railroad cannot legally favor one hack or bus line as against others. Kalamazoo, etc., Co. v. Sootsma, 47 N. W. Rep., 667 (Mich., 1890). holder in a belt line may enjoin one of the connecting railroad corporations from excluding the helt line from its grounds. Lathrop v. Junction R. R., 4 Fed. Rep., 41 (1880).

¹ Johnson v. Railroad, 16 Fla., 623 (1878); McDuffee v. Portland, etc., R. R., 52 N. H., 430; 110 U. S., 667, 674. Cf. Bond v. Wabash, etc., R'y, 67 Iowa, 712 (1885). Cf. English statutes and cases collected in Brown & Theobald's Railways. Public policy demands reasonable competition, and it is contrary to that policy for one road to attempt to secure a controlling interest in a rival

road, and any contract to that end will be set aside in equity as illegal, ultra vires and contrary to public policy. Central R. R. Co. v. Collins, 40 Ga., 582 (1869). A contract by the projectors of one road not to complete their line so as to interfere with the monopoly of a rival company is void as contravening public policy. Hartford & N. H. R. R. Co. v. N. Y. & N. H. R. R. Co., 3 Robertson, 411 (1865); Indianapolis, etc., R. R. v. Ervin, 118 Ill., 250 (1886). Here the plaintiff Ervin made a secret contract with the general freight agent of defendant company, whereby plaintiff was to ship grain and other freight over the company's lines and pay for the same at the schedule of rates issued to the public, which schedule was reasonable and in conformity with the one prepared for the company by the railroad and warehouse commissioners of the state; and it was agreed by said freight agent that the plaintiff should receive back, by way of rebate, a portion of the freight so charged and paid. After plaintiff had shipped a large quantity of freight under this secret agreement. when the rebates due amounted to over \$6,500, the company refused to pay the same, whereupon plaintiff brought suit to recover. Held, that the secret agreement was void as being against public policy at the common law, and a violation of the statute against unjust discriminations; holding, also, that the case of T., W. & W. R. R. Co. v. Elliott, 76 Ill., 67, having been decided under a prior statute controlling the same, and the case of E. & P. Dis. v. Cecil, 112 Ill., 185, being overruled, are not authority in this case, and that the principles there laid down are not applicable hereis a mandamus. It has been held that a private individual may

in. See, also, Illinois, etc., R. R. v. People, 12 N. E. Rep., 670 (1887). For a recent and well-considered case of discrimination, as affected by the English statute against such, see Manchester, etc., R'y v. Denaby, etc., Co., 54 L. T. Rep., 1 (1886), reversing in part 52 L. T. Rep., 598 (1885), and 51 L. T. Rep., 698* (1885). An agreement to locate a depot at a particular place cannot always be enforced by specific performance. Conger v. N. Y., etc., R. R., 120 N. Y., 29 (1890). The New York courts will not enforce a statutory liability of railroads in Pennsylvania for discriminations in rates. Langdon v. N. Y., etc., R. R., 58 Hun. 122 (1890).

1 A "strike" among the employees is no defense. People v. N. Y. C. & H. R. R. R. Co., 28 Hun, 543, 553, 558 (1883). And where a shipper has been damaged by a delay caused by a strike he has an action for such damage. Blackstock v. N. Y. & E. R. R. Co., 20 N. Y., 48 (1859). But where the delay is caused not by the inability of the company to procure men to operate its road, but by the violence of others who by striking have severed their connection therewith, the company can only be held to the exercise of due care and diligence to guard against delay and to forward the goods to their destination. Geismer v. L. S. & M. S. R. R. Co., 102 N. Y., 563 (1886); Pittsb., Ft. W. & C. R. R. Co. v. Hazen, 84 Ill., 36 (1876); Pittsb., Cin. & St. L. R'v Co. v. Hollowell, 65 Ind., 188 (1879); Indianap. & St. L. R. R. Co. v. Juntgen. 10 Bradwell, 295 (1881); Lake Shore & M. S. R. R. Co. v. Bennett, 6 Am. & Eng. R. R. Cas., 391 (1882). Yet even "the fact that the operation of the road is unprofitable furnishes no excuse whatever for the failure to comply with the conditions of [a land] grant, and the state may compel a compliance with the terms of the contract by mandamus or other appropriate remedy." State v. Sioux City & P. R. R. Co., 7 Neb., 357,

374 (1878). A peremptory mandamus was granted to compel a railroad company to operate a terminal bridge as an integral portion of its "one continuous line," instead of employing a bridge transfer device, to the great public inconvenience. United States v. Union Pac. R. R. Co., 4 Dillon, 479 (1875); affirmed, sub nom. Union Pac. R. R. Co. v. Hall, 91 U.S., 343. The state will employ a mandamus to compel a railroad company to continue the operation of a part of its line which it is under illegal contract to discontinue, the consideration of said contract being a mutual agreement to prevent competition. State v. Hartford & N. H. R. R. Co., 29 Conn., 538 (1861). The remedy in case of abandonment of a part of the line is by mandamus, indictment or, by the state, by proceedings to annul the corporation. People v. Albany & Ver. R. R. Co., 24 N. Y., 261 (1862). Mandamus does not lie to compel a railroad to operate a line where it accommodates all the traffic by another line owned by it. People v. Rome, etc., R. R. Co., 103 N. Y., 95 (1886). In an old English case, a tram-road having been put in operation by an incorporated company, and subsequently, to benefit special interests, torn up, it was held that, while the ordinary remedy would be indictment, vet the more perfect remedy of mandamus would issue to compel the relaying of the tram-plates. King v. Severn & Wye R'y, 2 Barn. & Ald., 646 (1819). Mandamus lies to compel a road to run all its trains to a town specified in its route, the road having changed its main line and having resorted to a branch line for that town. People v. Louisville, etc., R. R., 120 Ill., 48 (1887). Where a railroad ceases to stop its trains at a flourishing town, the county seat and largest place in the county, but stops four miles away in order to build up a speculative town, the court will order the railroad to stop at the old station. Northern P. R. R. v.

enforce this obligation of a railroad by mandamus.¹ The remedy of forfeiture of the charter is considered elsewhere.²

§ 903. Mandamus to compel a railroad to build its road, operate more trains, stop at depots, erect stations, etc.— Forfeiture for failure to complete the road.— Theoretically the right to enforce all these duties by mandamus exists, but practically the courts are conservative in their application of this remedy.

The railroad company cannot build part of its line and abandon the idea of building the rest. The remedy of forfeiture of charter

Territory, 13 Pac. Rep., 604 (Wash. T., 1887). *Mandamus* does not lie to compel a railroad to increase the number of its trains, unless the statute prescribes a larger number — particularly so where the road is profitless. Ohio & M. R'y v. People, 120 Ill., 200 (1887).

¹A private individual may sue for a mandamus to compel a railroad to operate its road. People v. Colorado, etg., R. R., 42 Fed. Rep., 638 (1890). In a suit by a tax-payer to compel a non-resident railroad lessee of railroad built by municipal aid to continue the use of an old track, the lessor domestic company is a necessary party. Hence no removal to United States court. Chicago, etc., R'y v. Crane, 113 U. S., 424 (1885).

²See ch. XXXVIII.

3 Mandamus lies to compel a railroad to build a bridge as required by its charter. People v. Boston, etc., R. R., 70 N. Y., 569 (1877); State v. Railroad, 9 Rich. L. (S. C.), 247 (1856); to deliver grain at any elevator, Chicago, etc., R'y v. People, 56 Ill., 365 (1870); to run daily trains, In re Brunswick, etc., R'y, 1 Pug. & B., 667 (1878); and to erect stations, Commonwealth v. Eastern R. R., 103 Mass., 254 (1869). Contra, People v. N. Y., etc., R. R., 104 N. Y., 58 (1887). Under the English statute an individual cannot sue out an injunction to compel a railroad company to run through trains where public convenience is already sufficiently served. In re Barret, 1 C. B. (N. S.), 423 (1857). That at common law a carrier is under no obligation to depots for passengers and freight, but that such obligation may be imposed by statute, see People v. N. Y., L. E. & W. R. R., 104 N. Y., 58 (1887). And cf. Caterham R'v v. London, etc., Co., 1 C. B. (N. S.), 410 (1857); State v. N. H. & N. R. R., 37 Conn., 153 (1870). Mandamus not granted to compel a railroad to establish a new station. People v. Chicago, etc., R. R., 22 N. E. Rep., 857 (Ill., 1889). Mandamus will not issue to compel a railroad to stop its trains at a station where there is no specific duty imposed by statute to do so, and where the trains stop at a station near by, even though the near-by station was located on the company's land in order to build it up at the expense of the old town. The residents of the old town had mostly moved into the new and the county seat also removed. Northern Pac. R. R. v. Dustin, 142 U.S., 492 (1892). A railroad engaged in carrying live-stock must furnish suitable facilities for receiving and shipping the stock and provide suitable yards. Covington, etc., Co. v. Keith, 139 U. S., 128 (1891).

⁴ Cohen v. Wilkinson, 12 Beav., 125 (1849). But in State v. Southern Minn. R. R. Co., 18 Minn., 40 (1871), it has been held that, upon a proper interpretation of all the acts in question, mandamus would not issue to compel a company to finish its road to a certain point named in such acts. Cf. § 638, note. Where a railroad company mortgages such part of its road as is completed, and the mortgage is foreclosed, the purchasers are not bound to go on and complete the road. Failure on their part to complete it is no defense to an ac-

and franchises for failure to complete the line, or to complete it within a specified time, or for refusal or neglect to operate a pertion or all of the line, is considered elsewhere. The remedy by indictment applies also in some cases.²

It is criminal conspiracy, under the statutes of the United States, for the employees of a railroad company to combine to refuse to handle interstate freight. The employees may resign, but cannot discriminate as to the freight which they handle.

§ 904. Eminent domain — Railroads may be authorized by the state to exercise the state's power of eminent domain — When and what property may be taken.— The power to exercise the right of eminent domain may be delegated by the state through its legislature to private corporations. Statutes delegating to corporations the power to exercise the right of eminent domain, being in derogation of the rights of private owners, are to be strictly construed; they cannot be extended by implication unless such extension is necessary to carry out the intention of the legislature.

tion on a subscription. Chartiers R'y v. Headgens, 85 Pa. St., 501 (1877).

¹ See ch. XXXVIII, supra.

Commonwealth v. Proprietors, etc.,
 Gray, 339 (1854); Boston, etc., R. R. v.
 State, 32 N. H., 215 (1855).

³ Toledo, etc., R'y Co. v. Pennsylvania Co., 54 Fed. Rep., 730 (Ohio, 1893). A mandatory injunction will issue. Id., 746

⁴ Wilson v. Blackbird Creek M. Co., 2 Pet., 251 (1829); Beekman v. Saratoga & S. R. R. Co., 3 Paige, 45, 73 (1871); Rensselaer & S. R. R. Co. v. Davis, 43 N. Y., 137 (1870); N. Y. & H. R. R. Co. v. Kip, 46 N. Y., 546 (1871); Kramer v. Cleveland & P. R. R. Co., 5 Ohio St., 146 (1855); Buffalo & N. Y. C. R. R. Co. v. Brainard, 9 N. Y., 100 (1853); Matter of City of Buffalo, 68 N. Y., 167 (1877). Power of eminent domain cannot be invoked to construct a railroad to run four months in the year for sight-seers. Re Niagara Falls, etc., R. R., 108 N. Y., 375 (1888). The legislature may change charter provisions as to method of exercising power of eminent domain. Miss. R'y Co. v. McDonald, 12 Heisk. (Tenn.), 54 (1873); Chatteroi R'y Co. v. Kinner, 81 Ky., 221 (1883). Where a company has a charter granted when the state constitution allowed property to be taken and compensation made afterwards, a change in the constitution does not take away the company's right under the first constitution. Lehigh V. R. R. Co. v. McFarlan, 31 N. J. Eq., 706 (1879).

⁵ New York & H. R. R. Co. v. Kip, 46 N. Y., 546 (1871); Rensselaer & S. R. R. Co. v. Davis, 43 N. Y., 137 (1870); Bonaparte v. Camden & H. R. R. Co., Bald., 205 (1830); Browning v. Camden & W. R. R. Co., 4 N. J. Eq., 47 (1837); Stevens v. Erie R'y Co., 21 N. J. Eq., 259 (1871), holding that power to construct a railroad along a river does not authorize building it in or upon the river: Cleveland & P. R. R. Co. v. Speer, 56 Pa. St., 325 (1867). Compare Proprietors of Locks, etc., v. Nashua & L. R. R. Co., 104 Mass., 1 (1870); Van Wickle v. Camden & A. R. R. Co., 14 N. J. L., 162 (1833); Doughty v. Somerville & E. R. R. Co., 21 N. J. L., 442 (1848); State v. Jersey City, 25 N. J. L., 309 (1855); Zack v. Pennsylvania R. R. Co., 25 Pa. St., 394 (1855); Currier v. Marietta & Cin. R. R. Co., 11 Ohio St., 228 (1860); Lackland v. North Mo. R. R. Co., 31 Mo., 180 (1860); Commonwealth v. Erie & N. E. R. R. Co., 27 Pa. St., 339 (1856).

A corporation can appropriate by the right of eminent domain such property only as is necessary for the purpose for which it is authorized to take.

When land is taken by a corporation for a specific purpose, its use by the corporation is limited to that particular purpose.² The statute may confer power upon a corporation to take possession of land pending proceedings to condemn it.³

In this case, where a company built and was operating its road in a place where it was not authorized so to do by its charter, an injunction was refused, but a decree was given requiring a relocation and reconstruction: Gilnier v. Lime, etc., Co., 19 Cal., 47 (1861); Lance's Appeal, 55 Pa. St., 16 (1867). The defense may be set up that the company's time to complete its road has expired. Atlantic, etc., R. R. Co. v. St. Louis, 66 Mo., 228 (1877). An uncompleted condemnation proceeding cannot be assigned by one company to another. Mahonev v. Spring, etc., Co., 52 Cal., 159 (1877). But a lessor railroad may condemn land for the use of the lessee. Re N. Y., etc., R'y, 99 N. Y., 12 (1885). In Iowa a railroad company cannot ' condemn land for an elevator. Johnston v. Chicago, etc., R. R., 58 Iowa, 537 (1882). See, also, State v. United, etc., R. R., 43 N. J. L., 110 (1881). A railroad succeeding to the franchises and property of another railroad may take up and complete its condemnation proceedings. Bradley v. Northern P. R'y, 36 N. W. Rep., 345 (Minn., 1888).

¹ Hill v. Western Vermont R. R. Co., 32 Vt., 68 (1859), holding that a railroad could not take more land than was necessary for its use; Lance's Appeal, 55 Pa. St., 16 (1867); Giesy v. Cincinnati, Wil. & Z. R. R. Co., 4 Ohio St., 308 (1854); Oregon Cascade R. R. Co. v. Baily, 3 Oreg., 164 (1869); Rensselaer & S. R. Co. v. Davis, 43 N. Y., 137 (1870), holding that the taking land for the purpose of speculation or sale or to prevent interference by competing lines or in aid of a collateral line is not lawful. May take for necessary use in the

immediate future. Re Staten Island R. T. Co., 103 N. Y., 251 (1886). A railroad may at any time condemn land for workshops. Chicago, etc., R. R. Co. v. Wilson, 17 Ill., 123 (1855); Lodge v. Philadelphia & W. B. Co., 8 Phila., 345 (1871), holding that ground may be taken for the deposit of waste earth. Land may be taken for terminal facilities. In re New York, etc., R. R. Co., 46 N. Y., 546 (1871); In re New York, etc., R. R. Co., 77 N. Y., 248 (1874); In re New York, etc., R. R. Co., 63 N. Y., 326 (1875). A lessor railroad company may condemn land. Matter of N. Y., etc., R. R., 99 N. Y., 13. Land may be condemned for a station although the railroad company has other available land, which, however, is used in ornamentation of the place. Matter of N. Y. C., etc., R. R., 59 Hun, 7 (1891).

² Proprietors, etc., v. Nashua & L. R. R. Co., 104 Mass., 1 (1870), where land taken by a railroad for the purposes of its business was rented to manufacturers. It was held that the owner of the fee might maintain a writ of entry to establish his right and recover damages; Imlay v. Union Branch R. R. Co., 26 Conn., 255 (1857), holding that land taken for a highway was not convertible into a common. See Binney's Case, 2 Bland, 99, 142 (1829).

³ Bonaparte v. Camden & A. R. R., Bald., 205 (1830); Fox v. Western Pa. R. R., Co., 31 Cal., 538 (1867); Cushman v. Smith, 34 Me., 247 (1852); Nichols v. Somerset & K. R. R. Co., 43 Me., 356 (1857); Currier v. Marietta & Cin. R. R. Co., 11 Obio St., 228 (1860), holding that a general power to take land for a road does not authorize taking land for tem-

The legislature is the sole judge of whether it is expedient to allow corporations to take land and property for a public use; but it is for the courts to decide whether or not the contemplated use is a public one.²

A public use is involved, and land and property may be taken under the power of eminent domain by railroads.³ This is the most common occasion for the use of that power. It may be used

porary use: Hazen v. Boston & M. R. R. Co., 2 Grav. 574 (1854), holding that taking land for temporary use without authority and before condemnation is trespass: Baltimore & S. R. R. Co. v. Compton, 2 Gill, 20 (1844), where a railroad which had relocated its line was held liable in damages to an owner upon its former line. The statute authorizing condemnation cannot affect acts committed before the statute was passed. In re Townsend, 39 N. Y., 171 (1868). The statute may provide that upon adequate provision being made to pay just compensation, a right of way may be taken under the power of eminent domain before compensation is made. Cherokee Nation v. Kansas R'y, 135 U.S., 641 (1890). A railroad company has no right to seize lands and construct a railroad thereon and then proceed to condemn them afterwards. Matter of St. Lawrence, etc., R. R., 133 N. Y., 270 (1892).

¹ People v. Smith, 21 N. Y., 595 (1860); Tidewater Co. v. Coster, 18 N. J. Eq, 518 (1866), affirming S. C., id., 55; Talbot v. Hudson, 16 Gray, 417 (1860); Water-works Co. v. Burkhart, 41 Ind., 364 (1872), holding that the legislature may delegate its right of decision upon this point to the courts or to other bodies; Tyler v. Beacher, 44 Vt., 648 (1871); Concord R. R. Co. v. Greeley, 17 ·N. H., 47 (1845); Chicago, etc., R. R. Co. v. Town of Lake, 71 Ill., 333 (1874); Bankhead v. Brown, 25 Iowa, 540 (1868); Morris & E. R. R. Co. v. Newark, 10 N. J. Eq., 352 (1855); Matter of New York & H. R. R. R. Co., 63 N. Y., 326 (1875), affirming 5 Hun, 20, holding that withiu the limits of its charter the corporation may judge of its wants and fix the location of lands to be taken, and the courts will not interfere if a reasonable necessity is shown.

² Talbot v. Hudson, 16 Gray, 417 (1860): Tyler v. Beacher, 44 Vt., 648 (1871); Concord R. R. Co. v. Greeley, 17 N. H., 47 (1845): Matter of Deansville Cemetery, 66 N. Y., 569 (1876); Chicago, R. L. & Pac. R. R. Co. v. Town of Lake, 71 Ill., 333 (1874); Bankhead v. Brown, 25 Iowa, 540 (1868); Costa M. R. Co. v. Moss, 23 Cal., 324 (1863); Oregon Cascade R. R. Co. v. Bailey, 3 Oreg., 164 (1869), holding that a grant of the power for any other than a public use is void. See, also, Re Niagara, etc., R. R., 108 N. Y., 375 (1888), holding that a pleasure railroad to a whirlpool was not a public use. A coal company cannt take land by eminent domain to use for a tramway to run coal from the mine to a railroad. Sholl v. German, etc., Co., 10 N. E. Rep., 199 (Ill., 1887). Under the general railroad act of New York the courts judge of the necessity of exercising the right of eminent domain by railroads. Rensselaer & S. R. R. Co. v. Davis, 43 N. Y., 137 (1870); Matter of New York Central R. R. Co., 66 N. Y., 407 (1876). A railroad to carry limestone may condemn a right of way. Farnsworth v. Lime Rock R. R., 22 Atl. Rep., 373 (Me., 1891). ³Olcott v. The Supervisors, 16 Wall., 678 (1872); Secombe v. Railroad Co., 23 Wall., 108 (1874); Bonaparte v. Camden & A. R. R. Co., Bald., 205 (1830); New York & H. R. R. Co. v. Kip, 46 N. Y., 546 (1871); Buffalo & N. Y. C. R. R. Co. v. Brainard, 9 N. Y., 100 (1853); Bradley v. New York & N. H. R. R. Co., 21 Conn., 294 (1851); Davis v. Tuscumbia, also by a mining company; 1 by manufactories; 2 also for booms; 5 for a cemetery; 4 for an aqueduct; 5 and for parks. 8

In order to constitute a public use it is not necessary that the improvement should directly benefit the people of the whole state, but the benefit may affect only a particular community. It cannot, however, be for the benefit of a few individuals only. And the power of eminent domain may be exercised by individuals as well as by corporations if the statute so provides, and may be delegated to foreign corporations. Foreign corporations are often

C. & D. R. R. Co., 4 S. & P. (Ala.), 421 (1833); Brown v. Beatty, 34 Mies., 227 (1857); Swan v. Williams, 2 Mich., 427 (1852); Weir v. St. Paul, S. & F. R. R. Co., 18 Minn., 155 (1872); San Francisco, A. & S. R. R. Co. v. Caldwell, 31 Cal., 367 (1866); Gibson v. Mason, 5 Nev., 283 (1869); Concord R. R. Co. v. Greeley, 17 N. H., 47 (1845), holding that "public use" does not mean "public ownership."

¹ New Central Coal Co. v. St. George's C. & I. Co., 37 Md., 537 (1872), involving a railroad to transport coal. See, also, Harvey v. Thomas, 10 Watts, 65 (1840); Hand Gold Mining Co. v. Parker, 59 Ga., 419 (1877), giving right of way for water to he used in mining.

² Great Falls Mfg. Co. v. Fernald, 47 N. H., 444 (1867), giving the right to back water upon land without the consent of the owner; Tyler v. Bacher, 44 Vt., 648 (1871); French v. Braintree Mfg. Co., 23 Pick., 216 (1839), holding that the rights conferred may be lost by not using them for an unreasonable length of time. Contra, Hay v. The Coliver Co., 3 Barb., 47 (1848), where it was said that in New York the right had not been granted to mills of any kind, and that Massachusetts and Maine were the only exceptions to the general rule, but that a few states afforded facilities in such cases to a limited extent: Guernsey v. Burlington, 4 Dill., 372 (1877), by statute of Kansas.

³ Patterson v. Miss. R. R., 3 Dill., 465 (1875); Att'y-Gen. v. Evart, etc., Co., 34 Mich., 462 (1876).

⁴ Matter of Deansville Cemetery, 66 N. Y., 569 (1876).

Lumbard v. Stearns, 58 Mass., 60 (1849).
 Matter of Central Park, 63 Barb.,
 282 (1872).

⁷ Bloomfield, etc., R. Co. v. Richardson, 63 Barb., 437 (1872).

⁸ A railroad to be built solely for the private business of its chief stockholder cannot exercise the power of eminent domain. Weidenfeld v. Sugar, etc., R. R., 48 Fed. Rep., 615 (1892). A contract whereby a street railway turns over part of its line to a private firm, and the latter uses it exclusively for its private business and uses freight cars, the contract is void as against public policy. A joint property owner may enjoin such use. Fanning v. Osborne, 102 N. Y., 441 (1886).

9 Moran v. Lydecker, 27 Hun, 582 (1882). A railroad may be built by an individual. Bank of Middlebury v. Edgerton, 30 Vt., 182 (1858). But see dictum that railroad built without express authority from state is a nuisance. Raritan R. R. Co. v. Delaware, etc., Canal Co., 18 N. J. Eq., 546, 570 (1867); Penn. R. R. Co. v. Nat'l R'y Co., 23 id., 441 (1873); Erie R'y Co. v. Delaware, etc., R. R. Co., 21 id., 283 (1871). Contra, dictum, Hughes v. Chester, etc., R'y, 1 Dr. & Sm., 524, 546 (1861); S. C. on appeal, 3 De G., F. & J., 352 (1861); Commonwealth v. Erie & N. E. R. R., 27 Pa. St., 339 (1856), holding that where a railroad authorized to be built on a certain line is made upon another it is a mere nuisance on every highway it touches in its illegal course.

¹⁰ In Matter of Townsend, 39 N. Y., 171 (1868). authorized by statute to take land by right of eminent domain for public use.1

The constitutions of the various states generally prohibit the taking of private property for public use without just compensation to the owner. A similar provision exists in the federal constitution, but it applies only to the federal government and not to the states.² The provision in the federal constitution prohibiting the passing of statutes which impair the obligation of contracts does not limit the state's power of eminent domain;³ and even where the state has contracted with a corporation to give it exclusive privileges, or exempt it from taxation, or confer upon it any other valuable rights or property, any or all of these rights may be taken away from the corporation under the state's power of eminent domain.⁴

§ 905. The right of way — Obtaining it and abandoning it — One road condemning the property of another road — Monopolies.— Where one corporation has taken land or property under the power of eminent domain, or holds such land or property for public use, another corporation cannot take such land or property under the power of eminent domain unless a statute expressly or by necessary implication authorizes the latter corporation to do so.⁵

1 Morris Canal & B. Co. v. Townsend. 24 Barb., 658 (1857); Union, etc., R. R. Co. v. East. etc., R. R. Co., 14 Ga., 327 (1853); Dodge v. City of Council Bluffs, 57 Iowa, 560 (1881). Unless so authorized the former does not exist. Holbert v. St. Louis, etc., R. R. Co., 45 id., 23 (1876); Re New York, etc., R'y, 35 Hun, 220 (1885); Abbott v. N. Y., etc., R. R., 15 N. E. Rep., 91 (Mass., 1888). In Nebraska the constitution prohibits the exercise of the power of eminent domain by a foreign corporation. State v. Scott, 36 N. W. Rep., 121 (Neb., 1888); Trester v. Missouri P. R'y, 36 N. W. Rep., 502 (Neb., 1888). Where the constitution prohibits a foreign corporation from condemning land, such condemnation cannot be by a "dummy" domestic corporation. Koenig v. Chicago, etc., R. R., 43 N. W. Rep., 433 (Neb., 1889). A constitutional provision that no foreign railroad corporation should exercise the power of eminent domain does not prevent such foreign corporation from purchasing a right of

way. St. Louis, etc., R. R. v. Foltz, 52 Fed. Rep., 627 (1892). A foreign corporation may condemn land in Missouri under the right conferred on domestic corporations. St. Louis, etc., Co. v. Lewright, 21 S. W. Rep., 210 (Mo., 1893).

²Barron v. Baltimore, 7 Pet., 243 (1833); Withers v. Buckley, 20 How., 84 (1857); Pumpelly v. Green Bay Co., 13 Wall., 166 (1871). As to the right of the federal government to exercise the power of eminent domain, see Am. L. Reg., March-April, 1887.

³ West River Bridge Co. v. Dix, 6 How., 507 (1847).

⁴ See Cooley on Constitutional Limitations (5th ed.), p. 341.

5 Matter of Boston & A. R. R. Co., 53 c N. Y., 574 (1873), holding that the implication does not arise if the powers expressly conferred can be exercised without appropriating such land; Springfield v. Connecticut R. Co., 4 Cush., 63 (1849); State v. Montclair R'y Co., 35 N. J. L., 328 (1872); Northern R. R. Co. v. Concord & C. R. R. Co., 27 1528 Subject to this rule the right of eminent domain may be exercised over land already owned by corporations which have acquired it by the same power. Corporations take their charters and exercise their powers subject to the pre-eminent right of the state in this respect.¹

N. H., 183 (1853); Cleveland & P. R. R. Co. v. Speer, 56 Pa. St., 325 (1867): Little Miami, etc., R. R. Co. v. Dayton, 23 Ohio St., 510 (1872); Re City of Buffalo, 68 N. Y., 167 (1877), where the city attempted to take railroad switching grounds. A municipal corporation may condemn a railroad right of way for the purpose of opening a street. In re Grand Rapids, etc., v. Grand, etc., R. R., 33 N. W. Rep., 15 (Mich., 1887), One mining company cannot take under eminent domain the tunnel of another mining company. Amador, etc., Co. v. Dewitt, 15 Pac. Rep., 74 (Cal., 1887). One railroad company cannot condemn land occupied by the main line and sidetracks of another railroad, although the land was purchased by the latter. In re Providence, etc., R. R., 21 Atl. Rep., 965 (R. I., 1891).

¹ West River Bridge Co. v. Dix. 6 How., 507 (1848), affirming S. C., 16 Vt., 446 (1844), holding that this does not conflict with the clause in the United States constitution which forbids state legislatures from passing laws impairing the obligations of contracts: Richmond, F. & P. R. Co, v. Louisa R. R. Co., 13 How., 71 (1851); New York, H. & N. R. R. Co. v. Boston, H. & E. R. R. Co., 36 Conn., 196 (1869); Delaware & R. C. Co. v. Camden, 16 N. J. Eq., 321 (1863); Shorter v. Smith, 9 Ga., 529 (1851); Alabama & F. R. R. Co. v. Kenney, 39 Ala. (N. S.), 307 (1864); Newcastle & R. R. R. Co. v. Peru & Ind. R. R. Co., 3 Ind., 467 (1852), holding that one railroad might in this case condemn land owned by another; Red River B. Co. v. Clarkesville, 1 Sneed, 176 (1853); Illinois & M. C. Co. v. Chicago & R. I. R. R. Co., 14 Ill., 314 (1853); United States v. Railroad Bridge Co., 6 McLean, 517 (1855), holding that a state may

make a public road through lands of the United States: Barber v. Andover. 8 N. H., 398 (1836), where a turnpike was taken for a highway: Newburyport T. Co. v. Eastern R. R. Co., 23 Pick., 326 (1839), where a railroad was authorized to raise the grade of a turnpike: Springfield v. Connecticut R. Co., 4 Cush., 63 (1849): Commonwealth v. Erie & N. E. R. R. Co., 27 Pa. St., 339 (1856); Baltimore & H. de G. T. Co. v. Union R. R. Co., 35 Md., 224 (1871); Chicago, R. I. & Pac. R. R. Co. v. Town of Lake, 71 Ill., 333 (1874); Metropolitan City R'y Co. v. Chicago W. D. R'v Co., 87 Ill., 317 (1877): Eastern R. R. Co. v. Boston & M. R. R. Co., 111 Mass., 125 (1872), where a statute authorizing a railroad to take lands of another was held lawful; Boston & M. R. R. Co. v. Lowell & L. R. R. Co., 124 Mass., 368 (1878); New York, H. & N. R. R. Co. v. Boston, H. & E. R. R. Co., 36 Conn., 196 (1869); Peoria, P. & I. R. R. Co. v. Peoria & S. R. R. Co., 66 Ill., 174 (1872), holding that a leasehold of an existing railroad may be appropriated by another railroad duly authorized. A railroad may take land owned by a steamboat company. Re N. Y., etc., R'y, 99 N. Y., 12 (1885); In re N. Y. C., etc., R. R. Co., 77 N. Y., 248 (1879), where water fronts, streets and avenues were taken by a railroad under a special statute. But a railroad cannot take park property unless expressly authorized so Re Boston, etc., R. R. Co., 53 to do. N. Y., 574 (1873). One railroad cannot enjoin another railroad from using land purchased by the former at a crossing of streams for a road-bed, unless the second railroad company is unable to respond in damages or the place of crossing does not admit of two tracks. Raleigh, etc., Co. v. Glendon, etc., Co., 17 S. E. Rep., 77 (N. C., 1893). Condemning

And one railroad may cross another railroad or highway at a point where there is no station or special use made of the land. The right to do so arises from the manifest necessity, and the power need not be specially conferred.

In New York a railroad acquires an exclusive right to a specified right of way after it has filed its maps and given the notice required by statute.²

The right of a railroad to property taken by it by virtue of eminent domain is that of an easement. The fee remains in the person from whom the right of way is taken. This right of way,

land of another railroad. Colorado, etc., R'y v. Union, etc., R'y, 41 Fed. Rep., 293 (1890). A market owned by a private corporation may be condemned. Twelfth, etc., Co. v. Phil., etc., R. R., 21 Atl. Rep., 989 (Pa., 1891).

¹ Baltimore & H. de G. T. Co. v. Union R. R. Co., 35 Md., 224 (1871); Brooklyn, C. & J. R. R. Co. v. Brooklyn C. R. R. Co., 33 Barb., 420 (1861), involving street railways; New York & H. R. R. Co. v. Forty-second St. & G. S. F. R. R. Co., 50 Barb., 309 (1867); Matter of Central R. R. Co. of L. I., 1 T. & C., 419 (1873); Starr v. Camden & Atl. R. R. Co., 24 N. J. L., 592 (1854), holding that a railroad cannot cross a highway without compensating the owner of the soil; Morris & E. R. R. Co. v. Central R. R., etc., 31 N. J. L., 206 (1865), holding that express power to cross another track is not necessary; Greenwich v. Easton & A. R. R. Co., 24 N. J. Eq., 217 (1874), holding that power to change the grade of a highway cannot be exercised merely for the convenience of a railroad; a necessity must exist. Under a state statute a railroad may cross another railroad which is chartered by the federal government. Union Pac. R'y Co. v. Leavenworth, etc., R'y Co., 29 Fed. Rep., 728 (1887). As to the pleadings in an action by one corporation to condemn property of the other, see Denver, etc., Co. v. Union, etc., R'y, 34 Fed. Rep., 386 (1888). In order to pass through a narrow pass, one railroad may condemn such parts of another railroad right of way as the

latter is not using, where its right of way is broad enough for two tracks. Armiston, etc., R. R. v. Jacksonville, etc., R. R., 2 S. Rep., 710 (1887). A stockholder in a road which is in a receiver's hands may enjoin another railroad from crossing it. Howlett v. N. Y., etc., R'y, 14 Abb. N. C., 328 (1882). One railroad may condemn the right of way to cross another railroad. National Docks, etc., R'y v. State, 21 Atl. Rep., 570 (N. J., 1891).

²Rochester, etc., R. R. v. N. Y., etc., R. R., 110 N. Y., 128 (1888). Cf. Third Ave. R. R. Co. v. N. Y. El. R. R. Co., Superior Ct., N. Y. Daily Reg., July 14, 1887. See, also, Morris & Essex R. R. v. Blair, 9 N. J. Eq., 635 (1866), holding that if neither of the charters of two railroads prescribes rules for the determination of the right of way the road which first actually surveys its line is entitled to the prior right. See, also, Troy etc., R. R. v. Boston, etc., R. R., 86 N. Y., 107 (1881). See Pierce on Railroads. p. 155, for many cases on conflict and interference of prior and subsequent grants, etc. Prior in location and survev held prior in right to another that actually built. Railway Co. v. Alling, 99 U. S., 463 (1878). A railroad which has located but not acquired its route cannot enjoin another company from locating on and acquiring that route. N. Y., etc., R. R. v. N. Y. W. S., etc., R. R., 11 Abb. N. C., 386 (1882).

³ Aldrich v. Drury, 8 R. I., 554 (1867), holding, however, that a railroad may grade and use the earth for filling, etc.,

however, is property and it belongs to the company, even though it is abandoned for a long period of years.¹ The expiration of the

in other places, but cannot sell the earth to other parties; Chapin v. Sullivan R. R. Co., 39 N. H., 564 (1859), to same ef-A deed to a railroad of a right of way may be so drawn as to convey a fee. Ballard v. Louisville, etc., R. R., 5 S. W. Rep., 484 (Ky., 1887). The fee and the right to the trees, etc., upon it and to the minerals, etc., below it remain in the owner subject to such easement. Blake v. Rich, 34 N. H., 282 (1856); Henry v. Dubuque & Pac. R. R. Co., 2 Iowa, 288 (1855). The original proprietor may use the property in any way consistent with the public right. Jackson v. Hathaway, 15 Johns., 447 (1818); Blake v. Rich, 34 N. H., 282 (1856); Adams v. Rivers, 11 Barb., 390 (1851). And see Jackson v. Rutland, etc., B. R. Co., 25 Vt., 151 (1853); Dean v. Sullivan R. R. Co., 22 N. H., 316, 321 (1851); Quimby v. Vermont Central, etc., 23 Vt., 387 (1851); Weston v. Foster, 7 Metc., 297 (1843); Giesy v. Cincinnati, W. & Z. R. Co., 4 Ohio St., 308 (1854); Henry v. Dubuque, etc., P. R. Co., 2 Iowa, 288 (1855).

1 Non-user of the whole right of way is no abandonment of it. Penn. R. R. v. Freeport, 20 Atl. Rep., 940 (Pa., 1890). A railroad right of way does not lapse merely because it is not used for thirteen years. Barlow v. Chicago, etc., R. R., 29 Iowa, 276 (1870). The state may convey to another railroad au abandoned right of way. Long abandonment does not destroy the right of way. Noll v. Dubuque, etc., R. R., 32 Iowa, 66 (1871); Henderson v. Central, etc., R'y, 21 Fed. Rep., 358 (1884). See, also, Chicago, etc., R. R. v. M. & A. R. Co., 57 Iowa, 249 (1881), holding that where a railroad company built and conducted its lines over a portion of the route set forth in its charter, but failed for a period of five years to build its road over another portion, or to evince an intention of building the same, that, as to the part not taken and used for the purposes of the company, there had been an abandonment, and another company was allowed to condemn and take the same for railroad purposes. A railroad by long ahandonment of a right of way may lose it. Beattie v. Carolina, etc., R. R., 12 S. E. Rep., 913 (N. C., 1891). An abandonment for ten years of a right of way and an adverse possession for that length of time is fatal to the company's claim. Brown v. Chicago, etc., R'y, 14 S. W. Rep., 719 (Mo., 1890). A railroad may be confined to a single right of way. Jay v. St. Louis, 138 U. S., 1 (1891). As to the right of one railroad to obtain the right to use the tracks of another company, see Lake, etc., R. R. Co. v. Cincinnati, etc., R'y Co., 19 N. E. Rep., 440 (Ind., 1888). In Chicago, etc., R'y v. Loewenthal, 93 Ill., 433 (1879), a mortgage given by a railroad company which had done a little grading and then abandoned the enterprise was not allowed as a lien upon the road as completed by a later railroad company that used the same right of way. One railroad cannot condemn and use a parallel track of another for eleven miles, under a statute authorizing crossings. Illinois Central R. R. v. Chicago, etc., R. R., 13 N. E. Rep., 140 (Ill., 1887). Cf. 6 S. Rep., 404. Where one road has possession of a right of way, equity will enjoin another road from interfering until the right has been judicially passed upon. Montana, etc., R'y v. Helena, etc., R. R., 12 Pac. Rep., 916 (Mont., 1887). Where two parties are litigating by a bill to quiet title to obtain title and possession of an unused railroad track. both parties being out of possession, the court will not appoint a receiver. St. Louis, etc., R. R. v. Dewees, 23 Fed. Rep., 519 (1885). Although a railroad company takes up its tracks and abandons its right of way for ten years, using a line which it leases, yet at the end of charter of the company does not put an end to its right to the right of way.1

The legislature has power to grant a monopoly to a railroad and thus bind the state not to charter another parallel railroad.² But such monopolies are never granted by implication, and are construed away whenever possible.³

§ 906. A railroad may contract to carry passengers or freight beyond its own line.4— Where a contract to deliver at the point of destination is entered into, the contracting railroad becomes

that time it may resume possession, although the adjacent owners have fenced it in. Durfee v. Peoria, etc., R'y, 30 N. E. Rep., 686 (Ill., 1892). Non-user is not an abandonment of a right of way; yet if there is a clear intent to abandon and improvements by the owner of the fee are allowed the right is lost. Roanoke, etc., Co. v. Kansas, etc., R. R., 17 S. W. Rep., 1000 (Mo., 1891).

¹ Although a railroad takes but a right of way, yet this does not revert to the owner of the fee upon the termination of the railroad charter. The right of user for a railroad is held to be perpetual. Miner v. N. Y. C., etc., R. R., 123 N. Y., 242 (1890).

² An exclusive right to have a railroad between two points granted by the legislature is a protected contract, and competitors will be enjoined. Boston, etc., R. R. Corp. v. Salem, etc., R. R. Co., 68 Mass., 1 (1854). The legislature cannot authorize a railroad to use for the distance of five miles the tracks of a railroad whose charter gave it exclusive right to the use of the track and there was no reserved right of amendment. Pennsylvania R. R. Co. v. Balt. & O. R. R. Co., 60 Ind., 263 (1883).

⁸ An exclusive right to a railroad to transport passengers between two places is not violated by another railroad which may be used for merchandise alone. Richmond, etc., R. R. Co. v. Louisa R. R., 13 How., 71 (1851). In the case of Connecting R'y Co. v. Union R'y Co., 108 Ill., 265 (1884), the court said: "The mere grant of the right to build a railroad between given termini creates no

implied obligation by the state to not thereafter grant the right to other companies to build other railroads parallel with it between the same termini; nor that other railroads with their tracks and switches shall not thereafter be granted the right to cross the state in a different direction, and thus pass over its tracks and switches."

4 Wheeler v. San Francisco & A. R. R., 31 Cal., 46 (1866); Perkins v. Portland, Saco & P. R. R., 47 Me., 573 (1859); Railway Co. v. McCarthy, 96 U. S., 258 (1877); Atchison, Topeka & S. F. R. R. v. Denver & N. O. R. R., 110 U. S., 667 (1883); Hill Manufacturing Co. v. Boston & B. R. R. Co., 104 Mass., 122 (1870); Noyes v. Rutland & Bur. R. R., 7 Vt., 110 (1854): Kessler v. New York Central R. R., 7 Lans., 63 (1872), holding that selling a ticket with coupons attached for other roads is a contract for transportation upon such roads. A contract to carry beyond the line of a railroad may be inferred from circumstances and need not be express. Wilby v. West Cornwall R'y Co., 2 H. & N., 703 (1858); Candee v. Penusylvania R. R. Co., 21 Wis., 582 (1867); Baltimore & P. S. Co. v. Brown, 54 Pa. St., 77 (1867); Converse v. Norwich & N. Y. Trans. Co., 33 Conn., 166 (1865); Perkins v. Portland, Saco & P. R. R., 47 Me., 573 (1859), holding that it may be so bound without any special arrangement if by its agents it holds itself out to be a common carrier to a place beyond the limits of its own road. Nashua Lock Co. v. Worcester & N. R. R., 48 N. H., 339 (1869).

responsible for the loss or damages of freight and injuries to passengers occurring upon other lines to the same extent as if the loss, damage or injury happened upon its own line.¹

The liability of a road, contracting to deliver beyond its own

¹ Noves v. Rutland & Bur. R. R., 7 Vt., 110 (1834); Morse v. Brainerd, 41 Vt., 550 (1869); Railway Co. v. Platt, 107 U. S., 123 (1874); Grover & Baker S. M. Co. v. Missouri Pacific R'v Co., 70 Mo., 672 (1869); Nashua Lock Co. v. Worcester, etc., R. R., 48 N. H., 339 (1869); Candee v. Pennsylvania R. R., 21 Wis., 582 (1867); Converse v. Norwich & N. M. Trans. Co., 33 Conn., 166 (1865): Baltimore & P. S. Co. v. Brown, 54 Pa. St., 77 (1867); Stewart v. Erie & Western Trans. Co., 17 Minn., 372 (1871); Railway Co. v. McCarthy, 96 U. S., 258 (1877); Hill Mfg. Co. v. Boston, etc., R. R., 104 Mass., 122 (1870); Railroad Co. v. Manufacturing Co., 16 Wall., 324 (1872); Bissell v. Michigan Southern and N. I. R. R. Cos., 22 N. Y., 258 (1860), holding that, where two roads chartered by different states united in the business of transporting passengers over a third line in another state, they were jointly liable for injuries caused by the latter; Burtis v. Buffalo & S. L. R. R., 24 N. Y., 269 (1862), holding that under the New York statute a railroad is liable for the delivery of freight upon a connecting line in another state; Buffit v. Troy & Boston R. R., 40 N. Y., 168 (1869), holding that, where a railroad hired a man to run stages from a village to its station and to sell tickets from the village to points on its line, it was liable for injuries received by a passenger on the stage. Whether the transaction was ultra vires or not the road was liable for its negligence in executing its contract. Upon the last point, see Hood v. New York & N. H. R. R., 22 Conn., 1, 502 (1853), holding that such a contract was not within the powers of the corporation, and was not obligatory upon it; Angle v. Mississippi & Mo. R. R. Co., 9 Iowa, 488 (1859), where it was held that a railroad which received goods marked for a point upon

another road is prima facie bound to carry and deliver them according to the marks. To same effect, Kyle v. Laurens R. R., 10 Rich., 382 (1857). But see Root v. Great Western R. R., 45 N. Y., 524 (1871), where it was beld that merely receiving goods marked for a place bevond its own terminus will not render a road liable for losses not occurring on its own line unless there be proof of an undertaking to deliver at the destination: McCluer v. Manchester & L. R. R., 13 Gray, 124 (1859), where a railroad was held liable for freight received for transportation over a leased line; and holding, also, that parol evidence that a foreign corporation has held itself out, through its agents, as a common carrier over a road in Massachusetts, is sufficient to sustain an action for damages to freight. The agreement does not constitute a partnership. Mohawk, etc., R. R. v. Niles, 3 Hill, 162 (1842); Illinois Central R. R. v. Copeland, 24 Ill., 332 (1860), holding that a road which sells tickets over its own and other roads is liable for the safety of the passengers and baggage to the point of destination; Najac v. Boston & Lowell R. R., 7 Allen, 329 (1863), holding that a road having sold a ticket for an excursion over its own line and others is liable for loss of baggage upon another road. There may be a joint liability; Wylde v. Northern R. R., 53 N. Y., 156 (1873); Milnor v. New York & N. H. R. R., 53 N. Y., 363 (1873), holding that, if there is no contract to deliver at destination, but only an agency for the sale of tickets, the road selling a ticket is not liable for a loss of baggage upon another road, Where goods are carried by connecting lines an injury to the goods by the first line will not give a cause of action against the line which receives the goods after the injury occurs. Darling line, for losses, damages and injuries happening upon lines otherthan its own, may be limited or released by special contract with the consignor.¹ But a mere notice by which the road seeks to avoid its liability is not sufficient to relieve it from liability.²

It has been held that railroads cannot establish steamboat lines, nor own steamboats to run in connection with their roads.

v. Boston, etc., R. R., 93 Mass., 295 (1865): Gass v. New York, etc., R. R., 99 Mass., 220 (1868). Unless a railroad by express contract limits its liability it is liable for loss of freight over a connecting line to which it delivers it. Alabama. etc., R. R. v. Mount, etc., Co., 4 S. Rep., 356 (Ala., 1888). A railroad is liable for the delay of a connecting line in delivering goods sent over both lines. Savannah, etc., R'y v. Pritchard, 1 S. E. Rep., 261 (Ga., 1887); but see Knott v. Raleigh, etc., R. R., 3 S. E. Rep., 735 (N. C., 1887); Ortt v. Minneapolis, etc., R'y, 31 N. W. Rep., 519 (Minn., 1887). Cf. Independence, etc., Co. v. Burlington, etc., R. R., 34 N. W. Rep., 320 (Iowa, 1887); Pennsylvania, etc., Nav. Co. v. Dandridge, 8 G. & J., 248 (1836), holding that a corporation chartered to carry between two points is not liable for property lost in the carriage by the corporation to a third point. St. Louis, etc., R'v v. Weakly, 8 S. W. Rep., 134 (Ark., 1888). Suit cannot be brought against the last connecting line for baggage lost somewhere or other on one of several connecting lines. Atchison, etc., R. R. v. Roach, 12 Pac. Rep., 93 (Kan., 1886). An intermediate line is not liable for the negligence of subsequent connecting lines. Hill v. Burlington, etc., R. R., 60 Iowa, 196 (1882). But the rule may be otherwise where all the lines are partners in the fast freight line. Block v. Fitchburg R. R., 139 Mass., 308 (1885). The right of a railroad to forward freight by any one of connecting lines cannot be limited by an oral agree-Snow v. Indiana, etc., R'y, 9 N E. Rep., 702 (Ind., 1887). A railroad company is liable for the negligence of train hands on an excursion train of

another line which is allowed to run on the tracks of the former company. Washington v. Raleigh, etc., R. R., 7 S. E. Rep., 789 (N. C., 1888). Connecting line liability. Kerigan v. Southern, etc., R. R., 22 Pac. Rep., 677 (Cal., 1889).

¹ Mashur v. St. Louis, etc., R. R. Co., 127 U. S., 390 (1888). May contract against liability on connecting line. Nines v. St. Louis, etc., R. R., 18 S. W. Rep., 26 (Mo., 1891); Evansville R. R. Co. v. Androscoggin Mills, 22 Wall., 594 (1874). In this case an exemption from loss by fire was held to apply to the whole distance, and to release the road from liability for such a loss occurring upon another road. Railroad v. Manufacturing Co., 16 Wall., 324 (1872); Mobile & Ohio R. R. v. Franks, 41 Miss., 494 (1867), holding that by statute of Mississippi a railroad is liable as a common carrier though there be a special contract limiting its liability. A stipulation that the carrier should not be liable for the negligence of a connecting road is void. Gulf, etc., R. R. v. Vaughn. 16 S. W. Rep., 775 (Tex., 1890). See, also, § 907, infra.

² Cincinnati, H. & D. R. R. v. Pontius, 19 Ohio St., 221 (1869), where it was said that such a notice is void as being against public policy; Railroad Co. v. Manufacturing Co., 16 Wall., 324 (1872), in which an unsigned general notice on the back of a receipt was held not to amount to a contract of release though accepted by the consignor without dissent.

³ Lyde v. Eastern Bengal R'y Co., 36 Beav., 10 (1866); Pearce v. Madison, 21 How., 441 (1858), holding a note given for a steamboat not collectible; Central R. R. v. Smith, 76 Ala., 572 (1884); Gunn A railroad which has been leased is liable in regard to the road to the same extent as though no lease had been made unless the statute provides otherwise.¹ The lessee is also liable.² A railroad

v. Central R. R., 74 Ga., 509 (1885), holding that a road cannot enter into a partnership with an individual to run a line of boats to carry passengers: St. Joseph v. Saville, 39 Mo., 460 (1867), holding that officers and agents of a railroad cannot use its funds in running a steamboat in connection with it: a contract for that purpose is not legal. To same effect, Hoagland v. Hannibal & St. J. R. R., 39 Mo., 451: Rutland & B. R. R. Co. v. Proctor, 29 Vt., 95 (1856), holding that, if a railroad has purchased steamboats without authority, yet if it did so without objection from its stockholders or the state, it may sell them and hold the purchaser for the price. Downing v. Mt. Washington, etc., 40 N. H., 230 (1860), holding that a railroad corporation has no power to establish a stage line for transportation purposes, nor to purchase horses and carriages for that purpose, and may defeat an action for not accepting the stages. But where the railroad has purchased a steamboat and given a draft therefor and is sued on the draft it is liable. Parish v. Wheeler, 22 N. Y., 494 (1860). One who contracts to run a boat in connection with a railroad, and furnishes a poor boat causing a loss of freight, is liable therefor to the railroad. South Wales R'y Co. v. Redmond, 10 C. B. (N. S.), 675 (1861); Wheeler v. San Francisco & A. R. R., 31 Cal., 46 (1866), holding that a railroad may own and control steamboats for transporting its

trol steamboats for transporting its freight and passengers over navigable streams on its line and constituting a

2 Wasmer v. Delaware, etc., R. R. Co., 80 N. Y., 212 (1880), where there were defective rails. Where connecting roads transfer freight by using cars owned by one company, the cars being labeled "Green Line," a cause of action for loss of freight in one of the cars while being hauled over another line

part of its route: Baltimore v. Baltimore & O. R. R. Co., 21 Md., 50 (1863), holding that two railroads may be connected by a ferry: Forest v. Manchester S. & L. R'v Co., 30 Beav., 40 (1861), holding that a railroad authorized to keep steamboats for a ferry may use them when not employed in the ferry for excursion purposes: Calloway M. & Mfg. Co. v. Clark, 32 Mo., 305 (1862), holding that a corporation chartered to mine and transport coal is empowered to purchase and use a steamboat for transporting: Shawmut Bank v. Plattsburgh & M. R. R. Co., 31 Vt., 491 (1859). holding that a railroad authorized by charter to contract for delivery beyond its line may purchase a steamboat to transport freight and passengers from its own line to another; Morgan v. Donovan, 58 Ala., 241 (1877), holding that, where a railroad company was authorized to purchase such steamboats as the directors might deem necessary for the use of the road, the purchase of hoats from an opposition line for the purpose of withdrawing them from business was not within the charter, and that a mortgage covering steamboats used in connection with the road did not include the boats so purchased.

¹ York & Maryland L. R. R. Co. v. Winans, 17 How., 30 (1854), a case of infringement of patent; Whitney v. Atlantic & St. Lawrence R. R., 44 Me., 362 (1854), involving a loss occasioned by neglect to erect fences; International, etc., R. R. Co. v. Moody, 9 S. W. Rep., 465 (Texas, 1888); Wyman v.

does not sustain an attachment against other "Green Line" property. Irvine v. Nashville R'y, 92 Ill., 103 (1879). The lessee is also liable for the torts of agents which it has in common with the lessor. Wabash, etc., R. R. v. Peyton, 106 Ill., 534 (1883).

is liable for torts although it has turned over the road to mortgage trustees 1

A railroad allowing another company also to use its tracks is liable for accidents caused by the latter.²

§ 907. Contracts by a railroad against its liability for negligence.— There is a wide difference of opinion as to whether a railroad company may shield itself from liability for its own negligence by a contract with the shipper to that effect. The weight of authority holds that it cannot.³ In England, however, and several of the states such a contract is upheld.⁴

Penobscot & K. R. R., 46 Me., 162 (1858); Singleton v. Southwestern R. R., 70 Ga., 464 (1883); Nelson v. Vermont & Canada R. R., 26 Vt., 717 (1854); Central, etc., R. R. v. Morris, 3 S. W. Rep., 457 (Tex., 1887); Longley v. Boston & Maine R. R., 10 Gray, 103 (1857); Harmon v. Columbia, etc., R. R., 5 S. E. Rep., 835 (S. C., 1888); Ohio & Mississippi R. R. Co. v. Dunbar, 20 Ill., 623 (1858); Nugent v. Boston, etc., R. R., 12 Atl. Rep., 797 (Me., 1888); Scott v. Grand Trunk R'y Co., 51 N. Y., 655 (1873), where the lessor was held for repairs upon a steamboat; Wylde v. Northern R. R. of N. J. & E. R'y Co., 53 N. Y., 156 (1873), where both the lessor and the lessee were held for injuries received by a passenger; Mahoney v. Atlantic & St. L. R. R., 63 Me., 68 (1873), holding that if the lessee operates the road the lessor is not liable for injuries to a passenger; Pittsburgh, Cin. & St. L. R'y Co. v. Kain, 35 Ind., 291 (1871), holding that a lessee cannot be held for the torts of the lessor committed before the execution of the lease; Abbott v. Johnstown, etc., R. Co., 80 N. Y., 27 (1880). A lessor railroad is liable for injuries on its road, even though it has leased the same to another railroad with the consent of the legislature. Chollette v. Omaha, etc., R. R. Co., 41 N. W. Rep., 1106 (Neb., 1889). A lease with legislative authority relieves the lessor from liability for the lessee's negligence. Virginia, etc., R'y v. Washington, 10 S. E. Rep., 927 (Va., 1890). But not if the lease is made without legislative authority. Ricketts v. Chesapeake, etc., R'y, 10 S. E. Rep., 801 (West Va.. 1890). Dictum that a lessor of a railroad is not liable for the torts of the lessee if the lease is authorized by statute. The lessor is liable, however, if the lease was unauthorized. Briscoe v. Southern Kan. R'y, 40 Fed. Rep., 273 (1889).

¹ Naglee v. Alexandria, etc., R'y, 2 S. E. Rep., 369 (Va., 1887). But see ch. LI, supra.

² Pennsylvania Co. v. Ellett, 24 N. E. Rep., 559 (Ill., 1890).

3 In the federal courts a common carrier's contract exempting itself from its own negligence is void. Liverpool, etc., Co. v. Phenix, etc., Co., 129 U. S., 397 (1889). The tendency in the United States courts is against any further relaxation of the common-law liability. Eells v. St. Louis, etc., R'y, 52 Fed. Rep., 903 (1892); Hart v. Chicago, etc., R'v. 69 Iowa, 485 (1886); Railroad Co. v. Manufacturing Co., 16 Wall., 318 (1872); Wabash, etc., R. R. v. Jaggerman, 115 Ill., 407 (1886), holding void a contract exemption of the road from liability for its own negligence. In Texas the statute forbids railroads from limiting their liability at common law. Gulf, etc., R'y v. Trawick, 4 S. W. Rep., 567 (1887). In Indiana and Alabama a railroad cannot by contract limit its liability to that of gross negligence. Alabama, etc., R. R. v. Thomas, 3 S. Rep., 802 (Ala., 1888): Rosenfield v. Peoria, etc., R'y, 103 Jnd., 121 (1885); Bartlett v. P., C. & St. L. R'y, 94 Ind., 281 (1883).

⁴ In England the rule seems to be that

Directors are not criminally liable for accidents where they were not personally in charge of the running of the road.

§ 908. Miscellaneous ultra vires and intra vires acts of railroad companies.— A railroad corporation has no power to take by gift lands lying along its route. An agreement of a railroad with a competing line not to complete the road is illegal and void. A railroad company cannot improve a river although it has power to build wharves; 4 and a stockholder in a railroad company may en-

the carrier may even shield itself from the consequences of its own negligence by an actual special contract. Carr v. Lancashire, etc., R'y, 14 Eng. L. & Eq., 340 (1852); S. C., 7 Exch., 707; McManus v. Lancashire, etc., R'y, 2 H. & N., 693; Stevens v. Great W. R'v, 52 L. T. Rep., 324 (1885): Austin v. Manchester, etc., R'y, 10 C. B., 454; Morville v. Great North, R'v. 10 Eng. L. & Eq., 366. In England a statutory duty to carry dogs prevents the railway from contracting for no liability beyond a certain sum, unless an extra price is paid. Dickson v. Great, etc., R'y, 55 L. T. Rep., 868 (1887). But, contra. Great W. R'y v. McCarthy, 56 L. T. Rep., 582 (1887), as to cattle. Cf. Cutler v. North, etc., R'y, id., 639 (1887), as to baggage; Goldsmith v. Great E. R'y, id., 181 (1881); and contra, Brown v. M. S. & L. R'y, 48 L. T. Rep., 473 (1883), reversing 46 id., 389 (1882), and holding that a certain contract against liability was void. In America the authorities are agreed that carriers may stipulate for a less degree of responsibility than that imposed by common law, but they differ as to the degree. Express Co. v. Caldwell, 21 Wall., 264 (1874); York Co. v. Central R. R., 3 id., 107 (1865); Field v. Chicago, etc., R. R., 71 Ill., 458 (1874); Squire v. N. Y. C. R. R., 98 Mass., 239 (1867); Powell v. Penn. R. R., 32 Pa. St., 414 But some of the states, as New York, are much more inclined to adopt the liberal view of the English courts. Kirkland v. Dinsmore, 62 N. Y., 171 (1875); Hinckley v. N. Y. C. & H. R. R. R., 56 N. Y., 429 (1874); Magnin v. Dinsmore, id., 168; Collender v. Dinsmore, 55 N. Y., 200 (1873). An exemp-

tion of a railroad from liability for accident to a person riding on a free pass containing such exemption is valid. Ulrich v. N. Y., etc., R. R., 108 N. Y., 80 (1888). A railroad may restrict its liability for freight except in cases of its own negligence. Hutchinson v. Chicago, etc., R'v, 35 N. W. Rep., 433 (Minn., 1887). In Pennsylvania a common carrier may limit its common-carrier liability by special contract. Penn. R. R. v. Riordan, 13 Atl. Rep., 324 (Pa., 1888). A limited liability contract, legal where it is made, is legal on the route in another state, although the latter state holds such contracts to be void. Western. etc., R. R. v. Exposition, etc., 7 S. E. Rep., 916 (Ga., 1888). A provision requiring notice of damage to live-stock to be given within five days is legal. Black v. Wabash, etc., R. R., 111 Ill., 351 (1884), Limitation of common carrier's liability for negligence. Central, etc., Co. v. Smitha, 4 S. Rep., 708 (Ala., 1888). In Pennsylvania a common carrier may contract against losses due to negligence. Forepaugh v. Del., etc., R. R., 18 Atl. Rep., 503 (1889). See, also, on this subject, Peterson v. Chicago, etc., R. R., 45 N. W. Rep. 573 (Iowa, 1890); Louisville, etc., R. R. v. Gilbert, 12 S. W. Rep., 1018 (Tenn., 1890); Richmond, etc., R. R. v. Payne, 10 S. E. Rep., 749 (Va., 1890).

¹ State v. —, 9 R'y & Corp. L. J., 439 (N. Y., 1891).

² Case v. Kelly, 133 U. S., 21 (1890).

³ Hartford, etc., R. R. v. N. Y., etc., R. R., 3 Rob. (N. Y.), 411 (1865); State v. Hartford, etc., R. R., 29 Conn., 558 (1861).

⁴ Munt v. Shrewsbury, etc., R'y Co., 13 Beav., 1 (1850). join it from subscribing for stock in another company.¹ A railroad cannot go into the water transportation business.² A stockholder may enjoin a railway from donating its funds to an exhibition, even though it is claimed that thereby the corporate receipts will be increased.³ Where a railroad company is about to extend its line beyond the limits fixed by the charter, a dissenting stockholder may enjoin it from so doing.⁴ A railroad is bound by its contract to give its patronage to a hotel if built.⁵ A stockholder's action to prevent his company from devoting all its resources to completing one line instead of all the lines will fail.⁶

Where a railway supply company contracted to advance funds to a railway construction company, and the latter sued the former for non-fulfillment of its contract, the suit failed, although the stockholders had expressly ratified the *ultra vires* contract. A land-owner cannot enforce against a company a contract made with its promoters whereby he was to receive an exorbitant price for his land, the real consideration being the withdrawal of his opposition to the charter. A railroad cannot pay for prosecuting criminals.

¹ Mannuell v. Midland, etc., R'y Co., 1 Hem. & M., 130 (1863). Or buying stocks. Central R. R. Co. v. Collins, 40 Ga., 582 (1869); Salomons v. Laing, 12 Beav., 339 (1849). See chs. IV, XIX, etc. And there are many other similar acts which are ultra vires acts, and which the stockholders may enjoin. They have been treated and explained in the various chapters of this work, under appropriate headings, q. v.

² Hartford & New Haven R. R. Co. v. Croswell, 5 Hill, 383 (1843), per Nelson, C. J.

³Tomkinson v. South., etc., R'y Co., 56 L. T. Rep., 812 (1887). See, also, cb. XL, supra.

⁴Bagshaw v. Eastern Union R'y Co., 7 Hare, 114 (1849). Even though the extension be authorized by an amendment. See Stevens v. Rutland, etc., R. R. Co., 29 Vt., 545 (1851).

⁵ Texas, etc., R. R. Co. v. Robards, 60 Texas, 545 (1883).

⁶ Hodgson v. Earl Powis, 1 De G., M. & G., 6 (1851).

⁷Riche v. Ashbury R'y Carriage Co., L. R., 7 H. L., 653 (1875); reversing L. R., 9 Ex., 224. 8 Preston v. Liverpool, etc., R'y Co., 5 H. of L. Cases, 605 (1856). In Maunsell v. Midland, etc., R'y Co., 1 Hem. & M., 130 (1863), a stockholder enjoined the directors from contributing towards the promotion of another railway bill; also from agreeing to subscribe to stock of another company, such subscriptions being legal only on a three-fourths vote of the stockholders; also from making traffic arrangements in excess of those allowed by statute. But he cannot complain that the acts are ultra vires of the other corporation. See, also, p. 1540, n.

9 Marshall v. Baltimore & Ohio R. R. Co., 16 How., 314 (1853); Caledonian R'y v. Solway R'y, 49 L. T. Rep., 526 (1883); Pingrey v. Washburn, 1 Aik. (Vt.), 264 (1826); Reed v. Paper Tobacco Warehouse Co., 2 Mo. App., 82 (1876). In this case the agreement of a corporation which collected the fees of state inspection officers wherehy it was to retain a part of such fees in consideration of forbearing its efforts to procure a repeal of the law by which they were appointed was held void. Low v. Connecticut & P. R. R., 46 N. H., 284 (1865). But in this case indemnity given in consideration of

1538

A corporate contract which is contrary to public policy is void exactly as it is void when entered into by an individual.¹

It has been a difficult question whether a change of the location or route of a railroad company by the directors or the majority of the stockholders is an ultra vires act of which a stockholder may complain. The prevailing opinion seems to be that it is ultra vires if the change is a material one. And there are many other acts which the stockholders may remedy as being ultra vires. Any act of the corporation that will render the charter liable to forfeiture, or heavy fines and penalties, may be enjoined by a stockholder. But a stockholder cannot prevent the corporation from applying to one purpose moneys raised for another purpose; nor can he compel a cessation of work by the corporation merely because it has not completed its line within the time prescribed by the charter; nor can he prevent a reasonable application of the profits of the company to an extension of the business; but he may enjoin

a withdrawal of opposition to the granting of a charter was enforced, it appearing that the legislature was not influenced by the transaction. Ricord v. Central Pac. R'y Co., 15 Nev., 167 (1880); Kelsey v. National Bank of Crawford Co., 69 Pa. St., 426 (1871), holding that the corporation may offer a reward for the detection of a criminal; American Express Co. v. Patterson, 73 Ind., 430 (1881), that corporation may employ and pay an agent to detect crime against it.

¹ Such as a contract to obtain a law from the legislature, Marshall v. Baltimore & O. R. R. Co., 16 How., 314 (1853); a contract by a railroad company not to have or use a depot within a certain distance of a specified place. St. Joseph, etc., R. R. Co. v. Ryan, 11 Kan., 602 (1873); a contract to locate a railroad depot upon the plaintiff's laud, and at no other place in the town, Marsh v. Fairbury, etc., R. R. Co., 64 Ill., 414 (1872) (cf. §§ 82, 83); a contract not to build any railroad station within three miles of a specified place, St. Louis, etc., R. R. Co. v. Mathers, 71 Ill., 592 (1874); a contract by the president and directors of a railroad company for the purchase of claims against the company, McDonald v. Houghton, 70 N. C., 393 (1874); a contract for the

sale and transfer of the property and franchise of a railroad company before its road has been completed. Clarke v. Omaha, etc., R. R. Co., 5 Neb., 314 (1877); an agreement on the part of a turnpike corporation to grant to individuals the privilege of passing the gate free of toll, in consideration that they would withdraw their opposition to a legislative act touching the alteration of the road, Pingrey v. Washburn, 1 Aik. (Vt.), 264 (1826). Where the parties to a contract which is void for this reason are not equally guilty, if the relief asked for is consistent with public policy it will be given. Ohio Life, etc., Co. v. Merchants' Ins. & T. Co., 11 Humph., 1 (1850), holding that a prohibition against engaging in mercantile business refers only to making such a business the general or principal business of the corporation, and does not forbid an exceptional or single venture in trade.

²See §§ 187, 429, 500; Board, etc., of Tippecanoe Co. v. Lafayette, etc., R. R. Co., 50 Ind., 85 (1875).

³ Bliss v. Anderson, 31 Ala., 612 (1858).
 ⁴ Yetts v. Norfolk R'y Co., 3 De G. & Sm., 293 (1849).

⁵ Ffooks v. South, etc., R'y Co., 1 Sm. & G. (1853).

ne ⁶See ch. XXXII.

the organization of the company when it is about to be made by a fraud on the law and on the state. And it has been held that he may enjoin the company from proceeding to build a part only of the line of railroad prescribed by the charter.

The directors cannot legally use the funds of the corporation to induce promoters to abandon a proposed rival company. A stockholder may enjoin the directors from making free of tolls a bridge from which the corporation derives its income. The directors may be held liable for allowing the president to use the corporate funds for lobbying purposes. An unreasonable use of the corporate profits of a leased railroad to build up and improve the lessor railroad, without reference to the rights of the lessee, has been held to be a good cause of complaint on the part of a stockholder in the leased railroad company. A railroad may construct a telegraph line and may rent surplus rolling stock.

A railroad having power to construct a broad-gauge railroad may construct a narrow-gauge one also. In cannot pay an exorbitant price for land in consideration of the land-owner withdrawing opposition to the charter. It cannot aid improvement schemes, I

¹ Cass v. Ottawa, etc., Ins. Co., 22 Grant (U. C.), 512 (1875), the capital stock not having been paid in as certified in the certificate.

 2 Cohen v. Wilkinson, 1 Mac. & G., 481 (1849).

³ Russell v. Wakefield Water-works Co., L. R., 20 Eq., 474 (1875), holding also that the promoters may be made parties defendant, and be compelled to refund the money.

⁴ East Rome, etc., Co. v. Nagle, 58 Ga., 474 (1877).

⁵Shea v. Mabry, 1 Lea (Tenn.), 319 (1878). And the case of York, etc., R'y Co. v. Hudson, 16 Beav., 485 (1853), held a director liable to the corporation for money used for "secret service" purposes.

⁶ March v. Eastern R. R. Co., 43 N. H., 515 (1862); S. C., 40 N. H., 548.

⁷ Western Union Tel. Co. v. Rich, 19 Kan., 517 (1878).

⁸ Attorney-General v. Great Eastern R'y Co., L. R., 11 Ch. Div., 449, 481 (1879).

⁹ Beman v. Rufford, 6 Eng. L. & Eq., 106 (1851).

10 A land-owner who withdraws opposition to an extension of a railway in

consideration of an agreement of payment to him of a large sum as damages cannot enforce the contract. Gage v. Newmarket R'v Co., 18 Q. B., 457 (1852). A contract of railway promoters to pay a certain price for land, the main part of the price being a bribe for the influence of the land-owner, cannot be enforced against the company. Earl of Shrewsbury v. North Staffordshire R'v Co., L. R., 1 Eq., 593 (1865). Where a railroad erected a pier for a bridge without license and bought off local opposition by agreeing to pay a forfeit if the bridge was not duly completed, etc., the forfeit cannot be collected. Mayor, etc., v. Norfolk R'y Co, 4 El. & Bl., 397 (1855). Land-owners who conveyed to railroad on contract of latter to construct wharves, etc., may have specific performance. Wilson v. Furness R'y Co., L. R., 9 Eq., 27 (1869). See, also, p. 1540, n.

11 Where a railroad company issues bonds to raise funds for aiding improvement, gas, water and land companies, the bonds are *ultra vires*. A stockholder may have them canceled so far as they are in the hands of persons taking them with notice. City of Chi-

nor apply funds raised under a charter amendment for one purpose to another purpose. It cannot improve a harbor. It cannot buy oil products and then refuse to pay for them.3 It may change the gauge of the railroad,4 and may agree to keep out of a competitor's territory. A railroad may be enjoined from illegally constructing branch lines. A railroad may grant an exclusive privilege to a hackman.

§ 909. An interstate consolidated railroad corporation is a sevarate corporation in each state, although it has one capital stock, board of directors and name. - This is now an established principle of law. The question has been involved most frequently in cases turning on the jurisdiction of the federal courts.

For the purposes of jurisdiction a distinction is made between a corporation chartered by two or more states and one that is chartered by but one state and merely authorized by the laws of other states to do business in them. Where it is chartered by two or more states it is considered a citizen of each of the chartering states.8

A corporation which is created by the joint act of two or more cago v. Cameron, 11 N. E. Rep., 899 (Ill., 1887).

¹Stockholder may enjoin a railway from applying funds raised under an amendment of charter authorizing same for building a specified branch to the construction of another branch. Stockholder here was recorded scripholder, but not registered stockholder. Bagshaw v. Eastern, etc., R'v Co., 7 Hare, 114 (1849).

² Stockholder may enjoin a railway company from using its funds to promote an act of parliament for the improvement of a harbor at public expense. Munt v. Shrewsbury, etc., R'y Co., 13 Hare, 1 (1850). Caledonian, etc., R'y Co. v. Helensburgh, etc., Trustees, 5 Jur. (N. S.), 695 (H. of L., 1856), holds that a promoter's contract that a railroad will make a loan to a harbor improvement and build an extension to it is not enforceable, even though the railroad received a free street privilege thereby.

3 Where an oil transportation company contracted to deliver all its oil to a railroad, which was to pay a certain price therefor, the oil company may collect after it has delivered. The railroad cannot set up ultra vires. Oil

Creek, etc., R. R. Co. v. Penn. Trans. Co., 83 Pa. St., 160 (1876).

⁴ A railroad may change its gauge from narrow to wide. Borough of Millvale's Appeal, 18 Atl. Rep., 993 (Pa.,

⁵ Railroads may agree that in constructing branch lines they will keep out of each other's territory. Ives v. Smith, 8 N. Y. Supp., 46 (1889).

⁶ Id. Railroad has power to construct spurs under the Alabama statute. Arrington v. Savannah, etc., R'y Co., 11 S. Rep., 7 (Ala., 1892).

⁷A railroad may give to a bus and baggage company the exclusive privilege of solicting business on its premises. Old Colony R. R. v. Tripp, 17 N. E. Rep., 89 (Mass., 1888). Contra, McConnell v. Pedigo, 18 S. W. Rep., 15 (Ky., 1892).

⁸ Graham v. Boston, etc., R. R. Co., 118 U. S., 161, 168 (1886): Ohio & Miss. R'y Co. v. Wheeler, 1 Black, 286 (1861); Nashua & L. R. R. Co. v. Boston & L. R. R. Co., 8 Fed. Rep., 458 (1881). A consolidated railroad running into two states is a separate corporation in each state. Nashua, etc., R. R. v. Boston & states is considered to consist of as many corporations as there are states which have joined in creating it. The relation of these constituent corporations towards each other is the same as though they were different corporations having the same name.

L. R. R., 136 U. S., 356 (1890); Horne v. Boston & M. R. R. Co., 18 Fed. Rep., 50 (1883); Nashua & L. R. R. Co. v. Boston & L. R. R. Co., 19 Fed. Rep., 804 (1883); Covington, etc., Co. v. Mayer. 31 Ohio St., 317: In re Sage, 70 N. Y., 220; Quincy, etc., Bridge Co. v. County of Adams, 88 Ill., 615 (1878), a taxation case; Port Royal R. R. Co. v. Hammond, 58 Ga., 523 (1877), holding that the courts of one of the chartering states cannot compel it to perform specifically a contract to be executed in one of the others: Eaton & H. R. R. Co. v. Hunt, 20 Ind., 457 (1863), a case of consolidation: Hart v. Boston, H. & E. R. R. Co., 40 Conn., 539 (1873), holding that a decree of dissolution in one of the states affects only its franchises in that state; State v. Metz, 32 N. J. L., 199 (1867), a taxation case: Richardson v. Vermont & M. R'v Co., 44 Vt., 613 (1872); Memphis, etc., R. R. v. Alabama, 107 U.S., 581 (1882); Blackburn v. Selma, etc., R. R., 2 Flip., 525 (1879); State v. Northern, etc., R. R., 18 Md., 193 (1861); Colglazier v. Louisville, N. A. & C. R. R. Co., 22 Fed. Rep., 568 (1884); Pacific R. R. v. Missouri Pac. R'y Co., 23 Fed. Rep., 565 (1883); Racine & M. R. R. v. Farmers' L. & T. Co., 49 Ill., 349 (1868). a case of consolidation. Hence, if the corporation is sued in one of these states it cannot assert that it is a corporation of the other state and thus remove the case to the federal courts. Union Trust Co. v. Rochester, etc., R. R. Co., 29 Fed. Rep., 609 (1886), holding also that a judgment against it is conclusive on it as a corporation in both states; Re United States Rolling Stock Co., 57 How. Pr., 16 (1878), passing upon receiver's certificates issued in different states: Cleveland, etc., R. R. Co. v. Spear, 56 Pa. St., 325 (1867), that the courts of one state follow the courts of

the other in its construction of the charter; Commonwealth v. Pittsburg. etc., R. R. Co., 58 Pa. St., 26 (1868), holding that reincorporating in another state is not cause for forfeiture of charter; Ohio & M. R. R. Co. v. Weber, 96 Ill., 443 (1880), a taxation case: Chicago. etc., R'v Co. v. Auditor-General, 53 Mich., 79 (1884), the same: McGregor v. Erie R'y Co., 35 N. J. L., 115 (1871). A consolidated railroad running into two states is a separate corporation in each state, and being sued in one state cannot remove the case to the federal court on the ground that it is a citizen of the other state. Paul v. Baltimore, etc., R. R., 44 Fed. Rep., 513 (1890). A consolidated corporation running into two states is a separate corporation in each state. Colglazier v. Louisville, etc., R'v. 22 Fed. Rep., 568 (1884). A consolidated company running into two states is a separate corporation in each of the states. Central T. Co. v. St. Lonis, etc., R'v. 41 Fed. Rep., 551 (1890). A consolidated corporation running into three states is a separate domestic corporation in each of those states. It may transact its corporate business in one state for all. Fitzgerald v. Missonri Pac. R'y, 45 Fed. Rep., 812 (1891). See, also, Pierce on Railroads, pp. 17-23.

¹Farnum v. Blackstone Canal Corp., 1 Sumn., 46 (1830), where it was said that their corporate existence is not merged, but that a unity of stock and interest only is created. To same effect, Quincy Bridge Co. v. Adams County, 6 Rep., 553 (1878); Covington, etc., Bridge Co. v. Mayer, 31 Ohio St., 317 (1877), holding that it has a legal domicile in each state and may hold its meetings in either; but as to meetings, see, contra, Aspinwall v. O. & M. R. R. Co., 20 Ind., 492 (1863); Matter of Sage, 70 N. Y., 220 (1877), holding that the consolidation

An interstate railroad running into Illinois is not bound to have a majority of its directors citizens of Illinois, even though the Illinois constitution requires such from all corporations created in that state.¹

Where a corporation created in one state is merely authorized by statute to transact business in others, it is a citizen only of the state which chartered it.²

of foreign and domestic corporations creates a domestic corporation. Cf. Chicago, etc., R. R. Co. v. Minn., etc., R. R. Co., 29 Fed. Rep., 337 (1886); Sprague v. Hartford & Providence R. R. Co., 5 R. I., 233 (1858), holding that it is not so far a foreign corporation as to render it liable to attachment: State v. Northern Central R. R. Co., 18 Md., 193 (1861); Fisk v. Chicago, R. I. & Pac. R. R. Co., 4 Abb. Pr. (N. S.), 378 (1868), holding that its ultra vires acts are not rendered valid by the action of the legislature of one of the states which created it confirming them; Port Royal R. R. Co. v. Hammond, 58 Ga., 523 (1877), holding that the courts of one of the states creating it cannot compel it to go into the other state and specifically execute a contract; Muller v. Downs, 94 U. S., 445 (1876), holding that, for the purpose of the jurisdiction of the federal courts, a corporation created by one state, though consolidated with another of the same name incorporated by another state, is considered as existing under the law of the former state alone. To similar effect, Clark v. Barnard, 108 U. S., 436 (1883); Blackburn v. Selma, M. & M. R. R. Co., 2 Flip., 525 (1879), a foreclosure case; Copeland v. Memphis, etc., R. R. Co., 3 Woods, 651 (1878); City of Covington v. Covington, etc., Co., 10 Bush, 69 (1873), upholding a charter amendment made by one state only; but see Canal Co. v. Railroad Co., 2 Bland's Ch. (Md.), 1, 131 (1832); Railroad Co. v. Harris, 12 Wall., 65 (1870), where a railroad chartered by two states was held to be a unity as related to its responsibility for damages for injuries

to a passenger. A foreign railroad corporation, having complied with the law of Nebraska as to filing its charter. etc., was held to be a corporation of that state. Stout v. Sioux City, etc., R. R. Co., 8 Fed. Rep., 794 (1881) Contra, Chicago, etc., R. R. Co. v. Minn., etc., R. R. Co., 29 Fed. Rep., 337 (1886). But a foreign corporation does not become a Nebraska corporation by purchasing a railroad in Nebraska. Chicago, etc., R'y Co. v. Dakota Co., 28 Fed. Rep., 219 (1886). A corporation of Virginia became a corporation of West Virginia by the creation of the latter state, the corporation being in its jurisdiction. Farmers' Bank v. Gettinger. 4 W. Va., 305 (1870). See, also Chicago, etc., R. R. Co. v. Auditor-General, 53 Mich., 79 (1884), involving a question of taxation. Merely authorizing a foreign corporation to do business does not make it a domestic corporation. County Court v. Baltimore & O. R. R., 35 Fed. Rep., 161 (1888); Baltimore & O. R. R. Co. v. Ford, 35 Fed. Rep., 170 (1888).

¹ Ohio & M. R. R. v. People, 123 III., 467 (1888).

²Penn. R. R. Co. v. St. Louis, etc., R. R. Co., 118 U. S., 290 (1885); Railroad Co. v. Koontz, 104 U. S., 5 (1881); Missouri, K. & T. v. Texas & St. L. R'y Co., 10 Fed. Rep., 497 (1881); Callahan v. Louisville & N. R. Co., 11 Fed. Rep., 536 (1882), where the defendant also operated a leased line in the state; Moore v. Chicago, St. P., etc., R'y Co., 21 Fed. Rep., 817 (1884), passing upon the right to remove a cause to the United States court. To same effect is Wilkinson v.

§ 910. Consolidation dissolves the existing corporations and creates a new one-Liability on the debts of the old companies.- There has been a great deal of litigation over this principle of law, inasmuch as it generally happens that the old corporations possessed peculiar and valuable powers or exemptions which are lost by the consolidation if the above principle of law is applied. Especially is this the case where one or more of the old corporations were by charter provision exempted from taxation. The courts, however, not favoring such exemptions, have quite uniformly held that the exemptions were lost by the consolidation, inasmuch as the old corporations were thereby dissolved and a new one was formed.

The established rule now is that where two or more corporations

Delaware, L. & W. R. R. Co., 22 Fed. Rep., 353 (1884), where it operated a leased line in the state; Baltimore & O. R. R. Co. v. Gallahue's Adm'r. 12 Gratt. 658 (1885): Dennistoun v. N. Y., etc., R. R. Co., 1 Hill (N. Y.), 62 (1856): Baltimore & O. R. R. Co. v. Wightman, 29 Gratt., 431 (1877), holding that it may be sued for injuries received on a leased line in the state where such leased line is situated. To same effect, Baltimore & Phillipsburgh Bank v. Lackawanna R. R. Co., 27 N. J. L., 206 (1858), holding that in New Jersey attachment will not lie against a foreign corporation owning property there, and authorized by that state to do business there. To same effect, Martin v. Mobile & O. R. R. Co., 7 Bush, 116 (1870). Nevertheless such a corporation is foreign. State v. Delaware, etc., R. R. Co., 30 N. J. L., 473 (1864): Milnor v. New York & N. H. R. R. Co., 53 N. Y., 363 (1873), but holding that a foreign railroad corporation authorized to extend its line into another state is liable the same as a domestic corporation. Cf. Pennsylvania R. R. Co. v. St. Louis, etc., R. R. Co., supra; but see Memphis, etc., R. R. Co. v. Alabama, 107 U. S., 581 (1882), and Clark v. Barnard, 108 U.S., 436, 451 (1882). The whole question turns upon the wording of the statute. Goodlett v. Louisville R. R. Co., 122 U.S., 391 (1887), a case where

the rule stated in the text prevailed. As contrary to the rule, see Goshorn v. Supervisors, 1 W. Va., 308 (1865). In Baltimore, etc., R. R. Co. v. Wight's Adm'r, 29 Gratt, (Va.), 431 (1877), a foreign corporation which had leased a railroad in the state was held to be a domestic corporation as regards the right to remove a case to the federal court. See, also, Wilbur v. Atlantic, etc., R'y Co., 2 Woods, 409 (1875), hold-O. R. R. Co. v. Noell, 32 Gratt., 394 (1879); 'ing that a federal court sitting in one state will appoint a receiver over the property in both; Bishop v. Brainard. 28 Conu., 289 (1859); City of Wheeling v. Baltimore, 1 Hughes, 90 (1862), holding that a stockholder in one state may sue the duplicate corporation in the other state in the federal courts on a stockholder's cause of action. An Illinois and Wisconsin corporation is a Wisconsin corporation only as regards injuries inflicted there. Railroad Co. v. Whitton, 13 Wall., 270 (1871). Cf. in general, County of Alleghany v. Cleveland, etc., R. R., 51 Pa. St., 228 (1865); Ohio & M. R. R. v. Wheeler, 1 Black, 286 (1861). The fact that the C., B. & Q. R. R. Co., an Illinois corporation, first took a lease of and then purchased the road of the B. & M. R. R. Co. in Iowa, does not make the former company an Iowa corporation. It coutinues an Illinois corporation. Conn v. Chicago, etc., R. R., 48 Fed. Rep., 177 (1891).

are consolidated, they are thereby dissolved and the consolidated company is a new corporation.¹

This new consolidated corporation usually succeeds to all the rights and takes the property subject to all the obligations of the

1 Upon the consolidation of two companies a new one comes into existence. Miner v. New York C., etc., R. R., 123 N. Y., 242 (1890). In Ohio the consolidation of two or more railway companies works their dissolution. Shields v. Ohio. 95 U. S., 319 (1877). This is also the case in Georgia. Railroad Co. v. Georgia, 98 U. S., 359 (1878); Atlanta, etc., R. R. Co. v. State, 63 Ga., 483 (1879). Where an Iudiana and Ohio railway corporation were consolidated it was held in Indiana that the Indiana corporation was dissolved, but that, for the purpose of enforcing the payment of a debt, the Ohio corporation would be assumed to be still in existence. Eaton & Hamilton R. R. Co. v. Hunt. 20 Ind., 457 (1863). Generally a consolidation works the dissolution of the old corporations. Clearwater v. Meredith, 1 Wall., 25, 40 (1863); St. Louis, etc., R'v v. Berry, 113 U. S., 465 (1885): McMahon v. Morrison. 16 Ind., 172 (1861); State v. Bailey, 16 id., 46 (1861): Powell v. North Missouri R. R. Co., 42 Mo., 63, etc. (1867); Racine, etc., R. R. Co. v. Farmers' Loan & Trust Co., 49 Ill., 331, 349 (1868). But each case depends upon its own peculiar circumstances, and the rule is by no means a universal one. Wabash, etc., R. R. Co. v. Ham, 114 U.S., 587, 595 (1884). See, also, State v. Merchant, 37 Ohio St., 251 (1881); Prouty v. Lake Shore, etc., R. R. Co., 52 N. Y., 363 (1873). Consolidation of gas companies dissolves the old companies and forms one new one. Charity Hospital v. New Orleans, etc., Co., 4 S. Rep., 433 (La., 1888); Ohio, etc., R'y Co. v. People, 14 N. E. Rep., 874 (Ill., 1888); New Orleans, etc., Co. v. Louisiana. etc., Co., 11 Fed. Rep., 277 (1882). Cf. Central R. R. Co. v. Georgia, 92 U. S., 665 (1875). The question whether on consolidation the two former corporations are dissolved is a question of construc-

tion of the act authorizing the consolidation. It is important when the charter of a new corporation may be amended or repealed, but old charters cannot be. Henderson v. Central Pass. R'v Co., 21 Fed. Rep., 358 (1884). But see State of Ohio v. Sherman, 22 Ohio St., 411: Pullman Car Co. v. Missouri P. R. R. Co., 115 U.S., 587 (1885). Consolidation of a railroad with another under power given in charter does not render the railroad subject to constitutional provisions existing at time of consolidation. Zimmer v. State, 30 Ark., 680 (1875). Consolidation of two roads is different from a sale: the franchises are all merged in the new corporation. Green County v. Conness, 109 U. S., 104 (1883). In Boardman v. Lake Shore, etc., R'y Co., 84 N. Y., 157, 181 (1881), the court said: "It is held that where two railroads are consolidated, as far as one of the creditors of one of the original companies is concerned, the consolidated company is the successor of the old company; but in respect to the properties of the other companies it is a new and independent company, and such creditor has no claim against it upon their original contract, but only by virtue of its assumption of the obligations of the old companies." In Dongan's Case, 28 L. T. (N. S.), 60 (1873), the court said: "Two companies may be united, either by fusion into a third or by one absorbing the other. The former process seems to correspond most nearly with the popular sense of the word amalgamation, and I believe nobody really knows what amalgamation means. Whatever be the process, no shareholder in the company which it destroys, or of which it suspends the life, can become a shareholder in the other company without his per-. sonal assent." For definition of "amalgamation" as used in England, see In re

old companies. The statutes authorizing the consolidation generally so provide.

Empire Assurance Corp'n, L. R., 4 Eq., 341 (1867). In the case of Fee v. Gas Company, 35 La. Ann., 413 (1883), the court said: "The articles of consolidation and the legislative act by authority of which they were executed evidently present a case of complete and perfect amalgamation, the effect of which was under American authorities to termipate the existence of the original cornorations, to create a new corporation, to transmute the members of the former into members of the latter, and to operate a transfer of the property, rights and liabilities of each old company to the new one." Quære, whether the formation of an interstate railroad corporation by the consolidation of separate corporations in two states creates a new corporation. In New York an incorporating fee is not imposed on the whole consolidated capital. People v. New York, etc., R. R., 129 N. Y., 474 (1892). In the case of Meyer v. Johnston, 53 Ala., 237 (1875), it seems to be held that a consolidation of an Alabama corporation with two Georgia corporations, all three companies having power to unite and consolidate their stock with the others, left the Alabama corporation still in existence, and that the two Georgia corporations were merged into it. Affirmed in Meyer v. Johnston, 64 id., 603 (1879). An act providing that any corporation thereafter receiving a charter, or renewal, amendment or modification of charter, shall hold its charter subject to amendment or repeal, applies to a corporation which is subsequently formed by the consolidation of two others. McCandless v. Richmond, etc., Co., 16 S. E. Rep., 429 (S. C., 1892). In the case of Citizens' St. R. Co. v. Memphis, 53 Fed. Rep., 715 (1893), the court held that a charter granted without the reserved right to amend or repeal did not become subject to the right to amend or repeal, although it had entered into a consolidation after

a constitutional provision was passed reserving this right in all cases. The consolidation was held not to have dissolved the old corporation. A consolidated company under the Missouri statutes relative to railroads meeting at the state line is a new corporation and the old one is dissolved. An exemption from taxation of the old corporation is thereby lost. State v. Keokuk, etc., R. R., 12 S. W. Rep., 290 (Mo., 1889).

¹ See § 643, supra. A consolidated company does not succeed to the right of one of the original companies to charge tolls and not to be subject to any reduction thereof by the legislature. Covington, etc., Co. v. Sanford, 20 S. W. Rep., 1031 (Ky., 1893). When by statute the consolidated company is liable for the contracts of the old companies, it must issue stock in exchange for houds of the old company which were convertible into stock. India Mut. Ins. Co v. Worcester, etc., R. R., 25 N. E. Rep., 975 (Mass., 1890). Under the New York act for the consolidation of railroads the new corporation is liable on the old bonded debt, although the statute says that it shall not be liable on the old "mortgages." Polhemus v. Fitchburg R. R., 123 N. Y., 502 (1890). In sning a foreign consolidated company on bonds issued by one of the constituent companies, the statutes rendering the former liable must be pleaded. Rothschild v. Rio Grande, etc., R'y, 59 Hun, 454 (1891). Consolidation dissolves both of the old corporations, except as to the creditors. The creditors may hold the old companies liable. Compton v. Railway, 45 Oliio St., 592 (1888). See, also, in . general, Louisville, etc., R'y v. Boney, 117 Ind., 501 (1888). Suits which are pending against one of the old companies abate by the consolidation. Kansas. etc., R'y v. Smith, 40 Kan., 192 (1888). The new company takes subject to the obligation of one of the old companies

The liability of the consolidated company for the debts of the old companies is frequently provided for by the contract.

A consolidation agreement between individuals whereby the consolidated company was to assume a lease then owned by another company cannot be enforced by such other company. It was not a party to the agreement.²

Judgment obtained against the consolidated company in one state is binding on it in the other states.³

§ 911. Contractors for the construction of a railroad.—The chief cause of litigation between a railroad company and contractors is in regard to the specifications and extra work.⁴ Generally all these matters are, by the terms of the contract, to be

to furnish gas on certain terms. Charity Hospital v. New Orleans, etc., Co., 40 La. Ann., 382 (1888). The old companies are not released from their obligations by reason of the consolidation. Gale v. Troy, etc., R. R., 51 Hun, 470 (1889); Compton v. Railway, 45 Ohio St., 592. Cf. McMahon v. Morrison, 16 Ind., 172 (1861). holding that a creditor of the old company cannot pursue property that has passed into bona fide hands. A mortgage by a consolidated railroad in Indiana takes precedence over the unsecured debts of the constituent companies. Tysen v. Wabash R'y, 15 Fed. Rep., 763 In Indiana the consolidated company is liable for damages due to injuries inflicted by one of the constituent companies. Cleveland, etc., Co. v. Prewitt, 33 N. E. Rep., 367 (Ind., 1893). See, also, Indianapolis, etc., R. R. v. Jones, 29 Ind., 465; Jeffersonville, etc., R. R. v. Hendricks, 41 Ind., 48: Paine v. Lake Erie, etc., R. R., 31 Ind., 283.

¹ Where on consolidation the new corporation was to pay from the dividends going to the stock of one of the old corporations the debts due by that corporation, the court will compel the new corporation to pay an existing maritime lien against the old corporation. The Key City, 14 Wall., 653 (1871). Where the consolidated company succeeds to all the rights of the prior companies, it may sue on an indemnity bond given to one of the old companies. Pa., etc., R.

Co. v. Harkins, 24 Atl. Rep., 175 (Pa., 1892). General creditors of a road that is consolidated with another have no equitable lien on the bonds issued by the consolidated company. Harvey v. Ill. Mid. R'y, 28 Fed. Rep., 169 (1884). That a consolidated railroad is liable for all the debts of the companies which are consolidated, see many cases in Jones on Corporate Bonds, §§ 364, 365.

² Lorillard v. Clyde, 122 N. Y., 498 (1890).

³ Union T. Co. v. Rochester, etc., R. R., 29 Fed. Rep., 609 (1886). But see Pittsburg, etc., R. R. v. Rothschild, 4 Cent. Rep. 107 (Pa., 1886). Cf. Graham v. Boston, etc., R. R., 118 U. S., 161 (1886).

4 A contractor who has not complied with the contract on his part cannot obtain equitable performance on the company's part. Wood v. Bonev. 21 Atl. Rep., 574 (N. J., 1891). Suits by railroad contractors on their contract to construct the railroad frequently involve complicated questions growing out of the specifications. Galveston, etc., R'y v. Johnson, 11 S. W. Rep., 1113 (Tex., 1889). Concerning the liability of a railroad to pay contractors for extra work, where the plans are changed, see Henderson Bridge Co. v. McGrath, 134 U.S., 260 (1890). As to the classification of work see, also, Ricker v. Collins, 17 S. W. Rep., 378 (Tex., 1891); Gulf, etc., R. R. v. Ricker, id., 382.

determined by the chief engineer of the company, and his decision is made final.¹ Sometimes the company undertakes to obtain the right of way.² A subcontractor has contract relations with the contractor only.³

Questions relative to contractor's liens at common law 4 and under the mechanic's lien law 5 and relative to bonds issued to contractors 6 are considered elsewhere.

1 Where a construction contract refers matters to the company's engineer for decision, his decision is binding. Martinsburg, etc., R. R. v. March, 114 U. S., 549 (1885). Where the engineer's decision is to be binding on the parties, it can be impeached only for fraud or such gross error as to imply bad faith. Chicago, etc., R. R. v. Price, 138 U. S., 185 (1891). A construction contract may make the engineer's decision as to work conclusive. Wood v. Chicago, etc., R. R., 39 Fed. Rep., 52 (1889). Contractor's work and decision of chief engineer. Keller v. McCauley, 18 Atl. Rep., 607 (Pa., 1889). The rule in regard to the engineer's decision under a construction contract whereby his decision is made conclusive is as follows: "The second clause in the contract, declaring that the engineer's measurements and calculations of the quantity and amount of the several kinds of work, and also that his classification of the material contained in excavations, shall be final and conclusive, is a valid provision, and is binding upon the parties to the agreement. Therefore there can be no recovery in excess of the engineer's final estimate, unless such estimate is successfully assailed for fraud, gross errors, or mistake." Lewis v. Chicago, etc., R'y, 49 Fed. Rep., 709; Railroad Co. v. March, 114 U. S., 549; Wood v. Railroad Co., 39 Fed. Rep., 52, and citations: Sweet v. Morrison, 116 N. Y., 19; Brush v. Fisher, 70 Mich., 469

² Where a construction contract requires the railroad to procure the right of way or to act under the orders of the construction company in obtaining it, the former is not responsible to the owners of the latter for not obtaining it, the road having been built. Fitzgerald v. Missouri P. R'y, 45 Fed. Rep., 812 (1891).

3 A subcontractor caunot collect from the railroad company for extra work where no contract relation is shown. Woodruff v. Rochester, etc., R. R., 108 N. Y., 39 (1888). Where a subcontractor sues the contractor the latter may set up claims which the former should have paid but did not and the latter was obliged to pay. Damages for stopping the work are to be limited. Moore v. Taylor, 42 Hun, 45 (1886). A railroad company is not liable for the acts of the subcontractors in tearing down fences, etc. St. Louis, etc., R'y v. Knott, 16 S. W. Rep., 9 (Ark., 1891).

4 See § 860, supra.

⁵ See § 859, supra,

⁶See ch. XLVI.

CHAPTER LIV.

STREET RAILROADS.

§ 912. The incorporation of street railroads.

913. The right to use the streets is a contract — Exclusive rights — Priority in occupying street — Conditious of grading — Limitation on time of construction — Abandonment of route — Purchaser at foreclosure sale.

914. The rights of owners of property adjoining a street railroad.915. Powers which a street railroad

915. Powers which a street railroad possesses — General statutes apply to street railroads — Condemning land — Double tracks, switches, etc.— Use of electricity, cable, etc.— Crossing a steam railroad.

§ 916. Right of one street railroad to run over the tracks of another.

917. Rights of a street railroad relative to its daily operation.

918. Liability for negligence, etc.

919. Ordinances of municipality in re-

gard to street railroads.

920. Paving, assessments, etc., as required from a street railroad.

921. Taxes levied upon street railroads.

§ 912. The incorporation of street railroads.— Street railroads came into use about the year 1850, being twenty years later in their origin than steam railroads. In New York one of the first street railroads was the outgrowth of an omnibus line, and at first differed but little from it except in the fact that it was confined to a track. So little, in fact, was the importance of street railroads understood in those days that no act was provided for their incorporation. In New York, from 1850 to 1884, all street railroads were incorporated under the general steam railroad act.¹

¹ People v. Third Ave. R. R., 112 N. Y., 396, 400, 401 (1889); In the Matter of Washington, etc., R. R., 115 id., 442 (1889). Although a street railway company is organized under the general railway act, yet where it accepts a subsequent act for the incorporation of street railway companies, the legality of its organization cannot be questioned. Cincinnati, etc., St. R'y v. Village Comm'rs, 14 Ohio St., 523 (1863). elevated railroad may be incorporated in Illinois under the general railroad act, although there is another act for incorporating elevated ways. Lieberman v. Chicago, etc., R. R., 30 N. E. Rep., 545 (Ill., 1892). Although the act requires the certificate of incorpora-

tion to specify the termini, and the certificate merely says the termini are in a certain city, yet if the legislature subsequently by special act recognizes the company, the legality of its existence cannot be questioned. Koch v. North, etc., R'y, 23 Atl. Rep., 463 (Md., 1892). In this case the organization was under the general railroad law. Under such a charter the route and its termini are to be determined by the mayor and the city council "under their general power of control and regulation of the streets." In 1865 Judge Redfield made a report to the legislature of Massachusetts on the nature, rights and duties of street railroads. This report is found in Volume I of Redfield on Railways, foot-paging § 913. The right of street railroads to use the streets — Who may grant it? — The right to use the streets is a contract — Exclusive rights — Priority in occupying street — Conditions of granting — Limitation on time of construction — Abandonment of route — Purchaser at foreclosure sale. — Difficulties quickly arose, however, in regard to the right of a street railroad to construct and operate its tracks in the public streets. It was at first supposed that the city in which the tracks were to be laid had power, under its general power over streets, to authorize a street railroad company to construct and operate its tracks in the streets. But the courts decided that the legislature alone could give this right. The municipality cannot do so.¹ This power the legislature may exercise without

316. The general nature of that report indicates how little the status of street railroads had been developed even at that comparatively recent date. The first street railroad company in this country was organized in 1831 (N. Y. L. 1831, ch. 263). It was the New York & Harlem Railroad Company. In 1832 it was compelled to propel a part of its cars by horses. The first decision on street railroads seems to be that of Hamilton v. N. Y., etc., R. R., 9 Paige, 171 (1841), holding that an abútting property owner could not enjoin the construction of the road in the street.

1 The grant to Jacob Sharp and others in 1853 by the board of aldermen of New York city, giving the right to lay down street-car tracks on Broadway, was illegal and void, inasmuch as the city has no express authority from the legislature to make such grants. State v. Mayor, etc., 3 Duer, 119 (1854). A cityhas no right to authorize the construction of street railways without some legislative enactment vesting the municipal authorities with such power. Covington, etc., R'y v. Covington, 9 Bush (Ky.), 127 (1872); City of Chicago v. Evans, 24 Ill., 52 (1860). Under a general power to open, grade, improve and curtail its streets, a city has power to authorize the construction of a street railway. State v. Corrigan St. R'y, 85 Mo., 263, 274 (1884); Dillon on Munic. Corp., § 727. Under its charter power to regulate and control the streets a city

has no power to authorize the construction of a street railway. Davis v. Mayor. etc., 14 N. Y., 506 (1856). The charter power of a city to regulate the laying of railroad iron and the passage of railroad cars through the city does not authorize it to authorize horse railroads, nor does the power to grant privileges in the use and enjoyment of the streets. People's R. R. v. Memphis R. R. 10 Wall., 38 (1869). A city cannot grant a franchise to a street railway company to use its streets "in virtue of the ordinary powers possessed by such municipalities," and the court even doubted whether the legislature could expressly delegate this power to a city. Id. An offer by the city to individuals to allow them to lay down street railway tracks on certain conditions does not bind a city although the offer is accepted in writing and a corporation is formed to construct the road. Id.

A city has no inherent power to grant to individuals the right to lay down tracks. Coleman v. Second Ave., etc., R. R., 38 N. Y., 201 (1868). "Kent says: 'The privilege of making a road or establishing a ferry and taking tolls for the use of the same is a franchise.'" A municipality has no inherent power to grant to individuals the franchise to lay down street railway tracks. A street railway franchise is a contract irrevocable, and one which the city cannot enter into unless expressly authorized. Milhau v. Sharp, 27 N. Y., 611 (1863).

reference to the city, and may give to a company the right to lay down tracks in the streets of a city without the consent of the city or its authorities. Generally, however, the legislature refuses to grant such a right, except upon condition that the city consents thereto, and in most of the states the consent of the municipal

In the case of Finch v. Riverside, etc., R'v. 25 Pac. Rep., 765 (Cal., 1891), a street railway franchise was granted to individuals and conveved by them to a corporation. The right to lay down the tracks and use them is a franchise. "The ordinary and incidental powers of a municipal corporation are not broad enough to include the power to grant to a railway company the right to lay tracks and conduct the business of transporting passengers upon and over the streets of the municipality." adjoining owner is not entitled to compensation from a horse railroad. See Cooley, Con. Lim., 556: Eichels v. Evansville, etc., St. R'y Co., 78 Ind., 261 (1881). Under the power to make regulations concerning omnibuses and other vehicles, and to regulate and make improvements to the streets, a city may authorize the construction of a street railroad by individuals. Brown v. Duplessis. etc., 14 La. Ann., 842 (1859). A city may grant to individuals the right to construct and operate a street railway. Henderson v. Ogden City R'v. 26 Pac. Rep., 286 (Utah, 1891). A street railway seeking to enjoin another street railway from crossing its tracks cannot question the right of the city to authorize the laying of tracks nor the right of the company using them, where the latter is in fact in actual possession and use. Market St. R'y v. Central R'y, 51 Cal., 583 (1877). A city has no implied power to grant the right to lay down street railway tracks (reviewing and explaining certain authorities to the contrary). A grant subject to future incorporation, which must be acceptable to the city, does not become a contract until it is acceptable to the city. People's Pass. R. R. v. Memphis, 16 S. W. Rep., 973 (Tenn., 1875). A city cannot authorize

a railroad to use the streets unless the statutes give the city that power. Atlantic, etc., R. R. v. St. Louis, 60 Mo., 228 (1878). A stockholder may sue to enjoin his company from laying tracks on a city street without authority. Teachout v. Des Moines, etc., St. R'y, 38 N. W. Rep., 145 (Iowa, 1888). See, also, Wiggins Ferry Co. v. Fast St. Louis, etc., R'y, 107 Ill., 450 (1883), where an extension was held to be authorized by the charter.

1 Where a general railroad has power to use the streets it may use them without consulting the city, even though the company has on one occasion obtained from the city the right to use a particular street. Atlantic, etc., R. R. v. St. Louis, 66 Mo., 228 (1877). The legislature has unqualified constitutional power "to take possession of the streets of an incorporated city, and appropriate them to the purpose of a railroad, either directly or through a company created for that purpose." Philadelphia v. Empire R'v. 3 Brews., 547 (1869). The legislature may authorize a railroad to lay down its tracks in the streets of a city and use the same. Philadelphia & Trenton R. R. Co. Case, 6 Whart., 25 (Pa., The legislature may authorize the construction and operation of a street railway even in opposition to the wish and will of the city wherein the road is located. Savannah, etc., R. R. Co. v. Mayor, etc., 45 Ga., 602 (1872). The legislature may authorize the construction of a horse railroad in the streets, irrespective of the municipality. State v. Jacksonville, etc., R. R., 10 S. Rep., 590 (Fla., 1892). Where a railroad by its charter has the right to cross a street in a city, the city cannot prevent it. Allen v. Mayor, etc., 22 Atl. Rep., 257 (N. J., 1891).

anthorities is required by statutory or constitutional enactment. The consent of the legislature, under general laws for the incorporation of street railroads, is given in advance, but the consent of the municipality in which the tracks are to be laid is given in each particular case.¹

In any case where a street railroad company has been legally authorized to construct and operate its tracks in the streets, whether that authority has been given by the legislature alone or by the legislature and the municipality, the right of the company to construct and operate its tracks, when accepted and acted upon by the company, becomes a contract which cannot subsequently be withdrawn, repudiated or impaired by the city or state.² This

1 Where an act of the legislature authorizes a city to authorize a railroad through the streets of the city, the city may authorize a street railroad. There is no implication that the road must be a steam railroad. Henderson v. Central, etc., R'v, 21 Fed. Rep., 358 (1884). Where a special act of incorporation granted the right to lay down tracks in the streets provided the city council consented thereto, a refusal by the council to assent puts an end to the charter rights. The council cannot subsequently revive those rights by assenting. Musser v. Fairmount, etc., St. R'y. 7 Am. L. Reg., 284 (Pa., 1858). Where the city has power to grant the right, an injunction does not lie to prevent it from granting that right. People v. May, 20 How. Pr., 144; Whitney v. May, 28 Barb., Cf. Stuyvesant v. Pearsall, 15 Barb., 244 (1853).

² In the case Milhau v. Sharp, 27 N. Y. 611, 620, 621 (1863), the court said: "It was not, as has been insisted, an act of legislation, but on the contrary it possesses all the characteristics of, and was in fact, a contract. It was held to be a contract in the case of The People v. Startevant, 9 N. Y., 273, and but a slight examination of its provisions is requisite to show the correctness of that decision. Prior to its acceptance by the defendants the resolution was only a proposition, having no binding force whatever. It was certainly not then a law. and since that time the common

council have taken no action upon it. Upon its acceptance (if valid) it became a contract between two parties, binding each to the observance of all its provisions. . It was something more than a mere executory contract between the parties." The acceptance by a railroad of a license from a municipal corporation to lay down and operate its tracks in the streets constitutes a contract. Mayor, etc., v. Trov, etc., R. R., 49 N. Y., 657 (1872). The ordinance giving to a street railway company the right to construct its road through a public square is a contract, and the city will be enjoined from violating it by inclosing the square with an iron railing. "The ordinance, when accepted, and certainly when acted upon, takes on many of the elements of a contract. It is not within the power of the city to abrogate the contract at pleasure, nor to destroy the rights thus given and acquired. It can no more do this than can an individual. . . . Equity will interfere to protect and secure the enjoyment of a franchise secured by statute, because it affords the only plain and adequate remedy." Springfield R'y v. Springfield, 85 Mo., 674 (1885). The supreme court in the case St. Louis v. Western, etc., Co., 148 U. S., 92 (1893), referred with approval to the principle of law that an ordinance giving a quasi-public corporation the right to use the streets of the city is an irrevocable contract, but held that that principle did not apply to the case at important principle of law becomes more important in these days when municipalities seek to repudiate grants already made and to confiscate the property of street railways, gas companies and other

bar. The right granted by a city to a street railway company is a contract and cannot be violated by the city. The supreme court of Missouri has said: "We cannot give our consent to the doctrine contended for, that by virtue of the ordinauce of 1869 defendant obtained simply a license to expend large sums of money in constructing its railway, and at a time when the success of such a scheme was experimental. equipping it at great cost, assuming an obligation to keep in repair a certain part of the street, which license was and is revocable at the pleasure of the city. If, as we think, the authorities herein cited establish the proposition that the general power of control given the city in its charter over the streets carries with it a street railroad operated by horses or mules, to be constructed and operated on and over its streets. when the city exercises the power as it did in the passage of the ordinance of 1869, and granted, permitted or licensed defendant to build and operate its railroads, and defendant accepted the grant, expended large sums of money on the faith of it, and was permitted by the city to do so, the license referred to was a contract, the terms of which are binding on both parties to it. If any one thing is guarded in the law more particularly than another it is the inviolability of a contract, and all attempts to impair such obligations, under whatever guise they are made, whether directly or indirectly, must prove abortive. State ex rel. v. Miller, 66 Mo., 329; State v. Miller, 50 Mo., 129; Hovelman v. K. C. Horse Railroad Co., 79 Mo., 632." State v. Corrigan St. R'y, 85 Mo., 263, 282 (1884).

A street railway company "having accepted the grant and built its railroad, there existed between it and the people—represented, as we may assume, by

the plaintiff - an obligation in the nature of a contract." City of Binghamton v. Binghamton, etc., R'v. 61 Hun, 479 (1891). Speaking of street railways' rights, the New Jersey court said: "The grant in this case must be conceded to be of a franchise. It includes the right to lay down tracks, to run carriages thereon, to carry passengers, and to exact tolls." Citizens' Coach Co. v. Camden, etc., R. R., 33 N. J. Eq., 266 (1880). In Davis v. Mayor, etc., 14 N. Y., 506, 523 (1856), the court said: "The right granted to these associates would be the very definition of a franchise. The privilege of making a road or bridge. or of establishing a ferry, and of taking tolls from the citizens for the use of the same, are among the most common examples of a franchise." a definition of the word "franchise," including the meaning of the right to run cars, see Morgan v. Louisiana, 93 U. S., 217, 223 (1876). In the case of New York v. Second Ave. R. R., 32 N. Y., 261 (1864), the court said that there is a "right of property in the franchise, which the common council could not take away nor impair by any subsequent act of its own. The resolutions which were incorporated into the contract were not an act of legislation, which the common council could modify or repeal without the consent of the other party to the instrument." Speaking of a street-railway franchise, the court, in Brooklyn, etc., R. R. v. Brooklyn City R. R., 32 Barb., 358, 364, said: "Rights acquired under a statute of a state which is in its nature a contract, and which does not reserve to the legislature the power of repeal, cannot be divested by subsequent legislation." The grant and its acceptance, and the expenditure of money relying thereon, invests "the company with the right of property in the franchise, of which it quasi-public corporations. This right to use the streets is property. It consists of a vested interest in the streets for the time indicated in the grant.²

The legislature may, under its reserved power so to do, repeal the charter of the company; but if such repeal is made, the right

cannot be deprived without its consent or against its will." Chancellor Kent says of franchises (vol. 3, p. 458): "They contain an implied covenant on the part of the government not to invade the rights vested, and on the part of the grantees to execute the duties and conditions prescribed in the grant:" and on page 459, "an estate in such a franchise and an estate in land rest upon the same principles, being equally grants of a right and privilege for an adequate consideration." A city ordinance in violation of a prior contract made by the city is the same as a state law impairing the validity of a contract, and is unconstitutional. The federal courts have jurisdiction of such a case irrespective of the citizenship of the parties. Saginaw, etc., Co. v. Saginaw, 28 Fed. Rep., 529 (1886). In a suit by a city to recover a license tax levied by it on a street railway the city cannot question the legality of the city's grant of the right to construct such road to certain individuals nor their assignment of the same to the defendant corporation. Such a grant "has all the properties of a contract." New York v. Second Ave. R. R. Co., supra. A grant by a city to a railroad, under statutory permission, of a right to occupy a street, is irrevocable. Port of Mobile v. Louisville, etc., R. R., 4 S. Rep., 106 (Ala., 1888). A grant of street rights is a contract not subject to revocation, although the constitution prohibits the grant of "irrevocable or uncontrollable grant of special privileges." Mayor, etc., v. Houston, etc., R'y Co., 19 S. W. Rep., 127 (Tex., 1892). In the case of Citizens' St. R. Co. v. Memphis, 53 Fed. Rep., 715 (1893), it was held that where a city had been granted the right to build its tracks on various streets, such right could not afterwards

be withdrawn, there being no provision in the charter reserving the right to amend or repeal. An abandonment of the right does not exist unless the intent to abandon is clear and decisive. See, also, § 985, infra.

¹ For a flagrant example, see City of Detroit v. Detroit City R'y, 56 Fed. Rep., 867 (1893); Id., 54 Fed. Rep., 1 (1892).

² In Milhau v. Sharp, 27 N. Y., 611 (1863), the court said that this right was "an immediate grant of an interest, and, it would seem, of a freehold interest in the soil of the streets to the defendants. The rails, when laid, would become a part of real estate, and the exclusive right to maintain them perpetually is vested in the defendants. their successors and assigns. I say perpetually, because there is no limitation in point of time to the continuance of the franchise, and no direct power is reserved to the corporation to terminate it." In the case of People v. O'Brien, 111 N. Y., 1 (1888), the court said: "We are therefore of the opinion that the Broadway Surface Company took an indefeasible title to the land necessary to enable it to construct and maintain a street railroad in Broadway and to run cars thereon for the transportation of freight and passengers, which survived its dissolution." Speaking of a street railway's right of way, the supreme court of California has said (North Beach, etc., R. R. Co.'s Appeal, 32 Cal., 499 - 1867): "This right of way is, at least, an easement in said street. . . . It is an incorporeal hereditament, but it is still a tenement and an interest in the land. . . . It is real property and it is created by grant." In the case of Providence Gas Co. v. Thurber, 2 R. I., 21, gas pipes having been permanently attached to the soil and united to the to operate the road continues. It constitutes assets of the company and belongs to the stockholders after the creditors are paid.¹

The repeal or lapse of the charter does not put an end to the contract right to operate the road on the streets. The right to construct and operate tracks on a street may be granted for a longer period than the charter duration of the corporation which takes such grant; ² and where there is no express limitation of time specified in the charter or ordinance giving this right, it is granted in perpetuity and exists forever.³

Although the statutes require the consent of the municipality in order to make the right to use the streets a valid right, yet the city cannot impose additional terms on the company that seeks the right. On the other hand, the city cannot add to the grant by providing that the grant to a particular company shall be an exclusive one.

easement of the company in the land, were held to become a part of the realty and to be properly taxed as real estate. Under the clause in a mortgage covering after-acquired property the right of a railroad subsequently acquired from a city to build tracks on certain streets is covered by the mortgage. Quincy v. Chicago, etc., R. R., 94 Ill., 537 (1880).

¹ People v. O'Brien, 111 N. Y., 1 (1888). The legislature may repeal the charter of a street railway under the reserved right to repeal, and may cause the property to be turned over to a new corporation upon compensation being paid. Greenwood v. Freight Co., 105 U. S., 13 (1881). Upon dissolution of a corporation its franchise does not revert to the state. The state may grant an unused street railway franchise to another company. Henderson v. Central, etc., R'y, 21 Fed. Rep., 358 (1884).

² People v. O'Brien, supra; State v. La Clede Gas Co., 102 Mo., 472 (1890). Contra, City of Detroit v. Detroit City R'y, 56 Fed. Rep., 867 (1893). Where the charter runs for fifty years the street rights may be granted for thirty years. Mayor, etc., v. Houston, etc., R'y Co., 19 S. W. Rep., 127 (Tex., 1892). Where one street railway by contract assigns its street franchises to another company in cousideration of four cents per mile for

every mile traveled by each car of the company which operates the tracks, the latter company cannot repudiate the contract on the ground that the charter of the former company has expired subsequently to the contract Canal, etc., Co. v. St. Charles, etc., Co., 11 S. Rep., 702 (La., 1892).

³ People v. O'Brien, supra; Milhau v. Sharp, supra; Davis v. Mayor, supra.

⁴Matter of Kings County, etc., R. R., 105 N. Y., 97, 114 (1887). Cf. Pacific R. R. v. Leavenworth, 1 Dill., 393 (1871). The city may lease or sell the grant for twenty years instead of granting it absolutely for all time. Brown v. Duplessis, etc., 14 La. Ann., 842 (1859).

5A city has no power to grant an exclusive right to a street railway company unless the legislature has expressly authorized the city so to do. Jackson, etc., H. R. R. Co. v. Interstate, etc., R'y, 24 Fed. Rep., 306 (1885). A city has no power to grant an exclusive right to a street railway company. New Orleans City R. R. Co. v. Crescent City R. R. Co.. 12 Fed. Rep., 308 (1881). A city has no inherent power to grant to a street railway an exclusive right to lay down tracks. Henderson v. Ogden City R'y, 26 Pac. Rep., 286 (Utah, 1891). A monopoly to a street horse railway does not prevent a street railway operated by Although the legislature may grant an exclusive right where the constitution of the state does not forbid, yet such grants are not favored by the courts.¹

Where two companies each claim and have the right to lay down tracks in a street, the one which occupies the street first may retain its tracks. This does not, however, prevent additional tracks being laid in the same street.²

other power. Teachout v. Des Moines. etc., R'v. 38 N. W. Rep., 145 (Iowa, 1888). A city under its power "to authorize or forbid" street railways may grant an exclusive right to a company for a period of years. Such a monopoly is not forbidden by a constitutional provisou that "no exclusive privileges . . . shall ever be granted." Des Moines, etc., R'y v. Des Moines, etc., R'y, 33 N. W. Rep., 610 (Iowa, 1887). An owner of land may grant to a street railway the exclusive right to run a railway over it. Fort Worth, etc., R'v v. Queen, etc., R'v. 9 S. W. Rep., 94 (Tex., 1888). A grant to a street railway is valid even though it contains an invalid provision giving exclusive rights. It is void only as to that provision. Mayor, etc., of City of Houston v. Houston, etc., R'y Co., 19 S. W. Rep., 127 (Tex., 1892). A city has no power to give exclusive privilege to a street railway company. New Orleans, etc., R. Co. v. City of New Orleans, 11 S. Rep., 77 (La., 1892); New Orleans, etc., R. Co. v. City of New Orleans, 11 id., 78 (La., 1892).

1 The exclusive right of a company to operate horse or street railways in a city does not prevent the construction of a competing cable line. Omaha H. R'y v. Cable, etc., Co., 30 Fed. Rep., 324 (1887). An exclusive privilege granted to a street railway company by a city under legislative authority, whereby the company is to be sole judge of when and where further lines are to be constructed, is not valid. The city must retain the power of deciding what new lines shall be built. Citizens' St. R'y Co. v. Jones, 34 Fed. Rep., 579 (1888). A provision in a steam railroad charter that it shall

have the exclusive right of the business of transportation between certain points does not prevent the construction of a street railway between those points. Louisville, etc., R. R. v. Louisville City R'y, 2 Duv. (Ky.), 175 (1865). Although there are street railway tracks already in a street, additional tracks may be authorized. Koch v. North. etc., R'y, 23 Atl. Rep., 463 (Md., 1892). So, also, of tracks over a bridge. North Balt., etc., R'y v. Mayor, etc., id., 470. A street railway company occupying a street may enjoin another street railway company from laying tracks on the same street in violation of the rights of the former. Germantown, etc., R'v Co. et al. v. Citizens', etc., R'y Co., 24 Atl. Rep., 1102 (Pa., 1892). Where two street railways commence work in a street at the same time, the one which had been constructing up to the street for some time will be given the preference. Indianapolis Cable St. R'v v. Citizens' St. R'y, 26 N. E. Rep., 893 (Ind., 1891). Although there is one track in a street, another company may be given the right to lay another track. Oakland R. R. v. Oakland, etc., R. R., 45 Cal., 365 (1873).

²A horse railway with one track, but with a right to lay down two, cannot prevent an electrical railway being built with two tracks on the same street. Ogden City R'y v. Ogden City, 26 Pac. Rep., 288 (Utah, 1891). Where two street railways have the right to use a street the one prior in taking possession acquires a prior right. Indianapolis, etc., Co. v. Citizens', etc., Co., 24 N. E. Rep., 1054 (Ind., 1890). Where a route bas been laid out under the New York Rapid

Where the statutes prescribe that the right shall be granted only upon certain prerequisites being complied with, a compliance is necessary.¹

Street railroad tracks can be laid down for public use only. They cannot be constructed for private business purposes.²

Although the charter requires the company to finish its tracks within a certain time, yet a failure to comply with such a provision does not work a forfeiture of all the company's rights.³

The company cannot lawfully build part of the route laid down

Transit route it is exclusive, and is not affected by the fact that the city subsequently takes for a public park a part of the land over which the route is laid out. Suburban R. T. Co. v. Mayor, 128 N. Y., 510 (1891).

1 Under the New York statute the company may apply to the court for consent to build before application is made to the common council. Application may be made for a part only of the streets to be traversed and a second or third application for the others. The allegations must be made and facts stated showing a substantial effort to get the consent and a failure to do so. Matter of People's R. R., 112 N. Y., 578 (1889). Where the franchise is to be sold to the highest bidder, it means the highest bidder in money and not in amount of paving. Buckner v. Hart, 52 Fed. Rep., 835 (1892). A provision that the franchise must be offered for sale at public auction after three months' publication prevents a subsequent enlargement of the franchise by including additional streets. street railway that has never obtained permission to lay down its tracks in the manner prescribed by law has no standing in court to enjoin a new company from laying down tracks. Appeal of Larimer, etc., St. R'y, 20 Atl. Rep., 570 (Pa., 1890). Where the statute requires that the right to lay down and operate street-car tracks shall be given to the one who "will agree to carry passengers at the lowest rate of fare," the right cannot be given to one who agrees to give the cheapest commutation tickets. Cincinnati, etc., R. R. v. Smith, 29 Ohio St., 291 (1876). See, also, p. 1564, n. 2.

² A municipality cannot grant to an individual the right to lay a track in a street for his own use. State v. Trenton, 36 N. J. L., 79 (1872). A city has no power to grant to a brewing corporation the right to lay tracks across a street in order to enable the company to transfer its cars. Glaessner v. Anheuser, etc., Assoc., 100 Mo., 508 (1890). A street railway cannot legally turn over part of its line to a private concern to be used for the latter's benefit exclusively. Fanning v. Osborne, 102 N. Y., 441 (1886). A manufacturing company cannot by lease from a railroad company use a street railroad for its private purposes, even with the consent of the municipality. Hartman Steel Co.'s Appeal, 18 Atl. Rep., 553 (Pa., 1889). An elevated tramway company formed to benefit a private business and practically doing so exclusively cannot condemn land for terminals. Matter of Split. etc., Cable Road Co., 128 N. Y., 408 (1891). An elevated tramway with two tracks to carry buckets containing stone cannot take land under condemnation proceedings although incorporated under the railroad act. Matter of Split Rock Cable Co., 58 Hun, 351 (1890).

³ See § 638, supra. When a street railway charter is to "cease" unless certain conditions are performed, no judicial forfeiture of the charter is necessary to work a forfeiture where the conditions have not been performed. Matter of Brooklyn, etc., R'y Co., 72 N. Y., 245 (1878). The city cannot re-

in the charter and abandon the rest. The state may forfeit the charter if the company does not construct the whole. The municipal authorities cannot delegate their power to grant permission to

voke the grant on the ground that the road has not been constructed in the time required. Brooklyn, etc., R. R. v. Brooklyn City R. R., 32 Barb., 358. Where a right of a company to lay down tracks requires the work to be done within a certain time and this time is extended, the new contract is not an abandonment of the original right, but only a postponement of it. McNeil v. Chicago City R'v. 61 Ill., 150 (1871). A street railroad cannot enjoin a city from tearing up the tracks for non-compliance with the contract and city license authorizing the company to lay its tracks where such non-compliance is admitted. Spokane, etc., R'v v. City of S. T., 46 Fed. Rep., 322 (1891). Where by its charter a street railroad is to be commenced within three years and completed within ten, but it does not even open books for subscriptions until nearly twenty years have elapsed. the corporation never came into existence, and an abutting property owner may enjoin the laying of tracks. Bonaparte v. Baltimore, etc., R. R., 23 Atl. Rep., 784 (Md., 1892). Where a street railway company has acquired the right to lay a track and bas laid it, the city cannot withdraw its consent thereto. Although the time within which a company was bound by its charter to complete its street railway tracks has expired, and it has failed so to do, yet the city cannot treat such rights as thereby forfeited and at an end, and proceed to give the right to another company. Brooklyn, etc., R. R. v. Brooklyn, etc., R. R., 32 Barb., 358 (1860). Although it is a condition of a grant to a street railway company that it shall complete the road within a year and in case of failure the council may withdraw the right, an adjoining property owner cannot enjoin the construction of the road on the ground that the year

has elapsed. Hovelman v. Kansas City Horse R. R., 79 Mo., 632 (1883). Permission given by a municipality to a railroad to occupy a street, if done within a certain time, lapses absolutely and inso facto if not occupied within that time. Atchison, etc., R'v v. Nave. 17 Pac. Rep., 587 (Kan., 1888). A provision that so much of the road as should not be occupied within a certain time should be considered abandoned is self-executing. Mayor, etc., v. Houston, etc., Co., 19 S. W. Rep., 786 (Tex., 1892). Only the city can complain of the failure of the street railway company to comply with its obligations. Another street railway company cannot set up the breach. If a city delays in objecting to the breach until the road is actually constructed, it cannot theu set up that the road was not constructed in time. New Orleans, etc., R. Co. v. City of New Orleans, 11 S. Rep., 77 (La., 1892). Private individuals cannot complain that a street railroad has abandoned part of its line. Kinealy v. St. Louis, etc., R. R. Co., 69 Mo., 658 (1879).

1 The charter of a street railroad company was forfeited in People v. Broadway R. R., 126 N. Y., 29 (1891), where the company had not constructed all the track called for by its charter, and had taken up a part of that which it had constructed. Where a company authorized to construct tracks has neglected to do so on some streets and has taken up its tracks on another street, the common council may disregard the grant and may authorize another company to lay the tracks. Galveston, etc., R'y Co. v. Galveston, etc., R'y Co., 63 Tex., 529 (1885). A stockholder may enjoin the operation of a street railway until the road is completed to its terminus. Martin v. Second, etc., R'y Co., 1 Amer. St. R'y Dec., 359 (Pa., 1858). Where lay down street railway tracks. A grant made by a common council, one of whose members is interested in the company, is fraudulent. Where the grant is for a limited time, the municipal authorities may renew it before that time expires.

The question of whether a street railway company may sell or mortgage its property is discussed elsewhere.

Where the power to sell or mortgage exists, a sale or mortgage of the property and franchises of a street railway company carries with it the right to operate the railway and to use the streets for that purpose to the same extent that the company might have continued to use them, even though the purchaser is an individual.

a person donates land to a street railway and takes a bond in a penalty equal to the value of the land, conditioned for the construction of the road, the boud may be enforced for the whole amount if the road is not built. Blewett v. Front St. R'v. 51 Fed. Rep., 625 (1892); S. C., 49 id., 126. A vendor of the stock of a street railway company may collect damages for breach of the contract of the vendee to construct the street railway to certain land owned by the vendor, even though the corporation the stock of which was sold had agreed to acquire certain rights of way and had not done so. Blagen v. Thompson, 31 Pac. Rep., 647 (Ore., 1892). Where a railroad company mortgages such part of its road as is completed, and the mortgage is foreclosed, the purchasers are not bound to go on and complete the road. Chartiers R'y v. Hodgens, 85 Pa. St., 501 (1877).

¹The common council cannot delegate its power to make grants of rights to lay down street-car tracks. State v. Bell, 34 Ohio St., 194 (1877).

²Where one of the common council and of the committee granting a street railway franchise to individuals who convey the same to a corporation becomes a stockholder in that corporation as soon as it is formed, the franchise is void as having been fraudulently obtained. Finch v. Riverside, etc., R'y, 25 Pac. Rep., 765 (Cal., 1891).

³ State v. La Clede Gas Co., supra. A common council may renew a street railway company's right to use the streets, even though the old right has not yet expired, and even though the statutes only authorize the common council to grant a renewal upon the expiration of the old grant. State v. East Cleveland, etc., R'y, 6 Ohio C. C., 318 (aff'd by Sup. Ct., 1892).

⁴ See §§ 892-896, supra.

⁵ In the case New Orleans, etc., R. R. Co. v. Delamore, 114 U. S., 501 (1884). it was contended that upon the adjudication that a street railway company was bankrupt, "the right of way and the franchise to build and use a railroad thereon reverted to the city of New Orleans." The court held that inasmuch as the company had power to mortgage its franchise, this franchise could be sold at a bankrupt sale, and the right to operate the road passed to the purchaser. The court held also that the right of way could not be affected by an ordinance of the city granting to another company the right to use the same streets. A sale of the alleged right of the latter company on an execution may be enjoined. At a bankrupt sale the right of way may be purchased by an individual. On an execution sale of a street railroad franchise, as authorized by statute, an individual may purchase and then operate the road. "There is no more difficulty in allowing individuals to exercise these powers than corporations, and the use of them for a brief period in no way interferes with the protection of the franchise in perThe question of whether a street railway company shall pay the city for the right to construct and operate its tracks is a question of policy and not of law.

§ 914. The rights of owners of property adjoining a street railroad.— The rule is well settled that the owner of property fronting on a street, even though he owns the fee of the land to the center of the street, cannot prevent a duly-authorized horse railroad being constructed on the street, and cannot collect damages for the use of the street or for injury done to his property by the building of the railroad, nor can he enjoin the construction of the road.²

petuity. There might be difficulties in managing larger enterprises, and different rules have been applied to them. But there are no difficulties in the way of private management of a street railway, and there is no reason why the statute, which by its language includes them, should be made to exclude them." Id.: McKee v. Grand Rapids, etc., R'v. 41 Mich., 274 (1879). Where a city grants to a railroad a right of way through certain streets, the railroad under its general power to sell its property may sell with that property the right of way. Quincy v. Chicago, etc., R. R., 94 Ill., 537 (1880). See, also, § 790, supra.

¹For various propositions made to New York city in 1854 for the franchise to operate a street railway on Broadway, see 3 Duer Rep., 123.

² Barney v. Keokuk, 94 U.S., 324 (1876). An adjoining property owner cannot enjoin the construction of a horse railroad that has been duly authorized by the legislature. Hinchman v. Paterson H. R. R. Co., 17 N. J. Eq., 75 (1864). A street horse railroad duly authorized by law cannot be enjoined by property owners. Van Horne v. Newark, etc., R'y, 21 Atl. Rep., 1034 (N. J., 1891). A street railway is legal although there remain only nine feet on each side of the track for vehicles. Where a city is given authority to authorize street railways and does so, quo warranto does not lie on behalf of the state on the ground that the street was too narrow for a street railway. People ex rel. Kunze et al. v. Ft. Wayne & E. R'y Co., 52 N. W.

Rep., 1010 (Mich., 1892). A cable street railroad is not such an additional servitude on the street as to entitle abutting owners to enjoin its construction until they are paid damages. They may join in a bill for injunction, but the injunction will not lie on the above ground nor on the ground that the company was not authorized to make a certain lease of property. Rafferty v. Central Traction Co., 23 Atl. Rep., 884 (Pa., 1892). "Whether the motive power of the cars be horses, electricity or a submerged cable makes no difference in the use. and no one of these modes of use confers any right of action upon the abutting owner," even though nearly the whole street is covered. Id. An abutting property owner cannot enjoin the use of the trolley system where such use has been regularly authorized by the state. Koch v. North, etc., R'v., 23 Atl. Rep., 463 (Md., 1892). In the case of Lockhart v. Craig St. R'v Co., 21 Atl. Rep., 26 (Pa., 1891), the court said: "It cannot be doubted at this day that the legislature of Pennsylvania has the power to authorize the incorporation of companies with power to build and operate railways with horses over the streets of cities, with the authority and consent of the authorities of said cities, as provided by section 9 of article 17 of the constitution. And it is too late to say that such use and occupation of the streets impose an additional burden or servitude thereon as renders it necessary to provide for compensation therefor to the owners of abutting property." The In New York a different rule prevails, and damages must be paid if the property owner owns to the center of the street, even though the road is a street railroad.¹

legislature may authorize the city authorities to permit street railways to lay down tracks without the consent of adjoining proprietors, and without compensation in damages to the owners of the soil over which the highway is located. "The franchise granted to a street railway corporation is not the grant of a right to appropriate without compensation an additional easement in the soil of the street. Nor can such use of the streets, under proper restrictions. be considered as the imposition of an additional servitude upon the land of the owner. The peculiar privilege given is the right, not to acquire land or an easement in land, but only the right, so long as permitted by certain municipal authorities, to lay tracks in streets already appropriated to the uses of public travel for the purpose of facilitating such travel; to modify the public use, and change to some extent the law of the road." Att'y-Gen. v. Metropolitan R. R., 125 Mass., 515 (1878). The authority to lay and use a horse railroad track in a public street is not a new servitude imposed upon the land for which the owners of the fee are entitled to compensation, but is a part of the public use to which the land was originally subjected when taken for a highway. Elliott v. Fair Haven, etc., R. R., 32 Conn., 579 (1860). Judge Cooley, in a dictum in Grand, etc., R. R. Co. v. Heisel, 38 Mich., 62, 66 (1878), said that a street railway may be authorized without compensation being paid to adjacent property owners. The laying down of rails and the running of cars by a street railway "is not the appropriation of the street to a new use, requiring compensation to be made therefor to an adjacent property owner, unless he suffers some private and peculiar injury by being deprived of that free access to his premises which otherwise he would continue

to have and enjoy." The fact that the adjoining owner cannot back his wagons up against the curb in order to unload goods is not such an injury. Hobart v. Milwaukee, etc., R. R. Co., 27 Wis., 194 (1870). A horse-car track is not an additional servitude on the street, and an adjoining owner cannot enjoin its construction until he is paid damages. Hiss v. Baltimore, etc., P. R'v Co., 52 Md., 242 (1879). An adjacent property owner cannot collect damages by reason of the fact that a switch, turnout and sidetrack are constructed in front of his premises, preventing a carriage from standing in front thereof, Carson v. Central R. R., 35 Cal., 325 (1868). adjoining property owner cannot enjoin a street railway company from constructing a road on the street, on the ground that the company has no right to do so on that particular street. The state alone can complain. It was conceded that the city had power to grant the right and the company had power to take it. Hovelman v. Kansas City Horse R. R., 79 Mo., 632 (1883). The adjoining owners are entitled to compensation where a street railway is built not in the center of the street, but next to the curb. Cincinnati, etc., St. R'y v. Village of Cumminsville, 14 Ohio St., 523 (1863). No new burden entitling adjacent owners to compensation. Ransom v. Citizens' R'y, 16 S. W. Rep., 416 (Mo., 1891).

1 The building and running of a street railway in New York state is held to be an imposition of an additional burden on the land of the adjoining proprietor, who owns the fee to the middle of the street, for which compensation must be made. Craig v. Rochester, etc., R. R. Co., 39 N. Y., 404 (1868). But in New York no compensation need be paid to the adjacent property owner where the fee to the street is in the city. People

Where a railroad in the street is operated by steam the adjacent property owner is entitled to damages, but not to an injunction. A street railroad operated by the overhead electric system does

v. Kerr, 27 N. Y., 188 (1863). In New York, where the fee to the streets is in the city, a street railway is not liable in damages to the adjacent property owners, nor can such owners enjoin the construction of the road which has been duly authorized by the city and state. Kellinger v. Forty-second, etc., R. R., 50 N. Y., 206 (1872). Iu New York there are two classes of cases in regard to street railroads and adjoining property owners. In the case Reining v. New York, etc., R. R., 128 N. Y., 157, 163 (1891), the court said as to these classes of cases: "These latter cases, as will be observed, decide that neither a horse nor steam railroad can be authorized in streets, the fee of which is in the adjacent owner, without his consent, while the former cases hold that where the fee is in the municipality, horse railroads may be authorized against the will of the abutting owner and without making compensation. The distinction is made to rest on the location of the fee." An owner of property cannot recover damages from a steam railroad running through the street, where the property owner does not own the fee of the street. Fobes v. Rome, etc., R. R., 121 N. Y., 505 (1890). Owner of property may recover damages for a nuisance caused by a steam railroad in the street. Hussner v. Brooklyn, etc., R. R. Co., 114 N. Y., 433 (1889). As to elevated roads, see the leading case of Story v. N. Y. El. R. R., 90 N. Y., 122 (1882). As to private injury, see Uline v. N. Y. C., etc., R. R., 101 N. Y., 98 (1886); Lahr v. Metropolitan, etc., R'y. 104 id., 268 (1887).

¹Where a railroad company has authority to lay its tracks and operate its road on a public street, an injunction will not lie against such construction and operation at the instance of an abutting property owner. The remedy

is at law for damages. The court said: "A court of equity must be satisfied that the threatened damage is substantial and the remedy at law in fact inadequate before restraint will be laid upon the progress of a public work. And if the case made discloses only a legal right to recover damages rather than to demand compensation, the court will decline to interfere." Osborne v. Missouri, etc., R'y Co., 147 U. S. Rep., 248 (1893). Where a horse railroad uses steam as a motive power, even without legal authority, the adjoining owners may recover damages. Hussner v. Brooklyn, etc., R. R., 114 N. Y., 433 A street railway operated by steam and carrying passengers is not an additional servitude on the street unless it practically monopolizes and substantially impairs the use of the street. An ordinary steam railroad does practically monopolize the street. The fact that outside of the city the railway carries freight is immaterial. Newell v. Minn., etc., R'y, 35 Minn., 112 (1886). Where one street railway company has leased a part of its lines to another company, and the latter is in possession, an adjoining property owner objecting to the use of steam on the road cannot raise the objection that such lease is ultra vires. Newell v. Minn., etc., R'v. 35 Minn., 112 (1886). A road built through a street, not to carry freight or passengers, but to transfer cars from one railroad to another, imposes an additional easement on the street, and an injunction will issue unless the company institute condemnation proceedings. Carli v. Stillwater, etc., Co., 28 Minn., 373 (1881). An elevated railroad is a new use of the street for which abutting property owners are entitled to damages. Koch v. North, etc., R'y, 23 Atl. Rep., 463 (Md., 1892). A street railroad differs from a railroad for general not give the adjacent property owners a right to damages, and they cannot enjoin the construction of such a road.¹

The owner of property abutting on the highway cannot enjoin the construction of the road. His remedy, if he has any, is at law for damages.²

It is a matter of doubt whether an adjacent property owner

traffic in the use and not in the motor power. A railroad propelled by steam may still be a street railroad and impose no additional servitude on the strects. and may be authorized by a municipality under its charter powers. Williams v. City, etc., R'v. 41 Fed. Rep., 556 (1890). Where the street railway may, when duly authorized so to do, lower the grade of its tracks, an adjoining property owner cannot complain. The fact that the company may and intends to use steam as a motor does not change the rule. Briggs v. Horse R. R., 79 Me., 363 (1887). An adjacent property owner cannot enjoin a street railway company on the ground that its charter is invalid, unless his property rights are affected. Nichols v. Ann Arbor, etc., St. R'v. 49 N. W. Rep., 538 (Mich., 1891). Concerning the statute in Wisconsin relative to damages to abutting property owners, see Sinnott v. Chicago & N. W. R'y, 50 N. W. Rep., 1097 (Wis., 1892). As to compensation to adjacent property owners where a railroad runs through a street, see Dill. on Munic. Corp. (3d ed.), § 725. A railroad occupying a street with the consent of the municipality is nevertheless liable to adjacent property owners. Denver, etc., R'y v. Bourne, 16 Pac. Rep., 839 (Col., 1888). That a railroad operated in a street may be a nuisance, see Thompson v. Penn. R. R., 14 Atl. Rep., 897 (N. J., 1888). In general see, also, Dalv v. Georgia, etc., R. R., 7 S. E. Rep., 146 (Ga., 1888). Injunction does not lie to restrain a railroad company from laying its track in the street. New Albany, etc., R. R. v. O'Daily, 12 Ind., 551 (1859).

¹ Lockhart v. Craig St. R'y Co., 139 Pa. St., 419 (1891); Taggart v. Newport

St. R'v Co., 16 R. I., 668 (1890); Rafferty v. Central Traction Co., 23 Atl. Rep., 884 (Pa., 1892): Halsev v. Rapid Transit R'y Co., 47 N. J. Eq., 380 (1890); Detroit City R'v v. Mills, 85 Mich., 634 (1891); Koch v. North Avenue R'v Co., 23 Atl. Rep., 463 (Md., 1892); Williams v. City Electric St. R'v Co., 41 Fed. Rep., 556 (1890); Gauss, etc., Co. v. St. Louis, etc., R'v. 20 S. W. Rep., 658; 147 U. S., 256; Booth on Street R'y Law, § 83, citing many cases. A telephone company has no cause of action against an electric street railway although the current of electricity of the street railway interferes with the operation of the telephone current. Hudson, etc., Tel. Co. v. Watervliet, etc., R'v. 135 N. Y., 393 (1893). Although the overhead trolley electric wire interferes through its ground current with telephone wires the latter cannot be the cause of complaint, even though they were constructed first. Cincinnati, etc., R'y v. City, etc., Assoc., 27 N. E. Rep., 890 (1891). An electric street railway does not impose an additional servitude on the street for which adjoining owners may demand compensation. Du Bois. etc., R'y v. Buffalo, etc., R'y, 11 R'y & Corp. L. J., 6 (Com. Pl. Pa., 1891). An abutting property owner owning the fee to the middle of the street may enjoin the erection of poles for the trollev system under an ordinance not authorized by statute. State v. Inhabitants. etc., 23 Atl. Rep., 281 (N. J., 1892).

² Lockhart v. Craig St. R'y Co., 139 Pa. St., 419 (1891); Osborn v. Missouri P. R'y, 147 U. S., 248; Williams v. City Electric St. R'y Co., 41 Fed. Rep., 556 (1890); Detroit City R'y v. Mills, 85 Mich., 634 (1891). may recover damages where the street railway changes the grade of the street. The rule seems to be that he cannot, and this is in accord with the old rule concerning changes in the grade of streets. Sometimes the statutes prescribe that the consent of a certain proportion of the adjacent property owners must be obtained before a street railroad can be built.

§ 915. Powers which a street railroad possesses—General statutes apply to street railroads—Condemning land—Double tracks, switches, etc.—Use of electricity, cable, etc.—Crossing a steam railroad.—Where there is no statute in a state relative to the powers of street railroads, the courts hold that they have the same powers that are given by statute to steam railroads.³

l A street railway is not liable to adjoining property owners for cutting down the grade of the street where it acts for the city in that respect. Interstate, etc., R'y v. Early, 26 Pac. Rep., 422 (Kan., 1891). An adjacent property owner is entitled to compensation where a street railway makes cuts and fills in the road. A steam street railway is an additional burden on the land. Nichols v. Ann Arbor, etc., St. R'y, 49 N. W. Rep., 538 (Mich., 1891).

² Where the statute requires the assent of the adjoining property owners. the assent to a single track is not an assent to a double track, and the construction of a double track may be enjoined by a property owner. Roberts v. Easton, 19 Ohio St., 78 (1869). Where the consent of a proportion of the adjoining property owners is required, the city may consent for a park. The city's consent once given cannot be withdrawn, the road having been constructed. Paterson, etc., R. R. v. Mayor, 24 N. J. Eq., 158 (1873). The act requiring the consent of adjoining property owners in Ohio was repealed. State v. Bell, 34 Ohio St., 194 (1877). "Where the grant of the right of way on said streets was accepted by the said company, and more than three miles of road actually constructed, the right of way on all of said streets became a vested right which could not be impaired or taken away by legislative enactment." After part of the road is constructed the legislature cannot provide that the consent of adjoining property owners must be obtained before the rest can be constructed. Hovelman v. Kansas City R. R., 79 Mo., 632 (1883). Although the statutes require the assent of a certain proportion of adjoining property owners to the granting of street railway rights, yet this is not necessary to the renewal of those rights by the city or the enlargement of those rights so as to allow the use of electricity. Pelton v. East Cleveland R. R., 22 Weekly Law Bull., 67 (Cleveland, 1889). In New York, as long ago as 1854, the legislature prescribed that no street railroad should be built except upon the consent of a majority in interest of the abutting property owners. Laws 1854, ch. 140. This provision was embodied in the constitution of the state in 1874, except that three commissioners appointed by the court might give a consent iu place of the consent of the abutting property owners. See, also, p. 1557, n. 1.

³ A general act applicable to railroads is applicable to street railroads. Chicago v. Evans, 24 Ill., 52 (1860). See, also, § 912, supra. The terms railroad and railway are synonymous, and have no distinct and independent meaning in themselves; and when either of the words is used in a statutory or constitutional provision, and the context is with-

Where the statutes authorize railroads to consolidate or mortgage their property, a street railroad comes within the meaning of the statute; 1 but a general statute reducing railroad rates does not apply to street railroads.2

A street railroad cannot condemn land under the statutes authorizing railroads to do so.³ The extent of a street railway company's right to lay down single or double tracks, freight tracks, switches, etc., depends upon the words of the grant.⁴ A street railroad has

out indication that a particular kind of road is intended, the provision will be held applicable to every species of road embraced in the general sense of the word used. A statute authorizing the lease of railroads applies also to street railroads. Rafferty v. Central Traction Co., 23 Atl. Rep., 884 (Pa., 1892). The word railway, as used in the Pennsylvania constitution, applies to street railways, while the word railroad applies to steam railroads. Hence the prohibition against the consolidation of competing lines does not apply to street railways. Montgomery's Appeal, 20 Atl. Rep., 399 (Pa., 1890). The crossing of one road by another does not constitute a taking of the property of the latter. Brooklyn, etc., R. R. r. Brooklyn, etc., R. R., 33 Barb., 420 (1861).

¹ In the Matter of Washington, etc., R. R., 115 N. Y., 442 (1889). A general act relative to the uniting of railroads applies to horse railroads as well as steam railroads. The court will not enjoin the passage of an ordinance which will be useless even if passed. City of Chicago v. Evans, 24 Ill., 52 (1860). Under the general statutes authorizing every corporation to mortgage its real personal property, a street railway company may mortgage its street railway. Hovelman v. Kansas City H. R. R., 79 Mo., 632 (1883). In the case of People v. Brooklyn, etc., R. R., 89 N. Y., 75 (1882), the New York court of appeals applied to street railroads a general statute authorizing "railroad" corporations to make leases of their property. Where a stockholder in a street railway starts suit to set aside an illegal consolidation with another company fraudulently brought about by the officers, the latter company being insolvent and the former liable to become so, a cause of action is stated and a receiver may be appointed. Becker v. Directors, etc., 15 S. W. Rep., 1094 (Tex., 1891).

²A general actreducing rates is not construed so as to apply to street railways. Where paper money depreciates the currency, a street railway may charge six instead of five cents, although the latter is the price fixed in its grant. Moneypenny v. Sixth Ave. R. R., 7 Rob., 328 (1865).

3 A street railroad company in New York has no power to acquire a right of way through private property. It must confine itself to the streets. Matter of South Beach, etc., R. R., 119 N. Y., 141 (1890). A street railway company cannot condemn land under the general statute authorizing railroads so to do. Thomas, etc., Co. v. Simon, 25 Pac. Rep., 147 (Oreg., 1890). A city council has no power to condemn land for a street for the express purpose of giving a railroad company the use of the street in such a manner as to exclude all other travel therefrom. Ligare v. City of Chicago, 28 N. E. Rep., 934 (Ill., 1891). Ejectment lies to recover land which a city and a street railway occupied without the consent or acquiescence of the owner. Green v. Tacoma, 51 Fed. Rep., 622 (1892). A street railway authorized to cross steam railroads may enjoin the latter from tearing up the street railway tracks. Du Bois, etc., R'y v. Buffalo, etc., R'y, 11 R'y & Corp. L. J., 6 (Com. Pl. Pa., 1891). ⁴ A street railway company having implied power to use horses or electricity, but it cannot change from horses to a cable or to electric power unless expressly authorized so to do 1

power to construct a double track may at any time subsequent to the construction of a single track put in the double track. People's Pass. R'v v. Baldwin, 37 Leg. Intell., 424 (Com. Pl., 1880), If a street railway has power to construct a single or double track, it may lay a single track and subsequently take it up and lav a double track. Ransom v. Citizens' R'v. 16 S. W. Rep., 416 (Mo., 1891). The fact that the company has laid its track slightly nearer the curb than the ordinance prescribes is not sufficient ground for a court of equity to interfere upon an information filed by the attorney-general. Attorney-General v. Metropolitan R. R., 125 Mass., 515 (1878). A city after granting the right to a street railway company to lay down a double track cannot confine the company to a single track. "The ordinance constitutes a contract whereby defendant is secured in the exercise of the powers conferred therein. If it had not this effect the defendant would have no security that its property would be destroyed by unfriendly legislation by the city council. The law will secure to defendant the exercise of all the powers conferred by the ordinance." The city cannot, without the consent of the defendant, change the terms of the contract entered into by the ordinance, nor abrogate or nullify it. City of Burlington v. Burlington St. R'y, 49 Iowa, 144 (1878). Street railways in Pennsylvania are known as "passenger railways" and are so distinguished from a "railroad." The former have no power to carry freight or to lay down tracks suitable for freight. Commonwealth v. Central Pass, R'v. 52 Pa. St., 506 (1866). A loop line may be authorized. It is not necessary that the cars run both ways on a street. Brown v. Duplessis, etc., 14 La. Ann., 842 (1859). A street railway company in laying its tracks may use the

cobble-stones of the pavement which it takes up. Philadelphia v. Empire, etc., R'y, 3 Brew., 547 (1869). The right to lay down a track between two points does not give the right to lav down tracks in more than one street between those points. No one except the company owning the tracks bas a right to use street railway tracks for street cars. Brooklyn, etc., R. R. v. Brooklyn, etc., R. R., 32 Barb., 358 (1860). The laving of a third broad gauge rail by a narrow gauge street railway will not be enjoined at the instance of a property owner. Denver. etc., R'v v. Barsaloux, 25 Pac. Rep., 165 (Colo., 1890). The right of a street railway company to construct switches, double tracks and turnouts is one of the prolific sources of litigation between the company and the Switches and sidings may be constructed after the time for the construction of the road has expired. Potterville v. People's R'y, 37 Atl. Rep., 900 (Pa., 1892). The right to construct a railway gives also the right to construct turnouts and switches, after the usual application to the city. Mayor, etc., v. Houston, etc., Co., 19 S. W. Rep., 786 (Tex., 1892), The charter right of a street railway company eastwardly and westwardly, with a right to construct branches "through any of the streets." is construed strictly, and after twentyeight years will not be held to allow the construction of a north and south road. Junction, etc., Co. v. Williamsport, etc., Co., 26 Atl. Rep., 295 (Pa., 1893).

¹A street railroad company whose charter forbids the use of steam as a motive power cannot change from horses to a cable except by legislative authority. People v. Newton, 48 Hun, 477 (1888); aff'd, 112 N. Y., 396. The legislature may authorize a street railway to change from horse to cable power without requiring the consent of

Where a street railroad is authorized to operate by any mechanical or other power except steam, it may adopt electricity as a motive power, even though electricity as a motive power was discovered subsequently to the statute. The fact that the company has used horses for a long time does not prevent its changing to electricity. The city may consent to the use under a general power authorizing the city to regulate the use of the streets by railways.¹

the municipal authorities, even though the constitution requires the consent of the municipal authorities to the laving down of tracks. Matter of Third Ave. R. R., 121 N. Y., 536 (1890). street railway company with no specifications in its charter as to the mode of propulsion may use electricity and may erect poles for that purpose. Halsev v. Rapid, etc., St. R'v. 20 Atl. Rep., 859 (N. J., 1890). Where an electric railway seeks to enjoin parties moving a house from blocking the tracks the defendants cannot attack the company's right to use electricity. Williams v. Citizens' R'v. 29 N. E. Rep., 408 (Ind., 1891). Although suit is brought to forfeit a street railway franchise for using electric power without authority, the legislature may cure the defect of power. To forfeit for not commencing work within a year the pleading must allege when the work was commenced. People v. Los Angeles, etc., R'v. 27 Pac. Rep., 673 (Cal., 1891),

1 Hudson, etc., Tel. Co. v. Watervliet, etc., R'v. 135 N. Y., 393 (1893). An ordinance authorizing the laying of horse railroad tracks is sufficient to lay an electric track. Although a street railway lays a double track where it has the right to lay only a single track, this does not justify the cutting of the electric wires. The stringing of a wire along the street is not an interference with the rights of adjacent property A company stringing wires without authority cannot obtain an injunction against property owners cutting the wires. Paterson, etc., Co. v. Grundy, 26 Atl. Rep., 788 (N. J., 1893).

An ordinance which gives power to a street railway company to equip its lines with the electric system is sufficient authority for the lessee of the company to do the same. Reeves v. Continental R'v Co., 25 Atl, Rep., 516 (Pa., 1893). The grant of authority by a city to a company to erect poles for the trolley system should be by ordinance and not by resolution. State v. Mayor, etc., 23 Atl. Rep., 284 (N. J., 1892). A lessee company having power to lay a cable on streets on which a passenger railway has been constructed has power to lay a cable on streets upon which the lessor passenger company has power to lay tracks. Rafferty v. Central Traction Co., 23 Atl. Rep., 884 (Pa., 1892). Power of a municipality to authorize "horse aud steam railroads" gives power to authorize an electric railway. Buckner v. Hart, 52 Fed. Rep., 835 (1892). If the charter of the company provides that it may use any mode of propulsion that does not involve the use of overhead wires, it cannot use such wires. Farrell v. Winchester Ave. R. R., 23 Atl. Rep., 757 (Conn., 1891), holding also that an abutting property owner might enjoin such use. A statute empowering municipalities to authorize the use of electric motors on street car lines does not sustain an ordinance authorizing the construction of poles for the trolley system. State v. Inhabitants, etc., 23 Atl. Rep., 281 (N. J., 1892). An adjacent property owner cannot question the right of the company to use electricity as a motive power. Detroit City R'y v. Mills, 85 Mich., 634.

Where a street railroad has power to lay tracks in a street, it has power to cross the tracks of a steam railroad which cross the street.1

§ 916. Right of one street railroad to run over the tracks of another. - One street railroad has no right to run over the tracks of another street railroad except by consent or by reason of a statute, and in the latter case compensation must be paid.2 But the legislature, under its power of eminent domain, may authorize one company to run its cars over the tracks of another company upon pay-Such statutes are now quite common.3 ing compensation.

¹ Booth on Street R'v Law, § 109, n. A preliminary injunction against a steam railroad interfering with the laying of a street railway track across the tracks of the former should not be granted where the former sets up that it has occupied the ground for more than twenty years, that it was a part of the yard for making up trains, that the street railway company was not valid, and that other and safer points of crossing were available. Calvert et al. v. State, 52 N. W. Rep., 687 (Neb., 1892). In Pennsylvania by statute a court of equity may enjoin a street railway company from crossing a steam railroad at grade. Pennsylvania R. Co. v. Braddock, etc., R'y Co., 25 Atl. Rep., 780 (Pa., 1893). A court of equity will not interfere with the crossing of a public highway by a railroad and the mode of such crossing except in serious cases. The ordinary remedies for a nuisance should be resorted to. Inhabitants, etc., v. Port Reading R. R., 23 Atl. Rep., 127 (N. J., 1891).

² Metropolitan R. R. Co. v. Quincy R. R. Co., 94 Mass., 262 (1866). One street railway company has no right to run its cars over another street railway. Brooklyn, etc., R. R. v. Brooklyn City R. R., 32 Barb., 358. In the case of Fidelity, etc., Co. v. Mobile St. R'y Co., 53 Fed. Rep., 687 (1892), the court held that the use of five blocks of the roadbcd of a street railway in the hands of a receiver by another street railway company materially impairs the just enjoyment of the property, and will be tracks of another, this right cannot be

enjoined at the instance of the receiver. The court said that "One public corporation cannot take the franchises of another public corporation in actual use by it, unless expressly authorized to do so by the legislature, and then only by proper legal proceedings of condemnation." The court held, however, that the erection of poles and wires for an electric railway did not interfere with the rights of a street railway already in operation upon that street. Where a bridge company has allowed street-car tracks to be constructed over the bridge. the bridge company cannot then prohibit the use of the bridge for street cars, but it may charge a reasonable sum for each passenger carried. Covington, etc., Bridge Co. v. South Covington, etc., R'y Co., 19 S. W. Rep., 403 (Ky., 1892).

3 The right of a street railway company to operate its road is a property right which may be condemned under the power of eminent domain. legislature may authorize one company to run over the tracks of another company upon paying compensation therefor. Sixth Ave. R. R. Co. v. Kerr, 72 N. Y., 330 (1878); Matter of Kerr, 42 Barb., 119. Cf. Second, etc., R'y v. Green, etc., R'y, 3 Phil., 430 (1859). In California street railroads may use each others' tracks for five blocks, each paying its share of the cost of construction. Pacific R'y v. Wade, 27 Pac. Rep., 768 (Cal., 1891). Where by statute one company has the right to run over the Where the consent of the municipality is required by the legislature upon such conditions as the former might prescribe, and such consent was given on condition that the city might grant the right to other companies to use the tracks on the payment of a compensation to be fixed by a majority of three persons, two being city officials and one the president of the company, the city may authorize a new company to put in the trolley system and operate its cars over the lines of the old company, even though some trouble and disturbance are caused in putting in the plant.

tost or forfeited by the act of the city common council. Jersey City, etc., H. R. R. Co. v. Jersey City & B. R. R. Co., 21 N. J. Eq., 550 (1870). After plaintiff, a street railway company, had received its charter and established its road, the legislature granted the city a new charter, which provided that any street railroad company should have the right to run its cars over the track of any other street railroad company on payment of a just compensation for the use thereof under such regulations as the city should prescribe, and the city was required to pass the ordinances necessary to carry the provisions into Plaintiff afterwards accepted from the city additional franchises. and agreed to conform to any ordinance then existing or thereafter to be passed enforcing the charter. that plaintiff conceded the right of other street railroad companies to use its tracks on payment of just compensation, and became subject to an ordinance subsequently passed providing the mode of ascertaining the compensation. St. Louis R. Co. v. Southern R'y Co., 15 S. W. Rep., 1013 (Mo., 1891). Though a corporation is given an exclusive right to streets, yet a new corporatiou may be authorized to use the streets on giving compensation to the old company. It amounts to an exercise of the power of eminent domain. Philadelphia, etc., Co.'s Appeal, 102 Pa. St., 123 (1883). Article 10, section 6, of the charter of St. Louis provides that "any street railroad company shall have the right to run its cars over the track

of any other street railroad company on payment of just compensation for the use thereof under such rules and regulations as may be prescribed by ordinance: and it shall be the duty of the municipal assembly to immediately pass such ordinances as may be necessary to carry this provision into effect." Held,. that an ordinance having been passed giving the right to use tracks, the onlything necessary to perfect the right was to have the "just compensation" ascertained, as provided by ordinance. Proceedings under an ordinance providing that when the right to use the tracks of one company has been granted to another company, and the two cannot agree as to compensation, it shall be determined by commissioners appointed by the mayor, do not involve the exercise of the right of eminent domain. Under said article 10, section 6, of the charter of St. Louis the city has the power to make rules and regulations. not only for running the cars of one company over the tracks of another, but also for ascertaining the compensation to be paid therefor. Union Depot R. Co. v. Southern R'y Co. et al., 16 S. W. Rep., 920 (Mo., 1891). See, also, on this point, St. Louis R. Co. v. Southern R'v. Co., id., 960.

¹ North Balt., etc., R'y v. North Ave. R'y, 23 Atl. Rep., 466 (Md., 1892). A provision in the ordinances that other companies shall be allowed to use tracks constructed under it does not apply to tracks laid even subsequently on another right of way. Chicago, etc., R'y v. Kansas City, etc., R. R., 52 Fed. Rep.,

§ 917. Rights of a street railroad relative to its daily operation.—A street railroad has a prior right to the use of its tracks, and persons, carriages, wagons, stages, etc., must leave the tracks when a car is obstructed by them.¹ If the legislature reduces the fare, a traffic contract affected by the reduction may be rendered void.² The charter will not be forfeited for failure to operate for a few days.³ Regulations concerning tickets are governed by substantially the same rules as steam railroads.⁴

§ 918. Liability for negligence, etc.— The rules of liability of a street railroad for damages for accidents due to the negligence of the company and its employees do not come within the scope of

178 (1892). Compensation must be paid by one company for running over the tracks of another company even though the ordinances give the right to one to run over the other. The material placed in the street by a street railway company is the private property of the company. An ordinance may specify the mode in which compensation shall be fixed, but cannot arbitrarily fix the amount. Canal, etc., R. R. v. Orleans R. R., 10 S. Rep., 389 (La., 1891). Where the city charter authorizes it to allow one street railroad company to run its cars over the tracks of another company, the city may authorize the running of electric cars by the former company over the tracks of the latter. Canal, etc., R. R. v. Crescent, etc., R. R., 10 S. Rep., 888 (La., 1892).

If a heavy truck refuses to make way on street railway tracks for a car, the driver is liable to indictment. The right to lay down and use the tracks is a franchise. Commonwealth v. Temple, 80 Mass., 69 (1859). Or he may be liable under a city ordinance. State v. Folev. 31 Iowa, 527 (1871). Other vehicles may drive upon or across a street railway track even though other parts of the street are clear. Adolph v. Ceutral Park, etc., R. R. Co., 65 N. Y., 554 (1875). A statute on the law of the road and public stages relative to turning out for a passing vehicle does not apply to street railroads. Whitaker v. Eighth, etc., R. R., 51 N. Y., 295 (1873). Other vehicles may drive on the tracks but must give a preference to the street-cars. Adolph v. Central Park, etc., R. R., 65 N. Y., 554 (1875); S. C., 76 N. Y., 530 (1879). A street railway company may enjoin a coach line from using the tracks of the former to the obstruction of the cars of the former. Citizens' Coach Co. v. Camden, etc., R. R. Co., 33 N. J. Eq., 266 (1880). Street-cars have no superior right of way at street crossings. O'Neil v. Dry Dock, etc., R. R., 129 N. Y., 125 (1891).

² Although two railroads by contract have agreed on rates to be charged, yet where the legislature reduces the rate of one of them, the contract is thereby rendered void. Buffalo, etc., R. R. v. Buffalo, etc., R. R., 111 N. Y., 132 (1888).

³ It is no cause for forfeiture that the company worked its men more than ten hours a day, or that for five days it did not run its trains. People v. Atlantic. etc., R. R., 125 N. Y., 513 (1891). A street railroad charter canuot be forfeited because of six days' non-user, nor because the company works its men more than ten hours a day. People v. Atlantic Ave. R. R., 57 Hun, 378 (1890).

⁴Where a street railway company is under no obligation to give transfers, it may attach conditions to the transfers which it voluntarily does give. Heffron v. Detroit City Railway, 52 N. W. Rep., 802 (Mich., 1892). If a passenger in a street-car puts too much money in the box by accident, he may retain the fare of the next passenger. Corbett v. Twenty-third, etc., R'y, 42 Hun, 587 (1886).

this work. In certain respects its liability is peculiar to it as a street railway.¹

§ 919. Ordinances of the municipality in regard to street railroads.—It has already been shown that a city cannot repeal a grant of a right to a street railroad to use the streets for its tracks.² Nor can the city pass an ordinance increasing the amount of paving which the company must do.³ It has also been decided that the city cannot pass an ordinance compelling the company to transfer passengers from one line to another.⁴ But it may pass and enforce an ordinance requiring the company to water its tracks,⁵ make reports,⁶ cease to use bob-tail cars,⁷ stop a car when there is danger,⁸ run cars at certain intervals, if such an ordinance is reasonable; ⁹ adopt a certain rail when the original grant contemplates such a change, ¹⁰ and sell tickets on the cars.¹¹ A city may be en-

1 A street railway company is liable if it leaves its rails so far above the level of the street that a person trips and is injured. Schild v. Central, etc., R. R., 133 N. Y., 446 (1892). A street railway company is liable for an accident due to a hole under its tracks even though it was dug under a permission given by the city. McMahon v. Second Ave. R. R., 75 N. Y., 231 (1878). Where a street railway is accustomed to carry packages for hire it is liable as a common carrier for the loss of a package. Levi v. Lynn, etc., R. R., 93 Mass., 300 (1865). A bond given by a street railroad to the city in regard to damages is not a lien, and upon foreclosure of a mortgage on the road the city will not be allowed to become a party. Farmers' L. & T. Co. v. New Rochelle, etc., R'y, 57 Hun, 376 (1890). For a digest of cases on the liability of street railroads for negligence, etc., see Colby's N. Y. R. R. Laws, p. 380, etc. Under its reserved power to make ordinances concerning street railroads, the city may exact a high degree of care in stopping cars where there is danger. Fath v. Tower, etc., R'y, 16 S. W. Rep., 913 (Mo., 1891).

² See § 913, supra.

³ See § 913, supra, and § 920, infra.

⁴ A street railway cannot be compelled to give transfers where the ordinance which has been accepted and

acted upon has no such provision. Electric R'y v. Com. Council, 47 N. W. Rep., 567 (Micb., 1890).

⁵ A city may compel the street railways to water their tracks. City, etc., R'y Co. v. Mayor, 77 Ga., 731 (1886).

⁶ The city may require a street railway to make reports. City of St. Louis v. St. Louis R. R., 89 Mo., 44 (1886).

⁷A city may order street railway companies, to abolish "bob-tail cars." State v. Trenton, 20 Atl. Rep., 1076 (N. J., 1890). A city may pass an ordinance prohibiting the use of "bob-tail" cars. South Cov., etc., St. R'y v. Berry, 18 S. W. Rep., 1026 (Ky., 1892).

⁸The city by ordinance may order a car to be stopped upon the first appearance of danger. Fath v. Tower, etc., R'y, 16 S. W. Rep., 913 (Mo., 1891).

⁹An ordinance that a street railway company shall run cars every twenty minutes from midnight to six o'clock is valid unless the company proves that it is unreasonable. Mayor, etc., v. Dry Dock, etc., R. R., 133 N. Y., 104 (1892).

10 When the grant to the company provides that the most approved rail shall be used, the city may compel the company to change from the tram-rail to the crescent-rail. Louisville City R'y v. Louisville, 8 Bush (Ky.), 415 (1871).

11 A city may by ordinance compel a street railway company to sell tickets on joined from passing an illegal ordinance, but the city cannot enjoin the company from raising the fare, even though it is raised above the limit fixed by charter.²

§ 920. Paving, assessments, etc., as required from a street railroad.—Generally the charters or grants to street railroads require them to do a certain amount of paving in the streets through which they run. The extent of this obligation and of the duty to repair and repave depends upon the words of the charter or grant.

the cars at the price specified in the original franchise of the company. City of Detroit v. Ft. Wayne, etc., Co., 54 N. W. Rep., 958 (Mich., 1893). In Nebraska the city of Lincoln has power to reduce the rates of street railways. Having that power it may compel the company to sell tickets on the cars,—six for twenty-five cents. Sternberg v. State, 54 N. W. Rep., 553 (Neb., 1893).

¹ The city authorities may be enjoined from passing an ordinance directing the tracks to be torn up. Paterson, etc., R. R. Co. v. Mayor, 24 N. J. Eq., 138 (1873). Cf. City of Chicago v. Evans, 24 Ill., 52 (1860).

²Even though a city has the future power to purchase a street railway, it cannot enjoin *ultra vires* acts of the company such as raising the fare contrary to the grant. Cambridge v. Cambridge R. R., 92 Mass., 50 (1865).

³ The legislature, under its reserved power to amend, may compel a street railroad company to pave the street one foot outside of its tracks in addition to the amount of paving which its charter originally called for. Sioux City St. R'y v. Sioux City, 138 U. S., 98 (1891). Where a street railway charter requires it to pave and repair, it is not obliged to repave when the city paves or repaves the remainder of the street. Repair does not mean repaye necessarily. A review of the cases for and against this view is given in this case. Binghamton v. Binghamton, etc., R'y, 61 Hun, 479 (1891). Although a street railroad is required to do certain paving, and, in case of its refusal to do so, to pay to the city the expense of such paving, yet the city cannot require the com-

pany to do the whole work within ten days, it being a physical impossibility. Hence the city cannot collect for the paying which it did upon the failure of the company to comply with the order. A reasonable time should have been allowed and a proper demand of performance made. People v. Coffey, 66 Hun, 160 (1892). Although a street railroad is bound to pave between its tracks. and two feet on each side and to keep it in good repair, and it neglects to repave with Belgian block when requested so to do by the municipality, yet, if the municipality thereupou paves the whole street, it cannot recover anything from the company, even though the statute authorizes an assessment on lands and buildings benefited thereby. The assessment statute and not the charter is what governs. Farmers' L. & T. Co. v. Ansonia, 23 Atl. Rep., 705 (Conn., 1891). Where the charter of a street railway company only required it to keep the space between its rails, and for a given distance outside, in good repair, the city cannot, by ordinance not assented to by the company, make it liable for grading improvements. (Distinguishing Railway Co. v. Sioux City, 138 U.S., 98; affirming 26 N. E. Rep., 188.) Western Paving. etc., Co. v. Citizens', etc., Co. of Ind., 28 N. E. Rep., 88 (Ind., 1891). Where a city consents to the laying of a street railway track on the condition that the company will observe and be subject to all past and future ordinances, the city may compel it at any time to repair or repave the pavement which the city is bound to keep up. The city may determine the material which shall be

The legislature, under its reserved right to amend the charter, may increase the amount of paving to be done by the company, but the city cannot do so by ordinance unless it has expressly reserved the power so to do.¹

In regard to levying assessments upon street railroads for street improvements, this also is a matter of statutory regulation.²

used and may require a better or more expensive material. The charter in this case required the street car company to pave the whole street from curb to curb. A company formed by the merger of old ones is subject to the same provisions. City of Phil. v. Ridge Ave. Pass. R'v, 22 Atl. Rep., 695 (Pa., 1891). The legislature under its reserved power may require street railways to pave. Sioux City, etc., R'y v. Sioux City, 39 N. W. Rep., 498 (Iowa, 1888). Although a street railway company is bound to pave and keep in good repair a certain part of the street, yet the city canuot compel the company to reconstruct the pavement which the company has already laid. State v. Corrigan St. R'y, 85 Mo., 263 (1884). Where a company is bound merely to pave, the city cannot compel it to use the Nicholson or other wooden or concrete pavement, Phil. v. Empire, etc., R'y, 3 Brews., 570 (1869). Although the company's ordinance required it to keep the street in repair, this does not curtail the general right of the city to make an improvement in the street; and if the company neglects to do its part, the city may do it and compel the company to repay the amount disbursed by the city. City of Columbus v. Street R. R. Co., 45 Ohio St., 98 (1887). If the railway contracts to keep a part of the street in good order and does not do so, and a person is injured in consequence thereof, and obtains judgment against the city, the city may have recourse to the company. City of Brooklyn v. Brooklyn, etc., R. R., 47 N. Y., 475 (1872). The agreement of a street railway company to connect its lines, construct new lines and reduce the fare is sufficient con-

sideration to sustain an ordinance relieving it from certain paving. ordinance granting the right is a contract (citing many cases). Western Paving. etc., Co. v. Citizens' St. Rv., 26 N. E. Rep., 188 (Ind., 1891). Under its power to regulate grading, paving and repaving, a city may compel a street railroad to cut off the euds of its ties. City of Detroit v. Fort Wayne, etc., R'y, 51 N. W. Rep., 688 (Mich., 1892). Under an ordinance that the company shall keep its track in as good repair and condition as the rest of the streets, it must pave when the city paves; mandamus lies to compel it. State v. Jacksonville St. R. R., 10 S. Rep., 590 (Fla., 1892). Although the state grants authority to lay a street railroad track, vet the city under its charter powers to regulate, etc., the streets may enact an ordinance that the company shall do paving, and if the company then proceeds to build its tracks, it does so subject to such ordi-"Macadamizing" is not nance. Id. Cities in Pennsylvania have inherent powers to impose upon street railroads duties as to paving and to modify those duties. Leake v. City of Philadelphia, 24 Atl. Rep., 351 (Pa., 1892). Where the obligation is to use the same material between the tracks and one foot outside that the city uses, the street railway company cannot be compelled to tear up such material and substitute another material which the city has adopted and with which the city has covered the rest of the street, Burgess, etc., v. Norristown, etc., R'y, 23 Atl. Rep., 1060 (Pa., 1892).

1 Cases supra.

²A street railroad cannot be assessed for street improvements under the New

§ 921. Taxes levied upon street railroads.—Street railroads like steam railroads may be compelled to pay taxes on its franchise, its capital stock or its tangible property, or on all three. It may also be compelled to pay a license to the city.¹ But the license cannot be levied for purposes of revenue after the original grant has been made and accepted.²

The legislature may change the mode in which the company

York statutes. People v. Gilon, 126 N. Y., 147 (1891), reversing 58 Hun, 76. Where a street railway by its ordinance agrees to be held liable for its proportion of the cost of improving streets over which it passes, it must pay. Schmidt v. Market, etc., R'y, 27 Pac. Rep., 61 (Cal., 1891). A street railway company may be assessed to pay a portion of the expense of broadening the street. North Beach, etc., R. R. Co.'s Appeal, 32 Cal., 499 (1867). Where a street railway is being foreclosed the city has no lien for the expense of grading and macadamizing between the rails, and the receiver will not be ordered to pay it. Union L. & T. Co. v. Southern Cal., etc., Co., 49 Fed. Rep., 267 (1892). A railway located in a street may be specially taxed to pay for the improvement of the street. Kuchner v. City of Freeport, 32 N. E. Rep., 372 (Ill., 1892). A street railway cannot prevent the city from laying a sewer in the middle of the street where the tracks of the company are, where the city has reserved the right to so construct its Spokane, etc., Co. v. City of Spokane, 32 Pac. Rep., 456 (Wash., 1893). The road-bed of the company may be assessed for a sewer under the New Jersey statutes. State v. Passaic, 23 Atl. Rep., 945 (N. J., 1892). In the case Clapp v. City of Spokane, 53 Fed. Rep., 515 (1892), the city was enjoined from tearing up the tracks for the purpose of laying a sewer under them, there being plenty of room on the side of the street The court granted for such sewer. the injunction instead of remitting the parties to an action at law because the company would be rendered insolvent,

and because the city itself was already practically insolvent. The court held that in laying the sewer the city must be reasonable in the location and construction of the sewer.

I The franchise to build and operate a street railway is subject to taxation. A license fee may be imposed on a street railway although under its franchises it is also bound to pay other taxes annually. New Orleans, etc., Co. v. New Orleans, 143 U. S., 192 (1892), "The modern railway car has been evolved from the old-fashioned stage-coach." Where a company agrees to pay a license for each "coach," it must pay for street cars which it substitutes for the coach. Mayor, etc., v. Third Ave. R. R., 117 N. Y., 404 (1889). Where the grant provides that the company shall pay an annual bonus the city may collect it by suit. Covington, etc., R'y v. Covington, 9 Bush (Ky.), 127 (1872). A city may require a street railway company to number its cars and pay a license fee for each car. Frankford, etc., Pass, R'v Co. v. Philadelphia, 58 Pa. St., 119 (1868). The stables, cars, horses, etc., of a street railway company are not subject to local taxation in Pennsylvania, the company being a quasi-public corporation. Northampton v. Easton, etc., R'y, 23 Atl. Rep., 895 (Pa., 1892).

² The city of New York having by contract granted to a railway company the right of way on one of its public streets cannot subsequently levy a license tax upon the cars running thereon, for revenue purposes only. City of New York v. Third Ave. R. R., 33 N. Y., 42 (1865); New York v. Second Ave. R. R., 33 N. Y., 261 (1864).

pays for its grant, but the city cannot violate a contract made by it with the company in regard to taxes.2 These are important principles of law, especially so when the modern tendency to increase the burdens of street railroads is considered.

¹ Under its reserved power the legisto to the city a certain percentage of its lature may change the charter so that gross earnings in lieu of all taxes exthe company shall pay into the city cept land taxes, the city cannot collect a treasury one per cent. of its gross receipts tax on the company's personal property instead of a license fee. Mayor, etc., v. in addition to the percentage. City of Twenty, etc., R. R., 113 N. Y., 311 (1889). Detroit v. Detroit City R'y, 43 N. W. Rep., ² Where by ordinance duly accepted 447 (1889). by a street railway the latter is to pay

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CHAPTER LV

TELEGRAPH, TELEPHONE, GAS, ELECTRIC LIGHT AND OTHER QUASI-PUBLIC CORPORATIONS.

§ 922. Bridge companies.

923. Canals.

924. Express companies.

925. Electric light companies.

926. Ferry companies.

927. Gas companies. 928. Insurance companies.

929. Plank-roads and turnpikes.

930. Telegraph companies.

§ 931. Telephone companies.

932. Water-works companies.

933. Wharf, steamboat, board of trade, stock-vard, cotton-press, booming, car-manufacturing, sleeping-car, irrigation, elevator, pipe-line and other corporations — Which are or are not quasi-public corporations?

§ 922. Bridge companies.—The right to build a bridge across a navigable stream and to charge toll for crossing it is a franchise.1 An exclusive privilege granted by the legislature to a bridge company will be protected by the courts.2 But the courts do not favor exclusive privileges, and an exclusive right to a bridge will not be construed to prevent the building of a railroad bridge or the operation of a ferry.3

1 Speaking of a bridge across a navigable stream, the supreme court has said: "This special privilege, conferred on the corporation by the sovereign power, of obstructing the navigation, did not belong to the country generally by common right, and is therefore a franchise; and secondly, the authority of taking tolls from those who crossed the river on the bridge was also a franchise, and freedom to do that which could not be lawfully done by one without public authority; this franchise could only be conferred by the legislature directly, or indirectly through public agents and tribunals, in pursuance of a statute." Such a franchise cannot be sold under an execution. But a court of equity will take possession, appoint a receiver to collect tolls and apply the receipts to the judgments. Covingtou, etc., Co. v. Shepherd, 21 How., 112 (1858).

²An exclusive legislative grant to build a bridge will be protected by injunction against a second bridge unless

the power of eminent domain is exercised. Piscatagua Bridge v. N. H. Bridge. 7 N. H., 35, 63 (1834); The Binghamton Bridge, 3 Wall., 51 (1865), holding that an exclusive bridge right for two miles was protected by the federal constitution as expounded in the Dartmouth College Case, 4 Wheat., 625 (1819). Charter giving exclusive bridge right for three miles up or down a river construed to apply to first location of bridge, not to rebuilding. Cavuga B. Co. v. Magee, 2 Paige, 116 (1830).

³ Toll-bridge company cannot prevent construction of railroad bridge authorized by the legislature, the former not being exclusive. Mohawk Bridge Co. v. Utica, etc., R. R. Co., 6 Paige, 554 (1837). Charter provision that no other bridge shall be built or ferry allowed does not prevent legislature authorizing a railroad bridge (cases reviewed). Thompson v. N. Y., etc., R. R. Co., 3 Sand. Ch., 625 (1846); Bridge Proprietors v. Hoboken Co., 1 Wall., 116 (1863); aff'g 2

The legislature has power to regulate a bridge, but the regulation must be reasonable. The power of eminent domain may be exercised by it only where the legislature has so provided. A bridge may be condemned under the power of eminent domain. A railroad may contract to pay tolls to a bridge company.

It is no misuser of its franchise for a bridge company to give reduced rates to constant patrons and give free passage in payment for land, nor is it a misuser to fail to file required statements.⁵

The legislature may reduce the tolls charged on a bridge but cannot confiscate the property by an unreasonable reduction.

Where a bridge company has allowed street-car tracks to be constructed over the bridge, the bridge company cannot then prohibit the use of the bridge for street cars, but it may charge a reasonable sum for each passenger carried.⁷

The right of the corporation under its grant may be merely to collect toll, the bridge itself belonging to municipalities.8

Beas. Ch. (N. J.), 81; McKee v. Wilmington, etc., R. R., 2 Jones (N. C.), 186 (1855). The legislature may authorize a railroad to build a bridge, even though it destroys the value of a ferry owned by individuals. Young v. Harrison, 6 Ga., 130 (1849). Exclusive right to a bridge is not violated by authorizing a ferry. Parrott v. City of Lawrence, 2 Dill., 332 (1872). Exclusive right to a toll-bridge is violated by a railroad bridge. Enfield Toll B. Co. v. Hartford, etc., R. R. Co., 17 Conn., 40 (1845). But a railroad may acquire the right by power of eminent domain. S. C., 17 Conn., 453 (1846). As to a toll-bridge, see, also, Oswego, etc., Bridge Co. v. Fish, 1 Barb, Ch., 547 (1846), and Charles River Bridge Co. v. Warren Bridge, 11 Peters, 420 (1837), where a toll-bridge interfered with a previous ferry; also Meads v. Wandell, 4 Saratoga Ch. Sentinel (N. Y.), 14 (1844); Dyer v. Tuskaloosa, etc., Co., 2 Port. (Ala.), 296 (1835); Stourbridge Canal Co. v. Whaley, 2 Barn. & Ad., 792,

¹It cannot compel a bridge company to enlarge its draws, where they were to build good and sufficient ones and did so. Washington Bridge Co. v. State, 18 Conn., 53 (1846).

² A bridge corporation having a spe- Co., 10 S. Rep., 677 (La., 1892).

cial charter cannot change its approaches and condemn land under the change. *Re* Poughkeepsie, etc., Co., 108 N. Y., 483 (1888).

³ West River Bridge Co. v. Dix, 6 How., 507 (1847).

⁴ A railroad's contract to pay for crossing a bridge is legal. Railway Companies v. Keokuk, etc., Co., 131 U. S., 371 (1889).

⁵ Commonwealth v. Alleghany, etc., Co., 20 Pa. St., 185 (1852).

6 The legislature may reduce the rates of a bridge company running from the state into another state, even though the charter gave the company the right to fix the rates, with an obligation to reduce them so that the net profits should not exceed fifteen per cent. per annum. But a reduction of the rates on a ferry so as to make the receipts less than the actual operating expense is invalid as constituting a taking of private property for public use without compensation. Commonwealth v. Covington, etc., Co., 21 S. W. Rep., 1042 (Ky., 1893).

⁷ Covington, etc., Bridge Co. v. South Covington, etc., R'y Co., 19 S. W. Rep., 403 (Ky., 1892).

⁸ Police Jury, etc., v. Thibodaux, etc., Co., 10 S. Rep., 677 (La., 1892).

A bridge cannot be sold under levy of execution. The remedy of the creditor is to have a receiver appointed and the earnings applied to the debt.¹

§ 923. Canals.— A canal is a quasi-public enterprise, and hence an execution cannot be levied upon it.² The legislature or congress cannot reduce the tolls of a canal below a reasonable figure,³ but may authorize a railroad to run along the line of the canal.⁴ A canal bed may be used for the road-bed of a railroad if the stockholders and the state assent thereto.⁵

A canal company may at common law give lower rates to a large shipper than to a small one.

¹ Overton B. Co. v. Taylor, 51 N. W. Rep., 240 (Neb., 1892).

²The right to operate a canal and collect tolls cannot be sold on execution unless the statute expressly authorizes it. Gue v. Tide-water Canal Co., 24 How., 257 (1860), holding that the locks, wharves, etc., of a canal company could not be reached by execution. But a canal basin owned by a railroad and not needed by it may be reached. Plymouth R. R. Co. v. Colwell, 39 Pa. St., 337 (1861). See, also, Evangelical, etc., Home v. Buffalo, etc., Assoc., 64 N. Y., 561 (1876), allowing a dam to be taken under execution. An execution on the toll-house of a canal is not good. "To permit it would tend to defeat the whole object of the charter by taking the improvements out of the hands of the corporation and destroying their use and benefit." Susquehauna, etc., Co. v. Bonham, 9 W. & S. (Pa.), 27 (1845). An execution cannot be levied upon a canal, especially where it is in the custody of the law, by reason of the court having put the trustees of the mortgage into possession. The execution will be enjoined. Brady v. Johnson, 26 Atl. Rep., 49 (Md., 1893).

³ Although the United States government owns all the stock of a canal company, yet if there is a mortgage on the property, congress cannot reduce the tolls to a point where the mortgage is affected. "It is a legislative attempt to destroy vested rights, and a taking of private property for public use without

due compensation." United States v. Louisville, etc., Canal Co., 4 Dill., 601 (1873), by Miller, J.

⁴ The legislature may charter a railroad to run along the line of a canal previously authorized. Tuckahoe Canal Co. v. Tuckahoe R. R. Co., 11 Leigh (Va.), 42 (1840); Ill., etc., Canal v. Chicago, etc., R. R. Co., 14 Ill., 314 (1853).

b Where a canal is turned into a railroad, no further compensation need be paid to adjoining owners. Hatch v. Cincinnati, etc., R. R. Co., 18 Ohio St., 92 (1868). Speaking of a canal, the court said, in Potts v. Warwick, etc., Co., Kay, 142 (1853): "The company could no more convert the land to any other purpose—into a garden, for example—than the owner of a high-road could alter its nature."

⁶The famous coal cases decided sintply that it was legal for a canal company and coal company to contract for transportation at a rate varying according to the quantities shipped and the price received for the coal. In Commonwealth v. Del. & Hud. Canal, 43 Pa. St., 295 (1862), it was held that a contract for half the carrying capacity of a canal was not invalid where it did not appear that the public was injured thereby; and the canal company might commute its tolls, making them vary with the market price of the coal. On this last point, and that the amount of business done may be a factor in estimating these fluctuating tolls, see Del. & Hud. Canal Co. v. Penn. Coal Co., 21 Pa. St., Although a canal is abandoned, and for twenty years is used as a street, the grantee of the company owns the fee, and not the adjacent owners.¹

The charter of a canal company will be forfeited where the company allows the canal to become out of repair.²

Where a canal has been legally constructed, a city cannot arbitrarily close its gates or compel it to construct bridges at intersections of streets.³

Where the national government condemns a dam and lock of a canal company, it must pay not only the cost of the dam and lock, but compensation for the taking of the franchise to exact and collect tolls. "The whole value must be paid, and that value depends largely upon the productiveness of the property, the franchise to take tolls." 4

§ 924. Express companies.— Express companies are common carriers, and are generally held closely to their liabilities as such.⁵

131 (1853); Penn. Coal Co. v. D. & H. Canal Co., 1 Keyes (N. Y.), 72 (1863). And cf. Del. & Hud. Canal Co. v. Penn. Coal Co., 50 N. Y., 250 (1872). Where a canal company and a coal company have a contract, and the latter claims the former discriminates against it in the management (not in rates or tolls), equity will not grant specific performance of the contract, but the injured party must go to law. Penn. Coal Co. v. Del. & H. Canal Co., 31 N. Y., 91 (1865).

¹ Decker v. Evansville, etc., Co., 33 N. E. Rep., 349 (Ind., 1893). Although the legislature authorizes the dissolution of a canal company and the sale of its property by a receiver, the land does not revert to the original owners. Bass v. Roanoke, etc., Co., 16 S. E. Rep., 402 (N. C., 1892).

² State v. Penn., etc., Co., 23 Ohio St., 121 (1872).

³ A statute may impose burdens upon such a corporation, under the police power, for the purpose of promoting the public peace, health and safety, but not for the accommodation and convenience of the public or for private aggrandizement. Platte, etc., Co. v. Dowell, 30 Pac. Rep., 68 (Colo., 1892).

⁴ Monongahela, etc., Co. v. United States, 148 U. S., 312 (1893).

⁵ Haslam v. Adams Exp. Co., 6 Bosw. (N. Y.), 235 (1860); Sherman v. Wells, 28 Barb., 403 (1858); Southern Exp. Co. v. Newby, 36 Ga.. 635 (1867); Buckland v. Adams Exp. Co., 97 Mass., 124 (1867); Hooper v. Wells. Fargo & Co., 27 Cal., 1 (1864); Gulliver v. Adams Exp. Co., 38 Ill., 503 (1865); United States Exp. Co. v. Backman, 28 Ohio St., 144 (1875). An express company's contract exempting it from liability for loss of goods is void. Block v. Merchants', etc., Co., 6 S. W. Rep., 881 (Tenn., 1888). An express company is liable for goods lost through its negligence, though its receipt for the goods provides otherwise. Proof of loss raises presumption of negligence. Exp. Co. v. Holmes, 9 Atl. Rep., 166 (Pa., 1887); 21 N. E. Rep., 340 (Ind., 1889). Limitation of express company's liability contained in printed form of receipt does not relieve the company from liability for loss by its negligence. Adams Exp. Co. v. Hocing, 11 S. W. Rep., 205 (1889). Blanks in an express company's receipt bind the shipper. Durgin v. American Exp. Co., 20 Atl. Rep., 328 (N. H., 1890). Mandamus will not issue to compel an express company to carry fragile goods subject to the common-law liabilities of a common carrier where the shipper refuses to accept a It is legal for a railroad to allow to one express company, exclusively, extra facilities for doing business on its line.¹

An express company cannot complain that a railroad is doing an express business ultra vires.²

Foreign express companies may be compelled to take out a li-

§ 925. Electric light companies.—An electric light company is a quasi-public corporation. The right of such a company to erect poles in the streets is very similar to the right of a street railroad to use the streets for its tracks.

receipt containing a contract limiting the company's liability for breakage. People v. Babcock, 16 Hun, 313 (1878).

1 Under the ruling of the United States supreme court in the Express Cases, 117 U.S., 1, 29 (1885), it is now settled that while railroad companies are obliged to provide the public with reasonable express accommodation, yet the discretion remains with them as to the agencies to be employed. They need not, therefore, in the absence of statutes, furnish to all independent express companies equal facilities for doing a package-carrying business upon their passenger trains. Thus, so long as the public service is satisfactory, a railroad may lawfully carry on an express business itself, and refuse to grant similar privileges to another company. Sargent v. Boston & L. R. R., 115 Mass., 416 (1874). And the special contracts which are customarily made giving the exclusive right to do express business on certain lines are legal. Railroads are common carriers of goods and passengers, but not common carriers of common carriers. Express Cases, supra. Before this question came under adjudication in the supreme court it had been almost universally decided the other way. Mr. Justice Miller reduced the arguments in favor of this view to propositions which he stated in his opinion in Express Cases, 10 Fed. Rep., 210 (Mo., 1882), and again in his dissenting opinion in Express Cases, 117 U. S., 1, 29 (1885). See Wells v. Oregon R'y & N. Co., 15 Fed. Rep., 561 (Oreg., 1883); Wells v. Northern Pac. R'y, 23 Fed. Rep., 469 (Oreg., 1884); Southern Exp. Co. v. Memphis, etc., R. R., 8 Fed. Rep., 799 (Ark., 1881); Fargo v. Redfield, 22 Fed. Rep., 373 (Vt., 1884); Wells v. Oregon, etc., R'y, 18 Fed. Rep., 667, and cases cited, 673 (Oreg., 1883); New Eng. Exp. Co. v. Maine Cent. R. R., 57 Me., 188 (1869); Sanford v. Railroad, 24 Pa. St., 378 (1855).

² Sargent v. Bostop, etc., R. R. Co., 115 Mass., 416 (1874).

³ Crutcher v. Commonwealth, 12 S. W. Rep., 141 (Ky., 1889).

⁴ Edison, etc., Co. v. Farmington, etc., Co., 19 Atl. Rep., 859 (Me., 1890).

⁵See § 913, supra. An ordinance granting an electric light company the right to use the city streets, without making such right exclusive, is a mere license and is valid. Crowder et al. v. Town of Sullivan et al., 28 N. E. Rep., 94 (Ind., 1891). Where the village trustees authorize the erection of poles in the street for electric lighting, an adjoining property owner may be enjoined from cutting down the poles, and he cannot defend on the ground that the trustees were bribed. sumers' Gas Co. v. Congress, etc., Co., 61 Hun, 133 (1891). Under the Michigan statute a city may give to an individual instead of a corporation the right to erect electric light poles and furnish electric lights. A provision that other companies should be allowed to use the poles under reasonable regulations does not authorize such use without any regulations. Citizens', etc., Co. v. Sands, 55 N. W. Rep., 452 (Mich., 1893).

The legislature may compel an electric light company to put its wires under ground. The legislature may also grant an exclusive franchise to such a company, but a municipality has no implied power to do so.²

An electric light company may enjoin another electric light company from placing its wires so close to the wires of the former as to endanger the lives of the employees of the former.³

The mechanic's lien law applies to poles of an electric light company.4

In Illinois, under the statutes relative to taxation, the wires of an electric light company are held to be personalty.⁵

§ 926. Ferry companies.— A ferry is also a quasi-public institution. The right to maintain and operate a ferry and collect tolls is a franchise which can be granted only by the state directly or indirectly. This right can be assigned only by deed. It is property and is protected as such.

¹The legislature may order electric light and other companies to put their wires under ground under the supervision of a commission and to pay the cost of such commission. People v. Squire, 145 U. S., 175 (1892). Electric wires may be ordered down by a city. Electric Imp. Co. v. San Francisco, 45 Fed. Rep., 593 (1891).

² A municipal corporation has no power to grant an exclusive right to an electric light company unless its charter expressly confers that power. Grand Rapids, etc., Co. v. Grand Rapids, etc., Co., 33 Fed. Rep., 659 (1888). A corporation having an exclusive right to furnish electric light cannot enjoin a rival company where all the stock of the former company has been sold to the president of a competing gas company. Appeal of Scranton, etc., Co., 15 Atl. Rep., 446 (Pa., 1888).

³Consolidated, etc., Co. v. People, etc., Co., 10 S. Rep., 440 (Ala., 1892). One electric light company may enjoin another electric light company from stringing its wires so closely to the wires of the former as to interfere with them and cause danger to the company's employees. Rutland, etc., Co. v. Marble City, etc., Co., 26 Atl. Rep., 635 (Vt., 1893).

⁴Badger, etc., Co. v. Marion, etc., Co., 29 Pac. Rep., 476 (Kan., 1892).

Shelbyville Water Co. v. People, 30
 N. E. Rep., 678 (Ill., 1892).

⁶ Evans v. Hughes County, 54 N. W. Rep., 603 (S. Dak., 1893).

⁷A ferry franchise created by act of the legislature can be conveyed only by deed and not by oral contract of sale. Gunterman v. People, 28 N. E. Rep., 1067 (Ill., 1891). Iu quo warranto charging defendants with usurping a public franchise to operate a ferry where they attempted to defend on the ground that they had a legal right to use the ferry, the burden was on them to show a valid title. Id. A person who has been licensed and authorized to run a ferry is not liable for an accident occurring under the management of one to whom he has leased the ferry right, even though the lease be of doubtful validity. Norton v. Wiswall, 26 Barb., 618 (1858); Ladd v. Chotard, 1 Ala., 366; Felton v. Dean, 22 Vt., 170; Bowyer v. Anderson, 2 Leigh (Va.), 550.

⁸A statute compelling non-residents to sell ferry rights cannot apply to ferry rights owned before the statute was passed. Dufour v. Stacey, 14 S. W. Rep., 48 (Ky., 1890).

The legislature may grant a ferry company an exclusive right, but such grants are not favored by the courts and are often construed away.¹

The legislative grant of the franchise of a ferry gives only the right to maintain a ferry and to take tolls; it does not give the right to make a landing upon the property of a private person upon a highway.² The franchises of a ferry company will be forfeited where the company allows the ferry to become out of repair.³

§ 927. Gas companies.— Gas companies are somewhat public in their nature, and owe a duty to supply gas to all.⁴ Competing gas companies will not be allowed to combine in regulating the price of gas to the public.⁵ The legislature may regulate and reduce the price charged for gas.⁶

1 A legislative grant to an individual of the exclusive right to a ferry is protected. McRoberts v. Washburne, 10 Minn., 23 (1865). An amendment to a charter giving the exclusive right to have a ferry is without consideration, and not binding as a contract. Johnson v. Crow. 87 Pa. St. 184 (1878). A statute that no court shall authorize a competing ferry does not prevent a city being authorized to license such other ferry. Fanning v. Gregoire, 16 How., 524 (1853). Where the legislature agree to discontinue a ferry in consideration of a bridge company doing certain things for the public the ferry cannot afterwards be restored. East Hartford v. Hartford Bridge Co., 10 How., 511 (1850). A free railroad ferry is in violation of an existing exclusive right to an older ferry. Aiken v. Western R. R., 20 N. Y., 370 (1859). A ferry cannot claim compensation in damages merely from the fact that a railroad is authorized to bridge near it, and this bridge is used by persons on foot. Kansas, etc., R'y v. Payne, 49 Fed. Rep., 114 (1892). A city cannot grant an exclusive ferry, but the grant is valid in other respects. Carroll v. Campbell, 17 S. W. Rep., 884 (Mo., 1891). An authorized toll-bridge may enjoin an unauthorized ferry. Catawba, etc., Co. v. Flowers, 14 S. E. Rep., 918 (N. C., 1892). Under the constitution of Missouri an exclusive right to a ferry cannot be granted. A ferry is not necessarily a regulation of Interstate commerce although it is between two states. Carroll v. Campbell, 19 S. W. Rep., 809 (Mo., 1892).

² Pittsburgh & Lake Erie R. R. Co. v. Jones, 111 Pa., 204.

³ State v. Council Bluffs, etc., Co., 11 Neb., 354 (1881).

4 The terms upon which and the manner in which such companies may be required to discharge their public duties are subject to legislative supervision and control. State v. Columbus Gas, etc., Co., 34 Ohio St., 572 (1878); New Orleans Gas Co. v. Louisiana Light Co., 115 U. S., 650 (1885). Gas companies possess, by virtue of their charters, powers and privileges which others cannot exercise; and the statutory duty is imposed upon them to furnish gas to persons entitled to receive it under the charters, and who offer to comply with the general conditions on which the companies supply others. People v. Manhattan Gas Co., 45 Barb., 136 (1865).

⁵ Gibbs v. Baltimore Gas Co., 130 U. S., 396.

⁶ The legislature may reduce the price of gas as charged by the company to consumers. Zanesville v. Zanesville, etc., Co., 23 N. E. Rep., 55 (Ohio, 1889). And mandamus lies to compel it to make the reduction. Zanesville, etc., Co. v. Zanesville, id., 59. The legislature

The legislature may grant an exclusive right to a gas company to furnish gas in a particular town, but a municipality has no inherent power to make such a grant. Moreover the courts do not favor grants of this kind.

Where a gas company has an exclusive right to supply gas to a

may restrict the price which gas companies may charge for meters. State v. Gas Co., 34 Ohio St., 572 (1878). If a gas company is ordered by a municipality under a statutory power to reduce the price of gas, it may defend against forfeiture for non-compliance by asserting that the municipality was fraudulently induced to act. State v. Cincinnati, etc., Co., 18 Ohio St., 262 (1868). A municipality in Indiana has power to regulate the price of natural gas. City of Rushville v. Rushville, etc., Co., 28 N. E. Rep., 853 (Ind., 1891). Where the charter gives a gas company power to sell gas, it gives the company power to fix the price, and such price cannot be reduced where the charter is not subject to amendment. State v. Laclede, etc., Co., 14 S. W. Rep., 974 (Mo., 1890).

1 A city has no inherent power to grant an exclusive right to a gas company. And even if the grant were valid, an electric light plant is not an impairment of the contract. Saginaw, etc., Co. v. Saginaw, 28 Fed. Rep., 529 (1886). A gas company cannot enjoin the city from constructing gas-works at the public expense. Hamilton, etc., Co. v. Hamilton, 37 Fed. Rep., 832 (1889). Exclusive right to furnish gas does not prevent statute regulating price. State v. Columbus Gas Co., 8 Cent. L. J., 404 (Ohio, 1878). The mere fact that a city ordinance specifically and by name grants to a natural-gas company the right to use its streets for laying pipe, etc., does not make the license exclusive, and therefore the grant of a monopoly. City of Rushville v. Rushville, etc., Co., 28 N. E. Rep., 853 (Ind., 1891). A municipal corporation has no power to grant an exclusive privilege to a gas company. Citizens'. etc., Co. v. Elwood, 16 N. E. Rep., 624

(Mass., 1888): State v. Cincinnati, etc., Co., 18 Ohio St., 262 (1868). Quo warranto to oust a gas corporation from its claim to an exclusive privilege for a certain number of years fails if such exclusive right legally exists. State v. Milwaukee, etc., Co., 29 Wis., 454 (1872). The case of Saginaw, etc., Co. v. Hamilton, supra, was affirmed by the supreme court of the United States (Hamilton, etc., Co. v. Hamilton City, 146 U.-S., 258-1892), and a careful consideration of the rules of law applicable thereto was given. An exclusive right to supply "light or heat" to a city does not prevent a subsequent grant to a company to light by electricity. Appeal of Scranton, etc., Co., 15 Atl. Rep., 446 (Pa., 1888), the court saying that "monopolies are favorites neither with courts nor people." The legislature does not create a gas monopoly by granting an exclusive right to one company where the exclusive privilege was granted by an amendment to the charter and was without consideration. Norwich Gas L. Co. v. Norwich City G. Co., 25 Conn., 19 (1856). A city authorized so to do may grant to a gas conpany the exclusive right to furnish gas in the city. City of Newport v. Newport, etc., Co., 84 Ky., 166 (1886). The statutes of Pennsylvania provide that where gas or water-works have been constructed by a municipality, gas or water-works cannot be constructed within the limits of that municipality without the consent of the corporate Electric Lighting Co. v. authorities. Underground Light Co., 16 Weekly Notes Cas., 407; 42 Leg. Int., 4. A gas company has no such monopoly as to prevent a city from putting in its own gas-works. State v. Hamilton, 23 N. E. Rep., 935 (Ohio, 1890).

city, subject to the right of the legislature to alter or revoke the same, the legislature may authorize the city to construct its own gas works. A gas company may be authorized to exercise the power of eminent domain. Gas pipes cannot be laid under public roads in rural districts without compensation to the owners of the fee, though "as to streets and alleys in cities and boroughs there are reasons why a different rule to some extent should prevail." A gas company may give a mortgage on its plant.

The relations of a gas company towards the municipality in which it is located are somewhat complex. The right to lay pipes in the streets can be granted by the legislature only. Generally, however, the legislature gives its consent in advance by a general statute, such consent to vest in the company upon the municipality consenting thereto.⁵ This right to use the streets may be granted

¹ Hamilton, etc., Co. v. Hamilton City, 146 U. S., 258 (1892). A municipal ordinance is not such a contract as is protected by the constitution of the United States in regard to impairing the validity of contracts. It is a contract that is protected in the same way as contracts of individuals. Id.

² Natural-gas companies may exercise the power of eminent domain. Consumers' Gas., etc., Co. v. Harless, 29 N. E. Rep., 1062 (Iud., 1892); Bloomfield & R., etc., Co. v. Richardson, 63 Barb., 437 (1872), giving right of way for transporting gas. The power may be exercised by an ordinary gas company. Johnston's Appeal, 7 Atl. Rep., 167 (Pa., 1886). The superfluous land of a gas company may be condemned by a rail-road company. Matter of N. Y. & H. R. R. R., 63 N. Y., 326 (1875), aff'g 5 Hun. 20.

³ Sterling's Appeal, 111 Pa. St., 35; Bloomfield, etc., Gaslight Co. v. Calkins, 62 N. Y., 386. A board of commissioners cannot enjoin a natural-gas company from laying pipes along a country road. Bd. of Com'rs, etc., v. Indianapolis, etc., Co., 33 N. E. Rep., 972 (Ind., 1893).

⁴See ch. XLVII, supra. A mortgage of a gas company on its existing property does not attach to mains subsequently laid at other points. Davidson v. Westchester, etc., Co., 99 N. Y., 558

(1885). Street rights granted to individuals "organized into a corporation" are granted to the corporation that takes them. A gas company may mortgage its property, including the right to use the streets for its pipes. Upon foreclosure an individual may purchase the property and rights. He may exercise them himself or transfer them to a new corporation. Although the city forfeits the rights of the old company for entering into an illegal combination, this does not affect the mortgagee's rights. Detroit v. Mutual, etc., Co., 43 Mich., 594 (1880).

⁵ A city under its ordinary powers has no right to grant the right to lay down gas pipes in the streets. Norwich Gas L. Co. v. Norwich City G. Co., 25 Conn., 19 (1856). "The right to use the public streets of a city for the purpose of laying gas pipes therein is, in my opinion, a franchise which the state alone can confer." Jersey City Gas Co. v. Dwight, 29 N. J. Eq., 242 (1878). The right to dig up the streets and lay down gas pipes is a franchise which can be granted only by statute or by a municipality having statutory power to grant it. New Or-. leans Gas Co. v. Louisiana Light Co., 115 U. S., 650, 659 (1885). "The right to use the street of a city by a gas company to enable it to lay down its pipes is a franchise that can be granted only by the

for a longer period than the period named in the charter of the company for its existence. This right is property. It is a contract which cannot be repealed or modified by the municipality after it has once vested. Gas pipes laid in the street are real estate and taxable as such.

Contracts between the city and a gas company relative to the use of gas and relative to the rights of each party turn on the construction of the terms of the contract in each case. A statute

legislature or some local or municipal authority authorized to confer it." City of Newport v. Newport, etc., Co., 84 Kv., 166 (1886). In New York a gas company must pay for its right of way along a country highway. Bloomfield, etc., Co. v. Calkins, 62 N. Y., 386 (1875). See notes The statute of Pennsylvania prohibits gas companies laying gas pipes in the streets without the consent of the authorities. Philadelphia municipal Steam Supply Co. v. City of Philadelphia, 41 Leg. Int., 252; City of Reading v. Consumers' Gas Co., id., 428.

¹ A gas company may take by a city ordinance certain privileges in the streets which extend beyond its chartered existence, and the company having power to transfer its franchises, the granted company may exercise those franchises. They constitute a contract. State v. Laclede, etc., Co., 14 S. W. Rep., 974 (Mo., 1890).

² The city having entered into a contract with a gas company cannot repudiate and withdraw from it. Lima Gas Co. v. Lima, 4 Ohio C. C. Rep., 22 (1889). The fact that certain provisions in an ordinance are not to take effect until a certain time in the future does not affect the validity either of the entire ordinance or of the particular provisions. City of Rushville v. Rushville Natural Gas Co., 28 N. E. Rep., 853 (Ind., 1891). A city may by ordinance forbid the opening of streets for the laying of gas mains at any time from December 1 to March. But it cannot forbid the opening of the street to lay a pipe across the street. Commissioners, etc., v. Northern, etc., Co., 12 Pa. St., 318 (1849).

³ Providence Gas Co. v. Thurber, 2 R. I., 21. Under the statutes of Iowa relative to taxation, gas mains are realty. Capital, etc., Co. v. Charter, etc., Co., 50 N. W. Rep., 579 (Iowa, 1874).

⁴ Although the legislature empowers a city to contract for the lighting of its streets with gas, yet a contract to run for five years is not binding but falls with a repeal of the statute. Richmond. etc., Co. v. Middletown, 59 N. Y., 228 (1874). Where a city is given power to contract with a gas company relative to ·the use thereof and does so contract for a term of years, the city cannot repudiate its contract and proceed to use other light. City of Indianapolis v. Indianapolis, etc., Co., 66 Ind., 396 (1879), Under its charter power to contract for and make regulations concerning the lighting of a city by gas in such manner as may be agreed upon, and to make generally such contracts in relation to the business of the gas company as may be beneficial, a city having the right to purchase gas works may waive its right, and make a new contract retaining the right to purchase at a later date. Specific performance of the right to purchase will not be ordered, however, where arbitrators are provided for, and the company refuses to appoint one to represent it. A concession by the company and the discontinuance of suits are good considerations for a new contract with the city. City of St. Louis v. St. Louis, etc., Co., 70 Mo., 69 (1879). Where an ordinance of a city, accepted by a gas company, fixes a maximum rate to be charged for gas, this constitutes a contract which

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forbidding the piping of natural gas to places outside of the state is unconstitutional.¹

§ 928. Insurance companies.—Insurance companies like banks are subject to regulation by the legislature.² A life insurance company cannot go into fire and marine insurance,³ nor can a fire insurance company insure against lightning.⁴

An insurance company has no power or legal right to subscribe for stock in a savings bank and building association, nor to purchase stock in another insurance company. One insurance company cannot subscribe to the stock of another. An insolvent insurance corporation cannot purchase shares of its own capital stock. The defense of ultra vires, however, is not favored by the

cannot be changed by the court, even though it turns out to be an inadequate price. Manhattan, etc., Co. v. Dayton, etc., Co., 55 Fed. Rep., 181 (Ohio, 1893).

¹ Benedice v. Columbus, etc., Co., 23 Atl. Rep., 485 (N. J., 1892).

² The legislature may enact stringent regulations of insurance business and prescribe a forfeiture of charter for non-compliance. Chicago Life Ins. Co. v. Needles, 113 U S., 574 (1885). The legislature may make it a criminal offense for agents of insurance companies to pay rehates on insurance premiums. People v. Formosa, 131 N. Y., 478 (1892).

² Ashton v. Burbank, 2 Dill., 435. A stockholder may enjoin a life and fire insurance company from engaging in marine insurance. Natusch v. Irving, 2 Cooper's Ch., 358 (1824). Although a life insurance company for eighteen months engages in marine insurance and then fails, the marine policy-holders cannot recover on their policies hut may recover back the premiums. Re Phænix, etc., Co., 2 J. & H., 441 (1862). See, also, Burges & Stock's Case, 2 J. & H., '441; Hambro v. Hull, etc., Co., 3 H. & N., 789.

4 Where the charter of the company only authorized insurance against fire, a by-law referred to in the policy recognizing damages by lightning as one of the risks assumed imposes no obligation upon the company to pay for losses other than by fire. Andrews v. Union,

etc., Ins. Co., 37 Me., 256 (1854). Where an insurance company has issued a policy which is not authorized by its charter, the policy cannot be enforced by the party who is insured. The court said in a dictum that his remedy is a suit in disaffirmance and for an accounting. Miller v. American, etc., Co., 21 S. W. Rep., 39 (Tenn., 1893).

⁵ Mutual Sav. Bank & Bldg. Ass'n v. Meriden Agency Co., 24 Conn., 159 (1855), holding the insurance company not liable on the stock. An insurance company cannot invest in the stock of a bank. State v. Butler, 8 S. W. Rep., 586 (Tenn., 1888).

⁶ Re Liquidators of the British Nation Life Insurance Association, L. R., 8 Ch. Div., 679 (1878), the court refusing to hold the former liable on a winding up; Berry v. Yates, 24 Barb., 199 (1857); Pierson v. McCurdy, 33 Hun, 520 (1884).

⁷ Berry v. Yates, 24 Barb., 199 (1857).

*In the case of *In re* Republic Ins. Co., 3 Biss., 452 (1873), where the insolvent corporation had, some three years previously, when the corporation was solvent, purchased stock of various stockholders and still held it, the court held that these old stockholders were not liable for the unpaid subscription price thereof. See, also, § 317, *supra*. In Farnsworth v. Robbins, 36 Minn., 369 (1887), the receiver of an insolvent company recovered from a stockholder whose stock the company had purchased.

courts.¹ Policy-holders have not the same standing in court to restrain an *ultra vires* act that stockholders have.² A tontine policy-holder cannot maintain a suit in equity against the insurance company.³

If a director of an insolvent company accepts a secret gift for reinsuring the company's risks in another insurance company, he

may be compelled to repay the same to the company.4

The profits of an insurance company generally belong to the stockholders and not to the policy-holders.⁵

In most, if not all, of the states stringent regulations exist relative to the transaction of business in the state by foreign insurance companies.⁶

¹ Taunton v. Royal Ins. Co., 2 H. & M. 135 (1864), holding that stockholders cannot enjoin the company from paying losses which are expressly excepted from the policy. The company may make such payment in order to get business. Ultra vires may be pleaded by a mutual insurance company where there is no proof that the beneficiary did not receive the benefit of his payments. Rockhold v. Canton, etc., Assoc., 19 N. E. Rep., 710 (Ill., 1889). An insurance company may enforce a note taken as collateral security, and the plea of ultra vires is unavailing. Home Ins. Co. v. Buckley, N. Y. L. J., April 22, 1890.

² Policy-holder's action against an insurance company to restrain an ultra vires act, not sustained. Levy v. Mutual L. Ins. Co., 54 Hun, 315 (1889). In Bewley v. Equitable Life Assurance Soc., 61 How. Pr., 344 (1881), where a policyholder sought to hold liable for misuse of funds the directors who were elected by the holders of the \$100,000 of stock of that corporation, it was held that the action by him would not lie. If he had been a judgment creditor and the corporation had been insolvent a different rule would have applied - thus distinguishing Evans v. Coventry, 5 De G., M. & G., 911 (1854); Aldebert v. Leaf, 1 Hem. & M., 681 (1862); Re State, etc., Ins. Co., 11 Week. Rep., 746; Belknap v. North, etc., Ins. Co., 11 Hun, 282 (1877).

³ Hunton v. Equitable Life, etc., Soc., 45 Fed. Rep., 661 (1891).

⁴ Bent v. Proest, 86 Mo., 475 (1885); Gaskell v. Chambers, 26 Beav., 360 (1858), where the director received a secret gift for bringing about a consolidation. Contra, if all assented. Southall v. British, etc., Assoc., L. R., 6 App., 614 (1871).

⁵The shareholder of an insurance company conducted on both the stock and the mutual insurance plan is entitled to all the rights in the guaranty accumulations that a stockholder in any other corporation has in the corporate assets. Traders', etc., Ins. Co. v. Brown, 142 Mass., 403 (1886). The guaranty accumulations of an insurance company conducted both on the mutual and stock principle belong to the stockholders and not to the policyholders. Id. As to dividends on a tontine insurance policy, see Pierce v. Equitable Life Assurance Co., 145 Mass., 56 (1887). Upon dissolution of a mutual insurance company having no stockholders, its assets, after the payment of its liabilities, belong to the state. Titcomb v. Kennebec, etc., Co., 9 Atl. Rep., 732 (Me., 1887).

⁶ See ch. XLI, supra. Premiums on insurance cannot be collected where the company issued the policy without complying with the law relative to foreign corporations. Wiestling v. Marthim, 27 N. E. Rep., 576 (Ind., 1891). Foreign corporations doing business in a state which prescribes statutory provisions

Money due from an insurance company on a loss occurring in that state cannot be attached at a branch office of the company in another state.¹

Consolidations of insurance companies are generally allowed by statutes, but these statutes carefully preserve the rights of policy-holders.²

There has been a vast amount of litigation over the powers of a local insurance agent to bind the company by his acts, contracts and representations. This subject, however, pertains to agency rather than corporation law.³

An assignment of an ordinary life insurance policy as collateral security is legal, but the assignee can retain only the amount of the loan and interest, even though the pledge has been modified or merged into a sale.⁴

for that business cannot in contracts. do away with the application to it of these provisions. Fletcher v. New York. etc., Ins. Co., 13 Fed. Rep., 526 (1882). The same rule applies to an insurance company chartered by congress. must conform to state restrictions. Daly v. National, etc., Ins. Co., 64 Ind., 1 (1878). For decisions under Massachusetts statute requiring foreign insurance companies to appoint an agent to accept service, see Thayer v. Tyler, 76 Mass., 164 (1857); National, etc., Ins. Co. v. Pursell, 92 Mass., 231 (1865); Leonard v. Washburn, 100 Mass., 251 (1868); Gillespie v. Commercial, etc., Ins. Co., 78 Mass., 201 (1858); Morton v. Mutual Ins. Co., 105 Mass., 141 (1870). Restrictions upon foreign insurance companies are strictly enforced. See § 696, supra.

¹ An attachment in Massachusetts on insurance money due from a New York insurance company on a loss occurring in New York is not good. Douglas v. Phenix Ins. Co., 63 Hun, 393 (1892). No attachment lies on insurance money due by resident branch of a foreign insurance company to another foreign company. Straus v. Chicago, etc., Co., 46 Hun, 216 (1887); Moch v. Virginia, etc., Ins. Co., 10 Fed. Rep., 696 (1882).

²As to consolidations of insurance companies in England and the liability of the old company and its stockholders

on old policies, see Hort's Case, L. R., 1 Ch. D., 307 (1875): Harman's Case, L. R., 1 Ch. D., 326 (1875); Cocker's Case, L. R., 3 Ch. D., 1 (1876); Rivington's Case, L. R., 3 Ch. D., 10 (1876); Doman's Case, L. R., 3 Ch. D., 21 (1876); Wynne's Case, L. R., 8 Ch., 1002 (1873); Hamilton, etc., Ins. Co. v. Hobart. 68 Mass., 543 (1854); Smith v. St. Louis, etc., Ins. Co., 2 Tenn. Ch., 727 (1877); Gardner v. Hamilton, etc., Ins. Co., 33 N. Y., 421 (1865). A consolidation may, under the Iowa statute rendering directors, etc., liable for diversion of funds, render them liable to an old policy-holder. Grayson v. Willoughby, 42 N. W. Rep., 591 (Iowa, 1889).

² The president of an insurance company which has not complied with the law authorizing its organization is liable to policy-holders for false representations to them by the insurance agents that the company had so complied. Belding v. Floyd, 17 Hun, 209 (1879). Acts of local insurance agents appointed by a general agent of a foreign insurance company are binding on the company, such acts being within the express powers given them by the general agent therein to solicit or take insurance. Kavey v. Amazon Ins. Co., 36 Hun, 66 (1885).As to insurance agents, see Perkins v. Washington Ins. Co., 4 Cowen, 645 (1825).

Cammack v. Lewis, 15 Wall, 643

It is cause for forfeiture of the charter if an insurance company takes risks which it cannot pay if required, or if it takes "grave-yard" insurance, or if a mutual relief association is run for the benefit of its officers only, or if it insures in a manner contrary to statute and delays payments of losses.

By statute forfeiture may be decreed where the court decides that a continuance of business by an insurance company will be hazardous to the community.⁵

§ 929. Plank-roads and turnpikes.— A plank-road or turnpike company is quasi-public in its nature. It is allowed and operated for the accommodation of the public as well as the profit of the stockholders. Hence an execution cannot be levied upon it unless the statute expressly allows such levy, inasmuch as the effect of the levy may be to break the road into fragments or to interfere with its maintenance.

The legislature may authorize a turnpike company to take possession of a country road and operate it as a turnpike, without paying damages to adjoining owners; the obligation of the company to keep the road in repair being considered an equivalent for the value of the road when turned over to the company. But a

(1872); Page v. Burnstine, 102 U. S., 664 (1880); Warnock v. Davis, 104 id., 775 (1881). See, also, Tenant v. Dudley, 68 Hun, 225 (1893).

¹ Ward v. Farwell, 97 Ill., 593 (1881).

² State v. Central, etc., Assoc., 29 Ohio St., 399 (1876), the person receiving the insurance having no insurable interest in the person insured.

³ State v. People's, etc., Assoc., 42 Ohio St., 579 (1885).

⁴State v. Standard, etc., Assoc., 38 Ohio St., 281 (1882).

⁵ Ward v. Farwell, 97 Ill., 593 (1881). The state may force the dissolution of insolvent insurance corporations or corporations whose continuance of business will be dangerous to the public. Id.; Chicago Life Ins. Co. v. Auditor, 101 Ill., 82 (1881).

⁶ Ammont v. Pittsburg T. Co., 13 S. & R. (Pa.), 210 (1825). After an execution sale of a franchise, etc., of a gravel-road corporation, the corporation may give a deed of the same to the purchaser. State v. Hare, 23 N. E. Rep., 145 (Ind., 1889).

Douglass v. President, etc., 22 Md., 219 (1864). The legislature may authorize a turnpike company to take possession of public roads and operate them as turnpikes. Chagrin, etc., P. R. Co. v. Cane, 2 Ohio St., 419 (1853). The legislature may authorize the turning of a highway into a turnpike without payment of compensation for the land, payment for damages to the adjacent land being provided for. Wright v. Carter, 27 N. J. L., 76 (1858). Reversed on another point, see 33 N. J. Eq., 277. The legislature may authorize a plank-road company to take, use, maintain and charge tolls on a road that up to that time was a public road. Such change may be made without payment of compensation to the state or adjacent property owners. The charging of toll is justified in exchange for the relief from taxes to keep the road in repair. Chagrin, etc., P. R. Co. v. Cane, 2 Ohio St., 419 (1853). The legislature may authorize a plank-road company to take public roads for its purposes, upon paying compensation for the public interest therein or agreeing turnpike company has no right to appropriate a public highway, unless expressly authorized by the legislature so to do. The grant of a turnpike and ferry privilege does not prevent a subsequent grant for another turnpike and bridge, although the latter destroys the former.²

A turnpike company may give a mortgage on its property.³ It may anthorize the construction of a street railroad on its road, if its stockholders do not object.⁴ Its stockholders may enjoin it from doing acts which are contrary to the original charter and object of the company.⁵

with the supervisor and commissioners of highways upon the amount to be paid. Beuedict v. Goit, 3 Barb., 459 (1848). Acceptance of the charter is not implied by accepting the benefits but performing none of the burdens imposed; as where a toll-road was established over a highway. Welsh v. Plumas Co., 29 Pac. Rep., 720 (Cal., 1892). Where a turnpike company is allowed, without objection, to expend a large amount of money in extending its road, under authority of a decree of court. the commonwealth is estopped to question the regularity of the proceedings under which such authority was granted. Commonwealth v. Philadelphia, etc., Co., 25 Atl. Rep., 1105 (Pa., 1893). If there is a dangerous declivity on the side of a turnpike, it is the duty of the company to protect it by a railing. Southworth v. Owenton, etc., Co., 16 S. W. Rep., 129 (Ky., 1891).

¹A turnpike company cannot appropriate for its purposes an existing highway. Groff v. Bird, etc., T. Co., 18 Atl. Rep., 431 (Pa., 1889). Legislative authority to construct a turnpike does not authorize the company to occupy a highway for that purpose. Groff v. Bird-in-hand T. Co., 22 Atl. Rep., 834 (Pa., 1891). A toll-road once located cannot be changed. Snell v. Chicago, 24 N. E. Rep., 532 (Ill., 1890).

² Hydes, etc., Co. v. Davidson County, 18 S. W. Rep., 626 (Tenn., 1892).

³ Bonds secured by a mortgage on land of a turnpike company are valid and the mortgage can be foreclosed. The defense that the mortgage was unauthorized by statute is not good. The delay is fatal. Browning v. Mullins, 13 S. W. Rep., 426 (Ky., 1890). Where a mortgage on a plank-road is foreclosed and the property is purchased by an individual, damages for an accident occurring subsequently while he is operating it cannot be recovered from the old company. Wellsborough, etc., Co. v. Griffin, 57 Pa. St., 417 (1868).

4 A street railroad may be constructed on a turnpike with the consent of the owners of the latter, and the consent of the trustees of the road district need not be obtained, they not "having charge" of such turnpike. Cincinnati, etc., St. R'y v. Village Com'rs, 14 Ohio St., 523 Where a turnpike company authorizes the construction of a street railway on its turnpike the adjoining owners cannot claim additional compensation, nor obtain damages for a change in the grade, the turnpike company having power to so change it. Peddicord v. Baltimore, etc., P. R. R'y Co., 34 Md., 463 (1871).

⁵ Even though the legislature, after a turnpike corporation is organized, authorizes it to issue stock in payment for another turnpike, yet a dissenting stockholder may prevent the purchase by showing that it decreases the value of his stock. Shaw v. Campbell, etc., Co., 15 S. W. Rep., 245 (Ky., 1891). The consolidation of two turnpike corporations, even under a statute authorizing it, may be enjoined by a stockholder. Botts v. Simpsonville, etc., Co., 10 S. W. Rep.,

It is illegal for a person to obstruct a turnpike or to use it and refuse to pay toll.¹

The right of a turnpike company to maintain, retain and operate its road and collect toll is property which cannot be taken from it except under the power of eminent domain.²

Under the power of eminent domain the property of a turnpike company may be taken for another public or quasi-public use.³

184 (Kv., 1888). Compare \$ 896 and ch. XXVIII. A stockholder in a plank-road company may enjoin his company from running a stage line and carrying the mails. Wiswall v. Greenville, etc., R. R. Co., 3 Jones' Eq. (N. C.), 183 (1857). See Crawford v. Longstreet, 43 N. J. L., 325 (1881), holding that a turnpike company may lease premises for storing implements used in repairing its road and for sheltering its employees. A property owner adjoining a turnpike cannot enjoin an assessment by the city for paving the road. Bagg v. Detroit, 5 Mich., 336 (1858). Ordinarily a plank-road company cannot guaranty the debts of another plank-road company. In Madison, etc., Co. v. Watertown, etc., Co., 7 Wis., 59 (1858), where a plank-road company built and owned a road over a part of another company's route which the latter had not constructed, the former was defeated in a suit for repayment from the latter corporation.

¹An indictment will lie against a person obstructing a turnpike. Commonwealth v. Wilkinson, 33 Mass., 175 (1834).

wealth v. Wilkinson, 33 Mass., 175 (1834). ²City of Detroit v. Detroit & F. Plank-road Company, 43 Mich., 140. The question was whether the legislature had power to compel the defendant to move its toll-gates from within the city limits after they had been lawfully placed there under the provisions of its charter. Judge Cooley says: "It cannot be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired. In the most arbitrary times such an act was recognized as pure

tyranny, and it has been forbidden in England ever since Magna Charta, and in this country always. It is immaterial in what way the property was lawfully acquired, whether by labor in the ordinary avocations of life, by gift or descent, or by making a profitable use of a franchise granted by the state; it is enough that it has become private property, and it is thus protected by the 'law of the land." A statute ordering the removal of toll-gates altogether is nnconstitutional where the right to take tolls was granted. Att'y-Gen. v. Germantown, etc., Road, 55 Pa. St., 466 (1866). The legislature cannot compel a turnpike company to remove its road to the outskirts of a town which has grown up since the road was constructed. pike Co. v. Davidson County, 3 Tenn. Ch., 396 (1877). An amendment giving right to take toll to mail coaches is not revocable. Derby Turnpike Co. v. Parks. 10 Conn., 522 (1835). The legislature may amend tumpike charter so that it can charge only a proportionate part for the distance between gates, where the whole distance is not traveled. Maysville Turnpike Co. v. How, 14 B. Monr., 426 (1854). In the case Covington, etc., Co. v. Sanford, 20 S. W. Rep., 1031 (Ky., 1893), it was held that the courts would not consider the question of whether a reduction of turupike tolls by the legislature was reasonable or not.

³ Arminton v. Barney, 15 Vt., 745 (1843), where the franchises of a turnpike were taken for a public highway; White River T. Co. v. Vermont Cen. R. R. Co., 21 Vt., 594 (1849), holding that a railroad may take a turnpike unless its charter gave it an exclusive right. Bos-

A public road may be opened alongside of a toll plank-road.¹ A turnpike company cannot be deprived of its roads or its franchises by an extension of the limits of a municipal corporation. It may continue to collect toll even on the part of the road taken into the city.² Upon the termination of the period for which a turnpike company is authorized to collect tolls the highway becomes free and the stockholders no longer have any interest therein.³ A turnpike is not a private road and cannot be closed by the stockholders against public use, and the forfeiture of the charter does not destroy the character of the road as a public highway.⁴ The

ton & L. R. R. Co. v. Salem & L. R. R. Co., 2 Gray, 1 (1854); Central Bridge Co. v. Lowell, 4 Gray, 474 (1855); Boston Water-power Co. v. Boston & W. R. R. Co., 23 Pick., 360 (1839); Enfield Toll B. Co. v. Hartford & N. H. R. R. Co., 17 Conn., 454 (1846). Under power of eminent domain one turnpike may be laid out partly over route of another. Backus v. Lebanon, 11 N. H., 19 (1840). A town may condemn for a highway a turnpike and such part of an interstate bridge as is in the state. Croshy v. Hanover, 36 N. H., 404 (1858). The franchise to operate a toll-road seems to be personalty. The franchise does not pass to the heirs of a private individual who purchased the same from a corporation under legislature authority. Snell v. Chicago, 24 N. E. Rep., 532 (Ill., 1890).

¹ Auburn, etc., Co. v. Douglass, 9 N. Y., 444, 453 (1854), citing cases herein and saying that the cases of Croton T. Co. v. Ryder, 1 John. Ch., 611 (1815), and Newburgh T. Co. v. Miller, 5 id., 101 (1821), are overruled; and the case of Enfield Toll-bridge Co. v. Conn. River Co., 7 Conn., 28, 48 (1828), although correct in refusing an injunction against a competing concern, yet is incorrect in its dicta approving of the preceding cases. A mere legislative grant to a company to mine certain stone, paying the state a royalty, does not prevent the legislature granting similar rights to another company, there being no exclusive express grant. Bradley v. South, etc., Co., 1 Hughes, 72 (1877). So, also, of a toll-bridge. Shorter v. Smith, 9 Ga., 517 (1851).

² Fort Wayne, etc., Co. v. Maumee, etc., Co., 30 N. E. Rep., 880 (Ind., 1892); Mayor, etc., v. Vernon, etc., Co., 14 S. E. Rep., 610 (Ga., 1892).

³ McMullin v. Leitch, 23 Pac. Rep., 294 (Cal., 1890). Where the statute authorizes an existing turnpike company to take possession of and exact a toll on a bridge which connects with the toll road, the right to exact this extra toll expires with the dissolution of the company. Turnpike Co. v. Illinois, 96 U. S., 63 (1877). The legislature may provide that upon the discontinuance of the turnpike the adjoining owners shall not have new damages by reason of the public road to the same amount as though the public road were being laid out for the first time. Murray v. County Com'rs, etc., 53 Mass., 455 (1847). legislature may provide that a plankroad become a public road upon its abandonment for sixty days by the company. State v. Duff, 49 N. W. Rep., 23 (Wis., 1891). A plank-road corporation selling its franchises and property under an express act of the legislature becomes thereby dissolved. Suell v. Chicago, 24 N. E. Řep., 532 (Ill., 1890). A failure to complete a toll-road as called for by the charter is good cause for forfeiture. Id. If the charter of a turnpike company is forfeited the road becomes a public highway. 29 Alb. L. J., 237.

⁴ Northern Central R. R. v. Com., 90 Pa., 300; Pittsburgh, etc., R. R. v. Com., 104 Pa., 583.

charter of a turnpike company may be forfeited by the state for misuser or non-user.1

§ 930. Telegraph companies.—A telegraph company is a quasipublic corporation, substantially the same as a railroad. It is obliged to extend its services to all who apply therefor and who offer to pay the charges. Mandamus will lie to compel the company to render its services, and injunction will lie to prevent the discontinuance of such services.²

A telegraph company is liable for error or unreasonable delay in the transmission of a message,³ but this liability may be limited or changed by express contract.⁴

A railroad company may erect a telegraph line along its road,⁵ or may authorize a telegraph company to erect such a line and to have the exclusive use of that line of telegraph;⁶ but a contract

¹ As where a turnpike company allows its road to be out of repair. Washington, etc., T. Co. v. State, 19 Md., 239 (1862). It is no defense to a suit for forfeiture against a turnpike company that the state has anthorized a competing line. Turnpike Co. v. State, 3 Wall., 210 (1865). If a turnpike company is incorporated to purchase turnpikes, a purpose not authorized by the statute, a suit for forfeiture lies. State v. Beck, 81 Ind., 501 (1892).

² Thurn v. Alta Tel. Co., 15 Cal., 472, 474 (1860); Central, etc., Tel. Co. v. Bradbury, 106 Ind., 1 (1885); Friedman v. Gold, etc., Tel. Co., 32 Hun, 4 (1884); Am. Rapid Tel. Co. v. Conn. Telephone Co., 49 Conn., 352 (1881); 17 Atl. Rep., 1071. Statutes sometimes require impartial and prompt service under penalty of a fine to be recovered by the person whose dispatch is neglected or postponed. W. U. Tel. Co. v. Ward, 23 Ind., 377 (1864). In Smith v. W. U. Tel. Co., 84 Ky., 664 (1887), it was held that a telegraph company cannot be required to communicate messages which furnish a "bucket shop" with the market quotations. A contract has been held valid between a telegraph company and a news agency according to which the latter was to send all its news by the former, and to receive a rebate of fifty

per cent. on the regular rates. Reuter v. Telegraph Co., 6 El. & Bl., 341 (1856).

³In general damages may be recovered for delayed service. Baldwin v. U. S. Tel. Co., 54 Barb., 505 (1867); Bryant v. Tel. Co., 1 Daly (N. Y.), 575 (1866); N. Y., etc., Tel. Co. v. Dryburg, 35 Pa. St., 298 (1860).

⁴That telegraph companies may specially limit their liabilities, see Wann v. W. U. T. Co., 37 Mo. 472 (1866); Ellis v. Am. Tel. Co., 95 Mass., 226 (1866); W. U. Tel. Co. v. Carew, 15 Mich., 525 (1867); Breese v. U. S. Tel. Co., 45 Barb., 274 (1866); Camp v. W. U. Tel. Co., 1 Met. (Ky.), 164 (1858). Stipulations in telegraph blank are binding. Kiley v. Western U. Tel. Co., 109 N. Y., 231 (1888). Cf. 17 Atl. Rep., 766. A mere notice on a telegraph blank limiting the company's liability does not bind a party using it unless his attention is called to it and he assents thereto. Pearsall v. Western U. T. Co., 124 N. Y., 256 (1890). The provision as to repeating a message binds the sender and not the recipient. Tobin v. Western U. T. Co., 23 Atl. Rep., 324 (Pa., 1892).

⁵ A franchise to build a railroad carries with it the right to construct a telegraph line. United States v. Western U. Tel. Co., 50 Fed. Rep., 28 (1892).

⁶ Western U. T. Co. v. Chicago, etc., R. R., 86 Ill., 246 (1877). by which a railroad company agrees to exclude all other telegraph companies from constructing new telegraph lines along the railroad is contrary to public policy and is void.¹

A telegraph line cannot be constructed on a street or public highway except with the consent of the state.² The weight of authority holds that the line is a new use of the street, and that damages must be paid to the abutting property owners if they own the fee to the middle of the street.³ The poles and wires of a telegraph

¹ Western Union Tel. Co. v. B. & O. Tel. Co., 23 Fed. Rep., 12 (1885), citing W. U. Tel. Co. v. Amer. U. Tel. Co., 9 Biss., 72 (Ind., 1879); W. U. Tel. Co. v. B. & O. Tel. Co., 19 Fed. Rep., 660 (N. Y., 1884); W. U. Tel. Co. v. Burlington, etc., R'v. 11 id., 1 (Iowa, 1882); S. C., 3 Mc-Crary, 130; W. U. Tel. Co. v. Am. U. Tel. Co., 65 Ga., 160 (1880). See U. S. R. S., § 3964, ch. 772, Laws 1887-9: and cf. Pensacola Tel. Co. v. W. U. Tel. Co., 96 U.S., 1 (1877), as to whether a state may grant a territorial mouopoly of the telegraph business. The legislature may grant to individuals the exclusive right to a line of telegraph between two cities. An assignee of the persons to whom the grant was made may enjoin a competing concern. California, etc., Co. v. Alta, etc., Co., 22 Cal., 398 (1863). W. U. Tel. Co. v. Atlantic, etc., Tel. Co., 7 Biss., 367 (Ind., 1877), holds that a contract for complete exclusion is not against public policy, inasmuch as the numerous railroads between the points in question prevented the possibility of destroying competition; or new telegraph lines might be built near though not on the line of the road; or, finally, if a monopoly were secured and a new line necessary, there remained the method of proceedings for condemnation under the state laws. A telegraph company having a contract with a hotel to exclusively do business on the premises may enjoin the hotel from breaking the contract. Western, etc., Co. v. Rogers, 11 Atl. Rep., 13 (N. J., 1886). A grant to a telegraph company of an exclusive right of way along a railroad is void as to the exclusive part. Pacific,

etc., Co. v. Western U. T. Co., 50 Fed. Rep., 493 (1892).

²That telegraph lines in public highways may be public nuisances, see Queen v. United, etc., Tel. Co., 31 L. J. Mag. Cas., 166 (1862). Cf. S. C., 30 Beav., 287 (1861); Commonwealth v. Boston, 97 Mass., 555 (1867). And the company will be liable in damages for injuries resulting from obstructions. Dickey v. Maine Tel. Co., 46 Me., 483 (1859).

3 The construction of a telegraph or telephone line on a railroad right of way is a new use for which the owner of the fee is entitled to compensation unless it is to be used by the railroad in its usual business and is built for that purpose. American T. & T. Co. v. Smith, 18 Atl. Rep., 910 (Md., 1889). The owner of the fee of a country road may bring an action quare clausum fregit against a telegraph company erecting poles without having acquired the right to do so by agreement or condemnation proceedings, even though the company obtained the consent of the county hoard as provided by statute. Board of Trade Tel. Co. v. Barnett, 107 Ill., 507 (1883). In Massachusetts it is held that no additional servitude is imposed by the appropriation of a public highway for a telegraph line by the erection of poles and wires for which compensation must be made to the owner of the fee in the highway. Pierce v. Drew, 136 Mass., 75 (1883). A city may authorize the erection of telephone poles in the street. No additional servitude is imposed thereby on adjacent property owners. Julia, etc., Assoc. v. Bell Tel. Co., 88 Mo., 258 (1885).

company are real estate; but by express contract the wires and even the poles may be made personal property, and hence not subject to incumbrances upon the land or upon the land and poles.²

A telegraph company, being a quasi-public corporation, cannot mortgage, lease or sell its line unless expressly authorized so to do.3

The regulation or taxation of telegraph companies by a state must not interfere with the interstate operations of the company.

It is legal for a city to require a telegraph company to pay to the city each year the sum of \$5 for every telegraph or telephone pole erected and used by the company in the streets of the city. This is not a tax, nor a privilege or license fee. It is a rental.⁵

Cable companies are similar to telegraph companies in regard to their rights, powers and duties.

§ 931. Telephone companies.—A telephone company is very similar in all its rights, powers and dutics to a telegraph company. It must furnish equal facilities to all. The right to erect

1 "The telegraph poles with the wires and attachments thereto, which it is alleged were cut down by defendant, were affixed to the soil of a highway, and constituted a part of the freehold." American, etc., Tel. Co. v. Middleton, 80 N. Y., 408 (1880).

² Western U. T. Co. v. Burlington, etc., R. R., 11 Fed. Rep., 1 (1882), where a mortgage on the railroad was foreclosed and was held not to cover the telegraph line. Strung wires may by agreement be personalty separate from the realty. Otherwise they become realty. Boston, etc., Co. v. Bankers', etc., Tel. Co., 36 Fed. Rep., 288 (1886), where a mortgage on the telegraph line was held not to cover certain special wires.

³ A telegraph company has no power to sell and assign its lines unless such power is expressly given to it. The franchise is personal. United States v. Western U. Tel. Co., 50 Fed. Rep., 28 (1892), holding also that the government may file a bill in equity to set aside an illegal telegraph consolidation and need not resort to mandamus. All of the corporations were state corporations in this case. A mortgage on a telegraph line may cover subsequently-acquired property. Mortgage bonds issued to construct new lines of telegraph are

valid. Boston, etc., Co. v. Bankers', etc., Co., supra. In Benedict v. Western U. Tel. Co., 9 Abb. N. C., 214 (N. Y., 1878), a special term decision held that a pooling contract was allowed by a statute applicable to telegraph companies. A railroad company owning a telegraph line has no implied power to sell it. Atlantic, etc., Tel. Co. v. Union P. R'y, 1 Fed. Rep., 745 (1880).

⁴ Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S., 1 (1877); Telegraph Co. v. Texas, 105 U. S., 460 (1881). See, also, § 572d, supra.

⁵ St. Louis v. Western, etc., Co., 148 U. S., 92 (1893). The court did not have before it the question whether such a rental could be demanded for poles already erected at the time when the ordinance was passed. Id. A city has implied power to require telegraph poles to be inspected by its police and to impose a license fee of \$1 a pole therefor. Allentown v. Western U. T. Co., 23 Atl. Rep., 1070 (Pa., 1892).

⁶ As to their construction without government authority, see Submarine Tel. Co. v. Dickson, 15 C. B. (N. S.), 759 (1864).

⁷State v. Delaware, etc., Co., 47 Fed. Rep., 633 (1891). *Mandamus* will issue to compel a telephone company to give poles in the highway is very similar to the rights of telegraph companies.¹

A telephone line on a country highway must pay damages to the adjacent property owners for the use of the highway in the erection of its poles.² The legislature may reduce the charges of telephone companies if they are unreasonably high.³ A telephone company cannot enjoin a street railway company from using the trolley system, although the current of electricity interferes with the telephone.⁴

§ 932. Water-works companies.— A water-works company is also a quasi-public corporation. It must supply water to all who apply therefor and offer to pay the rates.⁵ Its franchise must originate from the state and not from a municipality.⁶ But an individual cannot question the right of a water-works company to lay its pipes in the public highways.⁷ This franchise or right is property, being a contract right. If it is granted by a municipality duly authorized to grant it, it is protected as property.⁸

equal privilege in the matter of connection to all telegraph companies although the license under which the telephone company operates its patent reserves the right of discrimination. State v. Bell Telephone Co., 23 Fed. Rep., 539 (Mo., 1885); State v. Bell Telephone Co., 36 Ohio St., 296 (1880); Chesapeake, etc., Tel. Co. v. B. & O. Tel. Co., 66 Md., 399 (1877); Bell Telephone Co. v. Commonwealth, 3 Cent. Rep., 907 (Pa., 1886); S. C., 35 Alb. L. J., 4. Contra, Am. Rapid Tel. Co. v. Conn. Telephone Co., 49 Conn., 352 (1881); American U. Tel. Co. v. Bell Telephone Co., 10 Cent. L. J., 438 (1880); S. C., 11 id., 359; 22 Alb. L. J., 363; State v. Bell Telephone Co., 23 Fed. Rep., 539 (1885); State v. Nebraska Telephone Co., 17 Neb., 126 (1885). They are under obligation to the public at common law. Louisville Transfer Co. v. American District Telephone Co., 1 Ky. L. J., 144; S. C., 24 Alb. L. J., 283; State v. Bell Co., 36 Ohio St., 296 (1880). A telegraph company may require telephone companies to receive dispatches from or for telegraph companies. State v. Telephone Co., 36 Ohio St., 296 (1880).

¹See § 930. Power to "license, tax and regulate" telephone companies gives power to the city to authorize

them to erect poles. Hershfield v. Rocky, etc., Tel. Co., 29 Pac. Rep., 883 (Mont., 1892).

² Blashfield v. Empire, etc., Co., 18 N. Y. Supp., 250 (1892); Eels v. American, etc., Co., 65 Hun, 516 (1892).

³ Chesapeake, etc., Tel. Co. v. Baltimore, etc., Tel. Co., 7 Atl. Rep., 809 (Md., 1887); Hockett v. State, 105 Ind., 250, 599; Central, etc., Co. v. State, 19 N. E. Rep., 604 (Ind., 1889).

4 See § 914, supra.

⁵ Mandamus lies to compel a waterworks company to supply a citizen with water. Haugen v. Albina, etc., Co., 28 Pac. Rep., 244 (Oreg., 1891).

⁶ Under the common-law charter powers of a city, it has no power to confer a franchise to own and operate waterworks. Nat'l, etc., Works v. Oconto, etc., Co., 52 Fed. Rep., 29 (1892).

⁷State v. Egg Harbor City, 26 Atl. Rep., 89 (N. J., 1893).

⁸ An ordinance authorizing certain individuals to construct water-works and duly accepted by them is a contract. A bond given by them to the city to construct the works may be enforced if the works are not constructed. City of Goldsboro v. Moffett, 49 Fed. Rep., 213 (1892). In Illinois, under the statutes re-

An exclusive franchise may be granted to a water-works company by the state, but not by a municipality, unless the latter has been expressly authorized to make such a grant.¹

The courts, however, do not favor these exclusive privileges and will construe them strictly, giving no wider meaning to their terms than is clearly expressed.²

A water-works company may be authorized to exercise the power of eminent domain.³ The general powers and duties of a water-

lative to taxation, water-mains are held to be personalty. Shelhyville Water Co. v. People. 30 N. E. Rep., 678 (Ill., 1892).

¹ A city has no inherent power to grant an exclusive privilege. A competing franchise may be granted to another water-works company. Syracuse Water Co. v. Syracuse, 116 N. Y., 167 (1889). A municipal corporation has no power to grant to a water-works company an exclusive privilege to furnish water for a term of years. Only the legislature can create such a monopoly (reviewing cases). City of Brenham v. Brenham, etc., Co., 4 S. W. Rep., 143 (Tex., 1887); Davenport v. Kleinschmidt, 13 Pac. Rep., 249 (Mont., 1887). An exclusive water-works right granted by the state is a contract which cannot afterwards be repudiated or impaired. New Orleans Water-works Co. v. Rivers, 115 U. S., 674 (1885); St. Tammany Water-works v. New Orleans Waterworks, 120 id., 64 (1887). In New Jersey it seems to be held that even though a city's grant to a company of an exclusive right to furnish water be ultra vires, yet equity will protect the company when it furnishes sufficient water and reasonably. "Equity will protect a corporation entitled to the enjoyment of an exclusive franchise against unlawful competition" (cases). Atlantic City Water-works v. Atlantic City, 39 N. J. Eq., 367 (1885). A city cannot grant an exclusive franchise to a waterworks company under the express power to contract for water-works. The city may subsequently erect its own works. Long v. City of Duluth, 51 N. W. Rep., 913 (Minn., 1892). A city has no power to grant an exclusive privilege to a water-works company nor to exempt it from taxation. Altgelt v. San Antonio, 17 S. W. Rep., 75 (Tex., 1890).

2 A contract by a city with a waterworks company contained in the latter's charter whereby it had the sole right to supply the city with water from a certain source is not impaired by authorizing another company to supply it from a different source. Stein v. Bienville, etc., Co., 141 U. S., 67 (1891); aff'g 34 Fed. Rep., 145 (1888). A charter to one corporation to take water from a certain source to supply a town does not prevent a similar charter to another later corporation. Rockland, etc., Co. v. Camden, etc., Co., 15 Atl. Rep., 785 (Me., 1888). A water-works company and a city, having power to purchase works, cannot enjoin another company from putting in rival works. Appeal of City of Chester, 8 Atl. Rep., 400 (Pa., 1887). In England, by statute, no water-works company is allowed to put works in a town which another company already adequately supplies. Held. however, that the latter exception does not apply where one company having a supply uses the plant of another company having the plant and street fran-Richmond, etc., Co. v. Richmond, L. R., 3 Ch. D., 82 (1876). Claims of exclusive privileges are strictly construed. Emerson v. Com., 108 Pa., 111; Lehigh Water Co.'s Appeal, 102 Pa., 527.

³The right of eminent domain may be given to an individual as well as to a corporation. It may be given in order to construct water-works. Pocantico, etc., Co. v. Bird, 130 N. Y., 249 (1891).

works company depend of course largely upon its charter and the statutes of the state. Being an enterprise of a *quasi*-public nature, its creditors can subject its property to their debts only by a suit in equity.

The legislature may regulate the rates charged by a water-works company,³ and may authorize its property or rights to be condemned under the power of eminent domain.⁴ A forfeiture of the

Water-works company cannot condemn land unless it is obliged to furnish water by public hydrants. Citizens', etc., Co. v. Parry, 59 Hun, 202 (1891). A waterworks company may cross a canal of a canal company. Lehigh, etc., R. R. v. Orange, etc., Co., 7 Atl. Rep., 659 (N. J., 1887). A water-works company engaged in the construction of its plant does not lose a part of its right of way by a subsequent company filing its maps first. Pocantico, etc., Co. v. Bird, supra. A city may proceed to condemn land for its own water-works instead of making a contract for water where it has power to do either. State v. Mayor, 23 Atl. Rep., 129 (N. J., 1891).

¹A water supply company may use its pipes to supply other towns where its charter so provides and the city ordinance does not forbid. Duluth v. Duluth, etc., Co., 47 N. W. Rep., 781 (Minn., A water company must lower its pipes when necessary to make them conform to a new grade. Jersey City v. City of Hudson, 13 N. J. Eq., 420 (1861). Where the contract of a water-works company with the city required it to filter its water, the city may enforce this contract by a suit for specific performance. The consumers will not be left to an action for damages. City of Burlington v. Burlington Water Co., 53 N. W. Rep., 246 (Iowa, 1892). A waterworks company may shut off the water from a customer who violates its reasonable regulations. Shiras v. Ewing, 29 Pac. Rep., 320 (Kan., 1892). A bond given to a city to the effect that waterworks will be built is without consideration, where the ordinance giving the right to construct the works did not

call for a bond. Moffett v. Goldsborough, 52 Fed. Rep., 560 (1892). A water-works company is not liable in damages for failing to supply water at a fire, although its contract with the city required it to furnish sufficient water for that purpose. Britton v. Green Bay, etc., Co., 51 N. W. Rep., 84 (Wis., 1892).

² A water-works plant in England is considered as of such a public nature as to preclude a foreclosure and sale by creditors secured by an undertaking. The court will only appoint a receiver to operate the plant for the benefit of creditors. Blaker v. Herts, etc., Co., 60 L. T. Rep., 776 (1889). In Wisconsin the mechanics' lien law is applicable to quasipublic corporations. When levied upon a part of water-works the court will not order a sale of that part, but the sale of the whole. Nat'l, etc., Works v. Oconto, etc., Co., 52 Fed. Rep., 43 (1892).

³Spring, etc., Works v. Schottler, 110 U. S., 347 (1884). Where the power to reduce water rates is delegated to a local board, that board must strictly comply with the statutory requirements as to investigation, etc., before reducing the rates. Spring Valley, etc., Works v. San Francisco, 22 Pac. Rep., 910 (Cal., 1890).

⁴ An express statute may authorize a water company to take water from lakes owned by another water company. Re Rochester Water Com'rs, 66 N. Y., 413 (1876). It is constitutional for the state to so enact. Illinois, etc., Canal v. Chicago, etc., R. R. Co., 14 Ill., 314 (1853). In Connecticut it has been held that the legislature cannot authorize a new water-works company to

charter for failure to keep up repairs will not be made where for such failure the legislature has prescribed another penalty.¹

§ 933. Wharf, steamboat, board of trade, stock-yard, cotton-press, booming, car-manufacturing, sleeping-car, irrigation, elevator, pipe line and other corporations which are or are not quasi-public corporations.— Many of these companies are quasi-public in their nature and are subject to the duties imposed on that class of corporations to serve the public when called upon so to do. Of such a nature are corporations operating a steamship line,² or a wharf,³

take by eminent domain the property and water rights of an old company that has an exclusive privilege to supply water to the city. Citizens', etc., Co. v. Bridgport, etc., Co., 10 Atl. Rep., 170 (Conn., 1887).

1 Where the legislature provides that for failure to keep in repair a water franchise no tolls shall be collected, the courts will not apply a different remedy—the forfeiture of the franchise. State v. Morris, etc., 11 S. W. Rep., 392 (Tex., 1889). As to regranting the privileges to another company, see Commonweath v. Lykens Water Co., 110 Pa., 391.

² A steamship company may not charge a higher rate to shippers simply because they refuse to patronize it exclusively. Menacho v. Ward, 27 Fed. Rep., 529 (N. Y., 1886). But see, contra. Mogul Steamship Co. v. McGregor, p. 650, note, supra. A steamship company may agree to give reduced rates to shippers who contract to ship by that line exclusively. If excessive rates are charged the remedy of the shipper is at law. Lough v. Outerbridge, 66 Hun. 103 (1892). A common carrier — a steamship company in this case - is bound to charge only reasonable rates. A shipper may sue to recover back any charge in excess of a reasonable rate. The fact that the company gave a less rate to some one else is evidence that the higher rate is unreasonable, but is not conclusive evidence. Such is the conclusion of the English cases and of the leading case, Johnson v. Railroad, 16 Fla., 623. The leading case to the contrary, Scofield v. Railway, 43 Ohio St., 571; Cowden v.

Pacific Coast S. S. Co., 29 Pac. Rep., 873 (Cal., 1892), follows Johnson v. Railroad, supra. The jury are to decide whether a steamboat company has power to operate a barge. Tenn., etc., Co. v. Kavanaugh, 9 S. Rep., 395 (Ala., 1891).

3 A steamboat company is entitled upon the payment of a reasonable compensation to use a wharf owned by a railroad and used by steamboats owned by the railroad. Oregon Short Line, etc., R'y v. Ilwaco, etc., Co., 51 Fed. Rep., 611 (1892). But where special wharfage privileges are customarily allotted to coal shippers, it is held that the carrier has a necessary discretion in the allotment, and the motives of its proceedings cannot be reviewed by the courts. Audenried v. Philadelphia & R. R. R., 68 Pa. St., 370, 380 (1871). A city having condemned and taken a wharf under the power of eminent domain cannot thereafter lease it for a term of years to a sugar refinery to use. Such a use is not a public one. Belcher, etc., Co. v. St. Louis, etc., Co., 82 Mo., 121 (1884). If a corporation opens a dock to the public for a general wharfage business, the public would have a right to use the same, under such reasonable regulations and upon the payment of such charges as the owner might fix or as might be regulated by law. Indian River Steamboat Co. v. East Coast Transp. Co., 10 S. Rep., 480, 492 (Fla., 1891). Packet Co. v. Aiken, 16 Fed. Rep., 890: Cannon v. New Orleans, 20 Wall., 577: Packet Co. v. Keokuk, 95 U. S., 80: Transportation Co. v. City of Parkersburg, 107 U.S., 691, 732.

a boom, a pipe line, a warehouse and elevator, an irrigation canal, a car-manufactory, a sleeping-car company and public exchanges. But stock-yard companies, cotton-press compa-

¹ Yellow, etc., Co. v. Wood Co., 51 N. W. Rep., 1004 (Wis., 1892); Patterson v. Mississippi R. R. B. Co., 3 Dill., 465 (1875); Attorney-General v. Evart Booming Co., 34 Mich., 462 (1876). The legislature has the power to regulate the charges of a booming company. Underwood, etc., Co. v. Pelican, etc., Co., 45 N. W. Rep., 18 (Wis., 1890).

² West Va. Trans. Co. v. Volcanic Oil, etc., Co., 5 W. Va., 382 (1872).

³ Munn v. Illinois, 94 U.S., 113 (1876). The legislature may regulate grain elevator charges. People v. Budd, 117 N. Y.. 1 (1889). In Budd v. New York, 143 U. S., 517 (1892), the court sustained the constitutionality of the New York statute regulating elevator charges. The court reviewed a large number of decisions on this power of the state and distinguished the recent case of Chicago, etc., R'y v. Minn., 134 U. S., 418, on the ground that there the rates were fixed, not by the legislature, but by a commission. The court, however, reiterated its decision that rates cannot be reduced so as to be unreasonable.

4 Mandamus lies to compel an irrigation company to deliver water to a party desiring it. Combs v. Agri. Ditch Co., 28 Pac. Rep., 966 (Colo., 1892). Mandamus is not the proper remedy to compel an urugation company to furnish a person with water perpetually. Townsend v. Fulton, etc., Co., 29 Pac. Rep., 453 (Colo., 1892). In the case of Bright v. Farmers', etc., Co., 32 Pac. Rep., 433 (Colo., 1893), a writ of mandamus for the purpose of compelling an irrigation company to furnish water was denied. An irrigation company is not strictly a common carrier in the sense in which those words are used. Wyatt v. Larimer, etc., Co., 29 Pac. Rep., 906 (Colo., 1892), containing an exhaustive discussion of the nature of such companies.

⁵ A corporation organized to manu-

facture and lease cars cannot lease its whole plant and assets for a period of years to another corporation. The latter may at any time repudiate the lease. The first corporation "was not an ordinary manufacturing corporation, such as might, like a partnership or an individual engaged in manufactures, sell or lease all its property to another corporation." It had a public duty to perform, and was a quasi-public corporation. Central Trans. Co. v. Pullman's Car Co., 139 U. S., 24 (1891).

6 The usual sleeping-car contract by which the railroad agrees to use the cars of a certain company exclusively is not contrary to public policy. Chicago, etc., R. R. v. Pullman Car Ço., 139 U. S., 79 (1891). A sleeping-car company is not a common carrier to the extent of being liable for a refusal of its agent to furnish berths. Lemon v. Pullman P. Car Co., 52 Fed. Rep., 262 (1892).

7 A board of trade may become so public in its nature that the courts will enjoin a suppression of its information. N. Y., etc., Exch. v. Board of Trade, etc., 19 N. E. Rep., 855 (Ill., 1889). A board of trade is not obliged to permit a telegraph company to collect the news of its exchange for transmission as market reports; nor, having undertaken such business, is a telegraph company bound to continue it in the absence of express contract, and equity will not grant an injunction to prevent the removal of its instruments from the exchange. Met. Grain, etc., Exchange v. Chicago Board, 15 Fed. Rep., 847 (Ill.,

s A stock-yard company is not a quasipublic corporation. Delaware, etc., R. R. v. Central, etc., Co., 19 Atl. Rep., 185 (N. J., 1890). Until the legislature imposes public duties on stock-yard corporations, a court of equity cannot prevent their giving preferences in rates, etc. nies, grist-mill and manufacturing companies are not quasi-public in their nature.2

A corporation organized to supply heat by means of pipes laid through the streets is not a public or *quasi*-public corporation, and may give a mortgage upon its property without express statutory power.³

In South Dakota it is held that the state cannot prohibit private banking.

Delaware, etc., R. R. Co. v. Central, etc., Co., 17 Atl. Rep., 146 (N. J., 1889).

¹The cotton press business is not such a public business that the public may appeal to the courts for redress against high charges. The legislature might possibly regulate. Ladd v. Southern, etc., Co., 53 Tex., 172 (1880).

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² See § 91, note, *supra*, showing what companies a municipality may not aid even when authorized to do so, and what companies it may aid.

⁸ Evans v. Boston Heating Co., 81 N. E. Rep., 698 (Mass., 1892).

⁴State v. Scougal, 51 N. W. Rep., 858 (S. D., 1892).

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PART VII.

STATUTORY AND CONSTITUTIONAL PROVISIONS REG-ULATING CORPORATIONS.

CHAPTER LVI.

STATUTORY AND CONSTITUTIONAL PROVISIONS OF THE VARIOUS STATES OF THE UNION IN REGARD TO CORPORATIONS.

8	934.	The reason and purpose of this	S	955.	Minnesota.
U		part of the work.			Mississippi.
	935.	New York, New Jersey, Illinois,			Missouri.
		Maine, Connecticut and West	1	958.	Montana.
		Virginia as grantors of charters	! !	959.	Nebraska.
		to corporations.		960.	Nevada.
	936.	Alabama.	1	961.	New Hampshire
	937.	Arkansas.			New Jersey.
	938.	California.	1	963.	New York.
	939.	Colorado.	1	964.	North Carolina.
	940.	Connecticut.	,	965.	North Dakota.
	941.	Delaware.	١ ١	966.	Ohio.
	942.	Florida.		967.	Oregon.
	943.	Georgia.	!	968.	Pennsylvania.
	944.	Idaho.			Rhode Island.
	945.	Illinois.		970.	South Carolina.
	946.	Indiana.	!	971.	South Dakota.
	947.	Iowa.	1 1	972.	Tennessee.
	948.	Kansas.	!	973.	Texas.
	949.	Kentucky.	!	974.	Vermont.
	950.	Louisiana.	١ :	975.	Virginia.
	951.	Maine.		976.	Washington.
	952.	Maryland.	1	977.	West Virginia.
	953.	Massachusetts.			Wisconsin.
	954.	Michigau.	!	979.	Wyoming.

§ 934. The reason and purpose of this part of the work.—It is no longer safe, in corporation matters, to rely upon the common law, inasmuch as the common law has been radically changed in many of the states by constitutional and statutory provisions. Already these changes have become too important to be omitted from any work on corporation law, and they are increasing year by year. The result is that the lawyer and investor must look first to the statutory and constitutional law, and then to the common law. The former, so far as it conflicts with the latter, is of course supreme. Moreover, the counsel and directors of a corporation are continually called upon to pass upon the powers of the

corporation, and these powers are to be ascertained first of all from the statutes, if there are any statutory provisions on the subject. Indeed, all of the rights, powers, duties and obligations of the stockholders, officers, directors and agents of the corporation in the management of its business are regulated more or less by statutory provisions.

Again, those who are about to embark in a corporate enterprise wish to know what liability is attached to their stock; for what kinds of business incorporation may be had; what the liabilities of the directors may be: what incorporation fee is required; what taxes they and their corporation are subject to; where corporate meetings are to be held; what is the method of voting at elections; who may be directors; what capital stock is allowed; how much land may be owned by the corporation; what powers are conferred; and all the miscellaneous rights, duties and liabilities which are created by constitutional and statutory provisions. For instance, it is important to know that in New York and Pennsylvania a large sum of money is demanded by the state before a charter is granted; that in New Jersey a large annual tax is now levied on corporations; that in Ohio all stockholders are liable doubly on their stock; and that in California stockholders are liable for all corporate debts. Each state has laws peculiar to itself.

It is legal for citizens of one state to incorporate a company in another state, even for the purpose of carrying on the entire corporate business in the state where they live. Hence it is that where one state is hostile or unduly restrictive or exacting in its requirements from corporations it is avoided by business enterprises. The charters are taken out elsewhere. This is not possible in the case of railroads, street railroads, gas companies and other quasi-public corporations, inasmuch as they must use the power of eminent domain or use the streets,—uses which generally are granted only to domestic corporations. With business, commercial and manufacturing enterprises, however, the case is different. They may go where they are treated best.2

§ 935. New York, New Jersey, Illinois, Maine, Connecticut and West Virginia as grantors of charters to corporations.— New York was formerly very liberal in its treatment of corporations; and it is a curious fact that while now the New York courts are the most liberal in the country in encouraging and protecting corporations, the New York legislatures devote themselves to extorting large

the corporate business in another state, ² Concerning the legality, purpose and see Cook on The Corporation Problem,

¹See §§ 237–240, supra.

effect of persons incorporating in one pp. 107-110. state with the intention of doing all of

license fees and taxes from corporations and to imposing unreasonable liabilities on the stockholders and officers. The result has been that New York enterprises have been driven to New Jersey for incorporation and New York has been deprived of an enormous income which a more fair and reasonable policy would have secured. It is possible for a state by reasonable legislation to drive out "bubble" companies without driving out at the same time legitimate business corporations.

New Jersey is the favorite state for incorporations. Her laws seem to be framed with a special view to attracting incorporation fees and business fees from her sister states and especially from New York, across the river. She has largely succeeded in doing so, and now runs the state government very largely on revenues derived from New York enterprises. In New Jersey the incorporation fee is one-fiftieth of one per cent. of the par value of the capital stock; the annual tax is one-tenth of one per cent. of the same; the incorporation may be "for any lawful business or purpose whatever;" only one director need be a resident; there is no limitation on the amount of capital stock; stockholders are not liable for corporate debts; stock may be issued for property, and no annual reports of the business are necessary.

In Illinois an incorporation is obtained very cheaply and the corporations are fairly treated. A great many of the most important business enterprises in the country are chartered under the laws of Illinois. This state will doubtless pass a law, as other states have done, increasing the fee charged for incorporation. But if the fee is reasonable it will not interfere with the organization of deserving companies.

Maine formerly was a resort for incorporations, but a recent decision of its highest court holding stockholders liable on stock which has been issued for property, where the court thought the property was not worth the par value of the stock, makes Maine too dangerous a state to incorporate in, especially where millions of dollars of stock are to be issued for mines, patents and other choice assortments of property.¹

Connecticut drove from her borders not only foreign enterprises but also her own industries when in 1881 she changed her incorporation act so as to require a majority of the directors to be residents and twenty per cent. of the capital stock to be paid in cash, a provision probably and ill-advisedly taken from banking acts.

West Virginia for the past ten years has been the Snug Harbor for roaming and piratical corporations. All the tramp and bubble companies of the country seem to have gravitated to her jurisdic-

> ¹See § 47, supra. 1604

tion. The manufacture of corporations for the purpose of enabling them to do all their business elsewhere seems to be the policy of this young but enterprising state. Its statutes seem to be expressly framed for that purpose. By them the incorporation costs but \$56 and an annual tax of \$50; the incorporators and directors may be non-residents; the incorporation may be for any purpose for which a partnership may be formed, except speculation in land; the capital stock may be five millions of dollars or less; the first meeting and all other meetings of stockholders and directors may be held out of the state and wherever the incorporators wish; no public reports are required, and there is no personal liability of directors or stockholders. The cheapness of her charters has made West Virginia the Mecca of irresponsible corporations.

§ 936. ALABAMA: Constitutional provisions.—The right of eminent domain shall not be so construed as to prevent the legislature from taking the property and franchises of corporations for public use, the same as that of individuals, nor to allow taxation or forced subscriptions for the benefit of railroads or other corporations, except municipal. Private property shall not be taken for the use of corporations, other than municipal, without the consent of the owner, except the right of way. Constitution of 1875, art. I, § 24. The legislature shall not authorize the investment of any trust fund by executors, or other trustees, in the bonds or stock of private corporations. Art. IV, § 35. The state shall not be interested in or lend its credit to any private or corporate enterprise. Id., § 54. The legislature shall not authorize any subdivision of the state to lend money or its credit to or in aid of any individual or corporation, or to become a stockholder in any corporation or company, "by issuing bonds or otherwise." Id., § 55. All taxes shall be in exact proportion to the value of the property taxed. Art. XI, § 1. The annual state tax shall not exceed three-fourths of one per centum, and no county tax shall in any one year exceed one-half of one per centum; provided, a county may levy additional taxes for the erection of public buildings. Id., §§ 4.5. The property of corporations and individuals shall "forever be taxed at the same rate." Id., § 6. Municipal corporations shall not levy a greater tax than one-half of one per centum on the value of the property, as assessed for state taxation; provided, that for the payment of existing debts the rate may be increased by one per cent. Id., § 7. "Corporations may be formed under general laws, but shall not be created by special act," except for manufacturing, mioing and industrial purposes, or for constructing canals, or improving navigable rivers and harbors of the state, and when otherwise judged necessary to attain the purposes of the corporation. Art. XIV, § 1. Any such general or special law may be altered or repealed. Id. Foreign corporations must have a place of business and an authorized agent in the state. Id., § 4. Corporations shall only engage in the business authorized by the charters. Id., § 5. "No corporation shall issue stock or bonds except for money, labor done, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void." The "stock and bonded indebtedness" of corporations shall be increased only in pursuance of general laws, and with the consent of the holders of a majority in value of the stock, obtained at a meeting noticed thirty days. Id., § 6. "In no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her." Id., § 8. No corporation shall issue preferred stock without the consent of two-thirds in interest of the stockholders, Id., § 9. No law shall "create,

¹ The acts of the legislature down to and including the laws of 1892-3 are included in this synopsis,

renew or extend" the charter of more than one corporation. Id., § 10. Corporations may be organized to construct and maintain telegraph lines, under the regulation of a general law of uniform operation, but such companies must not consolidate with or acquire competing lines. Id., § 11. Every railroad company shall have the right with its road to "intersect, connect with or cross" any other railroad and such companies shall transport each other's freight and passengers without delay or discrimination. Id., § 21. The legislature shall pass laws to correct abuses and prevent extortion in freight and passenger rates. Id., § 22. No railroad or other transportation company shall grant passes or reduced rates to any legislator or state or federal officer. Id., § 23. No street railroad shall be constructed without the consent of the local authorities. Id., § 24.

Miscellaneous corporations.— Special provision is made for the incorporation of insurance companies, mining, quarrying and manufacturing companies, railroad and street railway companies, toll-road, navigation and telegraph companies.

The following provisions apply to corporations not specially provided for: Two or more may incorporate for any lawful enterprise, or to carry on any industrial business. Code of 1867, § 1659. A declaration in writing, signed by all the corporators, must be filed with the probate judge, stating (1) the names and residences of the subscribers, and the name and style of the proposed corporation: (2) the general purposes of the corporation, and the principal place of business; (3) the amount of capital stock and the number of shares; (4) any other matters desirable to be stated. \$ 1660. The judge must then issue, to two or more of the subscribers, a commission to take subscriptions "at such times and places as they may appoint." § 1661. All subscriptions must be payable in money; but the commissioners may allow the privilege of discharging the same by rendering stipulated necessary services, or the performance of stipulated necessary labor for the corporation, at a reasonable remuneration, or in property, at a reasonable valuation, which the corporation has capacity to acquire and hold, the subscription stating the nature and character of such property, and when it is to be transferred to the company. § 1662. Fifty per cent. of the proposed capital stock being subscribed in good faith by persons "of whose solvency the commissioners are satisfied," the commissioners shall call the subscribers together, at such time and place as they may appoint, for the election of directors, and for further organization: a majority in value of the subscribers being present in person or by proxy. a board of directors must be elected from the subscribers, consisting of from three to nine members; an officer must be appointed to receive from the commissioners the subscriptions for stock. He shall require a payment in cash of twenty per cent. from those whose subscriptions are payable in money, and from other subscribers contracts in writing, expressing their privilege, and binding them to the rendition of the services, or performance of labor, or the transfer of the property, at the will of the board. Such officer shall file with the probate judge an affidavit, specifying in detail the kind of subscription received from each subscriber. The organization as above required being verified by affidavits duly filed, the probate judge must issue a charter. § 1663. The corporation has power to have succession for twenty years, unless a shorter period is named; to hold, purchase and dispose of the real and personal property needed for corporate uses; to make by-laws for the transfer of stock, the creation of a lien upon shares. and the payment of any liability incurred by stockholders; and "to borrow money, and to mortgage or otherwise convey or pledge its property, real or personal, and its franchises, to secure the payment of the money so borrowed or any other debt contracted by it." But the sum borrowed must not exceed the capital stock, nor the rate of interest eight per cent., payable semi-annually; nor must the mortgage, or pledge, be made without the consent of a majority of the stock, expressed at a special meeting noticed thirty days to each stockholder personally, Land companies, or corporations organized to improve land, may have additional

powers to invest in enterprises to advance their interests, or to loan money or property to persons or corporations making improvements near their lands. § 1664, Am'd Laws 1889, No. 126. The directors have power to appoint all officers, agents and servants, removing them at pleasure. fixing their compensation. etc.. and such other powers as are given by the by-laws. § 1665. Stockholders must meet annually, at such time and place, and upon such notice, as the by-laws prescribe. \$ 1666. The capital stock may be \$10,000,000, and any corporation formed under this chapter may increase its capital to that amount, or less, upon a vote of a majority of the stock, at a special meeting called by a thirty-days' personal notice. Each stockholder is entitled to preference "in taking of the increased stock an amount in proportion to the amount of the original stock he may own:" Provided, that such increase may be less, but not more, than the amount stated in the notice: Provided, also, that "hereafter neither stock nor bonds shall be issued by any private corporation except for money, labor done, or money or property actually received, and all fictitious increase of stock or indebtedness hereafter made shall be void." Stockholders shall have sixty days in which to exercise their preference. § 1667, Am'd Laws 1890, No. 91. The incorporation may be renewed with the consent of a majority in value of the stockholders at a special meeting. § 1668. The probate judge is entitled to a small fee. § 1682.

Railroads. - Seven or more may incorporate. Members must be stockholders. They must sign and file with the secretary of state a written declaration. stating (1) the names and residences of the subscribers: (2) the name and style of the corporation, the terminal points and such other points along the route as they think proper: (3) the amount of capital stock and the number of shares; (4) any matter they may wish to state. \$ 1574. The secretary issues to three or more of the subscribers a commission to take subscriptions. § 1575. Subscriptions books must be opened within ninety days after the date of the commission, after a thirtydays' notice in a county paper. § 1575. Subscriptions shall be payable in the manner noted above in section 1662, "or in lands in any county through which such railroad may run," at a reasonable valuation. \$ 1577. After a subscription of ten per cent, of the capital stock, the commissioners must call a meeting "at such time and place as they may appoint," for the organization of the corpora-A majority of the subscribers being present, in person or by proxy, they must elect from seven to eleven directors and other officers. The person appointed to receive subscriptious from the commissioners must collect two per cent. from those whose subscriptions are payable in money, and require from other subscribers a contract in writing for the fulfillment of their obligations, the same to be certified and filed with the secretary of state. A verified statement of subscriptions, moneys received, etc., must be filed in the same manner. The secretary of state must thereupon issue a charter. § 1578. The corporation has power to have succession perpetually, unless a period is limited in the charter to hold, purchase, dispose of and convey such real and personal estate "as its uses and business may require; "to appoint any officers and agents, fixing their compensation and removing them at pleasure; to provide for the transfer of its stock, and to make such by-laws as may be deemed necessary for the creation of a lien upon stock for all indebtedness or liabilities of stockholders to the corporation: to acquire and hold, by gift or purchase, or in payment of subscriptions, or by condemnation, lands necessary for the right of way, or such other lands or any interest therein as may be necessary in making excavations or embankments, or for the purpose of disposing of materials from excavations, "or for borrowing earth or other materials" for the construction of embankments, or for the protection and safety of the roadway, or lands for depots, side tracks, etc.; to purchase or lease or aid in the construction of any connecting line; to borrow money to build. construct or operate its road, or for the payment of debts contracted for that purpose, and to secure the payment of such debts, or debts contracted in the acquisition of property for its uses, by mortgage or deed of trust of its franchises and

its property, real or personal; "and for money borrowed, or for any of its debts, may make and issue negotiable bonds, or bills of exchange, or promissory notes in any form, or other proper evidences thereof." § 1580. The corporation may cross or intersect any railroad. § 1582. Any two or more railroads, or contemplated railroads, domestic or foreign, which "admit the passage of burden on passenger cars over any two or more of such roads continuously without breach or interruption," may consolidate. The directors shall make an agreement under the corporate seal, prescribing the terms and conditions of the consolidation, the mode of carrying out the same, the corporate name, the number of directors (not more than thirteen), the time and place of holding the first election, the number of shares in the new corporation and the amount of each, the manner of converting the old shares into the new, the manner of compensating stockholders in each corporation who refuse to convert their stock, with other details deemed necessary. Such new corporation shall have all the rights, etc., and be subject to all the restrictious of the several consolidating corporations. Those who refuse to convert their shares shall be paid actual value for each share, if they so require, before the consolidation is consummated. The agreement of the directors must be submitted to each corporation separately, and approved by two-thirds of the stock represented at a meeting thereof, called upon a published notice of thirty days, Every such new corporation shall keep an office in the state and be subject to the laws of the state as a domestic corporation. § 1583. Am'd Laws 1891. No. 403. The agreement must be filed with the secretary of state. \$ 1584. The rights. franchises and property of the old companies vest in the new without deed or transfer upon the election of directors, but the rights of creditors and liens upon property shall not be impaired. § 1585. Any domestic or foreign railroad corporation may at any time, "by means of subscription to the capital of any other corporation or company or otherwise," aid such corporation in the construction of its road for the purpose of forming a connection with the road furnishing aid: or may purchase or lease any part or all of any other connecting road; or any two or more roads may enter into any agreement for their common benefit, calculated to promote the purposes for which they were created. But no such agreements shall be in force without the consent of a majority of the stock represented at a special meeting.

Any foreign railroad corporation owning or operating, or which may be authorized to own or operate, by lease or otherwise, any line in the state, may, by a resolution of the directors, aid any domestic railroad corporation in the construction, renovation or operation of its road, "by the indorsement or guaranty of its securities, which may have been or may be issued for such purpose," in the manner agreed upon by the boards, or by leasing or guarantying the rentals of any lease of any such road on the terms agreed upon by the respective boards. § 1586, Am'd Laws 1891, No. 264; Laws 1887, No. 21. Any corporation may extend its road or build branch roads to any point or points within the state, or for the purpose of extending its line may acquire and operate a railroad without the state. § 1587. "Such purchase" must be made by resolution of the board of directors, which must be approved by a majority in value of the stockholders at a special meeting called by a personal notice of thirty days. The proceedings of the meeting must be certified by the president and secretary, and filed with the secretary of state. extension or construction of such branch road" must be made by resolution of the board, and a copy of the resolution, certified by the president and secretary, must be filed with the secretary of state. § 1588, Am'd Laws 1889, No. 87. A corporation may increase its capital to \$10,000,000 by a vote of a majority of all the stock at a special meeting. The proceedings of the meeting, certified by the president and secretary, must be filed with the secretary of state. § 1589. Bonded indebtedness can only be increased by a vote of a majority in value of all the capital at a special meeting. § 1590. Stockholders must meet annually at a time and place fixed by the by-laws. § 1591. Proxies are authorized, and each share

has one vote. § 1592. Directors must be shareholders in good faith. The board must elect a president from their own number, and appoint other necessary officers, and may remove at pleasure the president or other officers. Vacancies in the board must be filled by the remaining members. § 1593. Stockholders' meetings may, upon the written consent of all the resident stockholders, verified and filed with the secretary of state, be held without the state, at a place fixed by a resolution of the board of directors. The directors may meet either within or without the state. But a principal place of business must be kept within the state, and also an agent, with whom must be filed a record of the proceedings of such meetings. The said written consent of stockholders shall continue in force, as to the stock held by those signing the same, until formally revoked. § 1594, Am'd Laws 1889, No. 130. All corporations must have a principal place of business in the state. \$ 1595. The purchasers of a railroad at a judicial sale, or under a decree foreclosing a mortgage, deed of trust, or other security, when the purchase includes the franchise, being not less than seven in number, may form a corporation. A certificate must be made as specified above (§ 1574). §§ 1596-1598. The directors may prescribe the time and manner of paying subscriptions. § 1599. Certificates of stock are not to be issued until fully paid, "according to the terms of the subscription." No transfer is valid as to the corporation without a surrender of the certificate, and a transfer according to the by-laws. The directors may appoint places outside the state for the transfer of the stock of non-residents. § 1601. Non-user for five consecutive years forfeits the charter and the franchise. § 1602. There is a railroad commission. § 1120. The commission has general supervision of railroads, and must revise all rates, increasing or reducing the same as justice demands. §§ 1129, 1130. Railroads must furnish the commission with any information requested and a list of stockholders. \$ 1136. The railroad forfeits \$50 for each day's delay in making an annual report to the commission. \$ 1137. The commission may examine the books upon application of a director, or one-fiftieth of the stock. § 1139. Discrimination respecting individuals, corporations or localities is extortion for which the company is liable for damages and attorney's fees. § 1159. But freight or passengers may be transported free of charge. § 1162. Agreements for pooling are unlawful. § 1163. Railroads must form proper connections for the accommodation of freight and passengers. § 1165. If all the stock of a domestic company is owned by a foreign company, the domestic company may sell to the foreign company thus owning its stock all its property, roadbed, rights and franchises: Provided, that an officer and agent be kept in the state, and the road so purchased shall remain subject to all the laws of the state respecting a domestic company. Laws 1890-91, No. 430.

Mining, quarrying and manufacturing companies. — The provisions for incorporating such companies are the same as described above for miscellaueous corporations (§§ 1659-1664). § 1557 et seq. They have additional power to build, buy and operate railroads, canals, roads, etc., to and from their works, and may transport property and persons as common carriers. They may condemn land, build necessary depots, wharves, etc., purchase or charter vessels, and may aid in the construction of railroads, or the establishment of boat lines, running to and from their depots, etc. Such corporations may consolidate upon the recommendation of the respective boards of directors, adopted by a vote of a majority of the stock of each company at a stockholders' meeting. The consolidation may then be carried out by an agreement in writing, which must be filed with the judge of probate, §§ 1565-1567. The new corporation may, by the agreement of consolidation, adopt the name and charter of either corporation, and may make such changes "as to the amount of stock, and the number of directors," as is deemed best. § 1569. The property and rights of the old companies, as well as their liabilities, shall helong and attach to the new corporation. § 1569. The board of directors, consisting of as many members as may be prescribed by the by-laws, must fill all vacancies in the board and appoint all officers, fixing their compensation, and removing them at pleasure. § 1570. The stockholders must meet annually. § 1571. The capital stock may be increased to a sum not exceeding \$10,000,000 by a vote of a majority of the stock at a special meeting. The proceedings of the meeting must be reduced to writing and filed with the judge of probate. § 1572.

The above provisions apply to any specially chartered company, being supplementary to the provisions of any special charter. Laws 1893. No. 319.

General provisions. - Shares or interests in the stock of private corporations are personal property, transferable in the manner directed by the by-laws or by the rules of the corporation. § 1669. When a transfer is required to be made on the books, no transfer shall be valid as against bona fide creditors, or subsequent purchasers without notice, except from the time of registering the transfers. § 1670. Every corporation must require transfers, and holders of stock under a lien, or otherwise, must have the lien or transfer registered on the books, or the same shall after fifteen days be void as to bona fide creditors, or purchasers without notice, § 1671. Shares of stock are subject to levy and sale like other personal property. § 1673. All corporations have a lien on all shares for any debt or liability incurred to it by a stockholder before notice of a transfer, or of a levy on such shares. § 1674. Stockholders have the preference of taking increased stock in proportion to the amount of original stock owned and held by them. § 1675. Non-user for five consecutive years forfeits the franchise; and, unless otherwise provided, failure to organize for two years after filing the articles forfeits all right to organize. § 1676. Books, records and papers shall be open to the inspection of stockholders. § 1677. A failure to elect officers does not dissolve the corporation. \$ 1679. The number of directors in any corporation may be increased or diminished by a majority stock vote at a regular or called meeting. § 1680. The stockholders must meet annually. The directors have the power to call special meetings. Each share has one vote. § 1681. The judge of probate shall keep a record of incorporation and organization and receive a small fee therefor. § 1682. Unpaid subscriptions are subject to garnishment by a judgment creditor of the corporation. § 2972. Before receiving a commission to do business, a corporation shall pay, for the use of the state, fees ranging from \$25 for a capital of \$50,000 to \$250 for a capital of more than \$1,000,000. Corporations created by special act pay double these fees. Foreign corporations must pay the same fees as domestic corporations formed under the general laws before doing business in the state. Laws 1892-3, No. 302,

Charters may be amended as follows: At least three-fourths of the stockholders, owning at least two-thirds of the stock, shall file with the judge of probate with whom the original declaration was filed, or with the secretary of state if the original declaration was filed there, a declaration in writing setting forth (1) the date of the original organization, the corporate name, and the desired changes in the same, the amount of capital stock subscribed for and taken; (2) the names of the stockholders, and the amount held by each; (3) the purposes of the original corporation, and the desired changes therein; (4) the original amount of the capital stock, and any proposed reduction in the same. But no such change shall authorize the exercise of powers not anthorized in the case of similar corporations. The said judge, or the secretary of state, must issue a certificate authorizing the amendment, and the same must be recorded. Laws 1888, No. 17. Defects in incorporation may be remedied. Laws 1889, No. 86.

Stockholders' and directors' meetings may be held in other states, and all kinds of corporate acts be done there, if so provided in the original declaration, or by a vote of the directors or stockholders; provided all the resident stockholders assent thereto in writing, and provided an agent and an office be kept within the state, where a certified copy of the proceedings of such meetings must be filed. For failure to file such copy of proceedings the corporation may be dissolved. This act shall not entitle any such corporation to the privileges of foreign or non-resident corporations. Laws 1889, No. 88.

Corporations formed under the general laws may issue preferred stock by a vote of two-thirds in value of the stock at a special meeting. The proceedings of the meeting must be filed with the judge of probate. Laws 1889, No. 98.

Taxation.—Shares of stock are not taxed against holders when the corporate property is required to be listed in the state. § 451 (8). The capital stock of all corporations, except such portions as may be invested in property which is otherwise taxed as property, is taxed against the company; but when taxes upon the shares of capital stock are paid by the company, or the shareholders, the company shall only be taxed on "the real and personal estate owned by it, unless its investments are otherwise herein taxed." Id. (9). All railroad property is taxed. Id. (11). All dividends declared or earned and not divided are taxed. Id. (12). Insurance companies are taxed on their net receipts. Telegraph, telephone, express and sleeping-car companies are taxed on their gross receipts. § 454. taxable property of corporations not otherwise taxed shall be returned by the chief officer at its estimated value with a statement of the market value of the capital stock and the property in which it is invested, giving the number of shares with the par and market value thereof. If such return is made, and the taxes which are assessed or would be due by law on such property paid, then no tax shall be be levied on the shares of stock. \$ 478. Railroad companies shall annually make to the state auditor a return of all the corporate property used for profit within the state. \$ 494. The valuation of such property shall be made upon the same principles as the valuation of all other property. § 502. The auditor shall notify the county assessors of the value of the track in their county, and the proportionate value of the other property assessed by the state board, taxable in their respective counties, the same to be taxed like the property of individuals, in addition to the taxes on other corporate property assessed by the county. \$ 503. Telegraph, telephone, sleeping-car and express companies must also make returns to the auditor. §§ 504-508. All property not required to be returned to the auditor must be returned to the county assessor. § 509. Every railroad company must, annually, upon returning its property for taxation, make a return of the gross earnings of the previous year; and if the road is partly within another state, the gross earnings shall be apportioned to each mile of main track on the whole line, and the sum thus apportioned to each mile, multiplied by the number of miles in Alabama, shall be deemed the gross earnings in Alabama. The auditor must then ascertain what percentage of such gross earnings will be sufficient to pay the expenses of the railroad commission, and assess a license tax against every such railroad for such percentage. Upon satisfactory evidence of the payment of such license tax and of the safety of the road, the auditor shall issue a license to operate such road for one year. Every company operating a road without such license shall forfeit \$100 for each day's offense. § 1128.

§ 937. ARKANSAS:¹ Constitutional provisions.— No obligation or liability of any railroad or other corporation held by the state shall ever be exchanged, transferred, remitted, postponed or in any way diminished by the general assembly. Constitution of 1874, art. V, § 33. The general assembly may, by general law, exempt from taxation for seven years the capital invested in mining and manufacturing business. Art. X, § 3. "The assembly shall pass no special act conferring corporate powers," except for charitable, etc., purposes. Art. XII, § 2. No municipal corporation shall become a stockholder in any corporation, nor obtain or appropriate money for, nor loan its credit to, any corporation or individual. Id., § 5. Corporations may be formed under general laws. The assembly may alter, annul or revoke any charter whenever it may appear injurious to the citizens of the state. But no injustice may be done to the corporators. Id., § 6. "Except as herein provided" the state shall never become interested in the stock of any corporation. Id., § 7. "No private corporation shall issue stock or bonds.

The acts of the legislature down to and including the laws of 1891 are included in this synopsis.

except for money or property actually received or labor done, and all fictitious increase of stock or indebtedness shall be void: nor shall the stock or bonded indebtedness of any private corporation be increased, except in pursuance of general laws," nor until authorized by the vote of a majority of the stock at a meeting held after a sixty-days' notice. Id., 8 8. Full compensation must be paid or secured for property before it can be appropriated for a right of way. The compensation shall be "ascertained" by a jury, irrespective of benefits. Id., § 9. Foreign corporations may be authorized by law to do business in the state. Such corporation must maintain a known place of business within the state and an authorized agent upon whom process may be served. They shall be subject to the same limitations as domestic corporations, shall exercise no other or greater powers, and shall not have the right to condemn or appropriate private property. Id., § 11. "Except as herein otherwise provided" the state shall never assume or pay the debt or liability of any corporation, public or private. "Nor shall the indebtedness of any corporation to the state ever be released or in any manner discharged save by payment into the public treasury." Id., § 12. The public credit, state or municipal, shall never be loaned for any purpose whatever. Art. XVI, § 1. All taxable property shall be taxed according to its value. Id., § 5. "The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the state may be a party." Id. § 7. State taxes for any one year shall not "exceed in the aggregate one per cent, of the assessed valuation of the property of the state for that year." Id., § 8. "No county shall levy a tax to exceed one-half of one per cent. for all purposes." Id., § 9. "All railroads, canals and turnpikes shall be public highways, and all railroad and canal companies shall be common carriers. Any association or corporation organized for the purpose shall have the right to construct and operate a railroad between any points within the state, and to connect at the state line with railroads of other states. Every railroad company shall have the right with its road to intersect, connect with or cross any other road, and shall receive and transport each the other's passengers, tonnage and cars, loaded or empty, without delay or discrimination." Art. XVII. § 1. Such companies shall keep an office in the state where transfers of stock shall be made "and where its books shall be kept for inspection by any stockholder or creditor of such corporation, in which shall be recorded the amount of capital stock subscribed or paid in, and the amounts owned by them respectively, the transfers of said stock and the names and places of residence of the officers." Id., § 2. No such corporation shall discriminate in favor of or against any person or class of persons, or corporations. Id., § 3. Parallel or competing railroad or canal lines shall not consolidate, nor purchase, or lease, or control each other's lines in any respect. An officer of one line shall not act as an officer of a competing company. Id., § 4. No officer of a railroad or canal company shall be interested, directly or indirectly, "in the furnishing of materials or supplies to such company or in the business of transportation as a common carrier of freight or passengers over the works owned, leased, controlled or worked by such company; nor in any arrangement which shall afford more advantageous terms or greater facilities than are afforded or accorded to the public. And all contracts and arrangements in violation of this section shall be void." Id., § 5. The general assembly shall prevent the granting of free passes to state officers. Id., § 7. The property and franchises of incorporated companies may be taken for public use the same as the property of individuals. Id., § 9. The general assembly shall pass laws to prevent abuses and unjust discrimination and provide for enforcing such laws by adequate penalties. Id., § 10. The rolling stock and all other movable property belonging to any railroad corporation in the state shall be considered personalty and shall be subject to execution and sale. Id., § 11. The directors of railroads must report annually to the auditor of public accounts. The legislature shall provide penalties for enforcing the provisions of this section. Id., § 13.

Miscellaneous corporations. — Three or more may incorporate for any lawful business. R. S. 1884. § 960. The amount of capital stock "shall be fixed and limited by the stockholders in their articles of association, and shall be divided into shares of twenty-five dollars each; but every such corporation may increase its capital stock, and the number and amount of shares therein, at any meeting of the stockholders specially warned for that purpose." § 961. The purpose of the incorporation must be clearly specified in the articles, and the corporation must not direct its operations to any other purpose. § 962. After the association any two members may call the first meeting by giving fifteen days' notice in a county newspaper. § 963. There shall be not less than three directors, all stockholders, to be chosen annually. § 964. The secretary and treasurer shall reside and have their places of business within the state, and shall keep the books of the corporation within the state. § 966. The directors may fill any vacancy which occurs during the current year. § 967. Before commencing business the president and directors "shall file a true copy of their articles of association, at full length, and also a certificate setting forth the purpose for which such corporation is formed, the amount of its capital stock, the amount actually paid in the names of its stockholders and the number of shares by each respectively owned, with the secretary of state, and a duplicate thereof with the clerk of the county in which such corporation is to transact its business." Within thirty days after the payment of any instalment called for by the directors "a certificate thereof shall be made, sigued, filed and recorded as aforesaid." § 968. "A majority of the stockholders present at any legal meeting shall be capable of transacting the business of that meeting," and each share is always entitled to one vote. § 969. The directors may call in subscriptions in such instalments, and at such times and places, as they think proper, by giving notice as required in the by-laws. \$ 970, "Annual statements of the company's condition must be filed with the county clerk; and no transfer of stock is valid as against a creditor of a stockholder until a certificate of transfer is filed with the county clerk. § 971. If the president or secretary shall neglect to file such annual statement or such certificate of transfer, they shall be jointly and severally liable to an action on the statute for all debts of the corporation contracted during the period of any such neglect. Laws 1891, p. 12. Corporations formed under this act shall have power to acquire and hold such lands and property of every kind as shall be necessary for the purpose of such corporation, and such other realty as may be taken in payment of or to recover corporation debts, and may manage and dispose of the same at pleasure. § 973. The books of the company must be open to inspection by the stockholders. and at least once a year the directors must furnish the stockholders a statement of the condition of the corporation. § 974. Capital stock is deemed personalty and shall be transferred only on the books of the corporation. § 975. "Every such corporation may amend its articles of association by the specification of any other lawful business in which the stockholders may desire to engage." But before beginning any new business the amended articles, subscribed by all the stockholders, which specify the purpose of the corporation, must be published in a county newspaper, and a certificate drawn to correspond with such ameuded articles, must be filed in the same manner as the original certificate. § 976. A certificate of increase of stock must be filed with the secretary of state and the county clerk within thirty days after such increase. § 977. The county clerk receives for recording ten cents for each one hundred words. § 978. For failure to comply with the provisions of section 971 the president and secretary are jointly and severally liable for the corporate debts contracted during the period of any neglect. § 980. If the capital stock is refunded to the stockholders before the payment of all debts for which such stock would have been liable, the stockholders shall be liable to any creditor to the amount of the sum refunded to them. § 981. If the directors declare a dividend knowing that the company is insolvent, or that such dividend would make it so, they shall be liable for all debts existing at the

time of declaring such dividend. § 982. If the president, directors or secretary intentionally neglect to comply with any of the provisions of this act, those so neglecting are liable for all debts contracted during such neglect. § 983. The corporation has a lien upon the stock or property of members invested therein for all debts due from them to the corporation (\$ 975), and after three months' notice the coronary may enforce the lien by sale of the stock. \$ 985. A stockholder's equity of redemption in stock may be sold in the same way by the company. \$ 988. The legislature may, for just cause, rescind the powers of any joint-stock corporation, and provide for settling its affairs. § 991. A levy of seizure, under an execution or writ of attachment, is made by leaving a copy of the writ with the president, or other officer, with a certificate of the officer making the levy. Shares thus levied upon or seized are sold like other personalty, and the officer making the sale shall issue a certificate to the purchaser, who is then entitled to a transfer by the corporation on the books of the company. Laws 1891, p. 20. If a corporation is dissolved for any reason, the common law in relation to corporations shall not be in force, but every corporate interest vests in the state, ipso facto, in trust for the purposes contemplated in the charter. R. S., § 1035.

Railroads.—Any number may incorporate. \$ 5420. Directors may be elected when \$10,000 for every mile proposed to be built has been subscribed. Then they shall severally subscribe articles of association, setting forth (1) the name of the corporation. (2) the number of years the same is to continue, not more than ninetynine, (3) the amount of capital stock of the company (which shall be the actual cost of construction), (4) the cost of the right of way, (5) the "motive power and every other appurtenance for the completion and running of said road," (6) the number and names of the directors, (7) the termini of the road and the counties into which it will extend. (8) the length of the road, and (9) the names of five commissioners to open books of subscription. Each subscriber to the articles must name the number of shares taken by him. When the articles are filed in the office of the secretary of state the incorporation is complete. §§ 5420, 5423. The corporation may hold land necessary for its business, and any that may be given by any individual or state as an inducement to build the road. § 5423. The subscription books must be kept open until \$7,000 per mile shall have been subscribed. § 5424. From five to thirteen directors must be chosen at a meeting appointed by the commissioners of subscription, such meeting to be held in a county into which the road will run, after a twenty days' published notice. In this election each share owned for thirty days shall have one vote. §§ 5425, 5509. Directors must be stockholders, one-third of whom must be residents of the counties on the line of the road. § 5426. A majority must be citizens of the state. § 5505. Annual meetings must be provided for in the by-laws, to be held in a county on the line of the road. \$ 5428. Meetings in the interval may be called by those persons owning one-third of the stock, after a thirty days' published notice in each county on the line in which there is a newspaper. § 5429. A majority in value of the stockholders may remove the president and directors and elect others, provided thirty days' notice of any intended removal has been given in a newspaper of the county. § 5431. The directors may make by-laws "for the management and disposition of the property and business affairs of such company," consistently with the laws of the state. § 5435. The stock is personal estate. Transfers cannot be made until all calls and assessments have been paid in. Stock in their own or any other corporation cannot be purchased with the corporate funds. § 5436. Within thirty days after the payment of the last instalment of the capital stock, the president and directors must file a statement with the secretary of state to that effect. § 5437. All officers signing a false report or certificate shall be liable for the debts of the company contracted during their term of office. § 5439. Persons holding stock as executors, etc., are not personally liable as stockholders, but the funds and estate are liable. § 5440. The articles of association shall be void unless within two years a preliminary survey of the road be filed with the secretary of state, and five per cent, of the original stock subscribed shall have been paid to the directors. An affidavit of these directors must show that \$1,000 per mile has been subscribed and five per cent, thereof paid in. § 5421. A majority present at any meeting may demand from the directors a statement of affairs. § 5431. A change in the direction of the road from the route filed must not be more than five miles laterally. The company may borrow money for the construction and couldment of the road. \$ 5447. The purchasers of railroads may, after causing a deed and confirmation of a voluntary or foreclosure sale to be filed with the secretary of state and recorded in the same book with the original articles become a corporation with all the rights, etc., of the old company, or they may reorganize so as to associate with themselves any number of persons from whom directors may be chosen. The reorganized company may increase the capital stock to the estimated cost of the road and equipments. \$\\$ 5448-5451. The directors may, with the consent of the owners of a majority of the issued stock, "cause to be executed and issued coupon bonds whenever deemed expedient, and may secure the payment thereof by a mortgage or deed of trust" of any part of their charters, franchises or other property. Dividends may be paid in money, stock or bonds. § 5453. The damages paid for right of way shall be irrespective of any benefit the owner may receive from any proposed improvements by the corporation. § 5462. nual reports must be made to the secretary of state. \$ 5472. The legislature may from time to time alter or reduce the rates and profits; but a reduction of rates and profits shall not be made without the consent of the corporation, unless there be left to the company a profit of fifteen per cent, per annum on the capital actually paid in. § 5473. A corporation must begin the construction of its road within five years and put it in full operation within ten years. § 5484. The directors may, with the consent of a majority of the stock, increase the capital to an amount not greater than the estimated cost of the road, and may borrow money on the corporate credit not exceeding in amount the authorized capital stock, at a rate of interest not exceeding seven per cent, per annum, and may execute bonds therefor in sums of five hundred or one thousand dollars, and to secure the payment thereof may execute a deed of mortgage or other instrument of writing, pledging all the property and income of the corporation. The company may "sell, negotiate, pledge or mortgage such bonds for the benefit of the company, at such times and in such places, within or without the state, and at such rates and for such prices" as the directors deem best. If the bonds are sold bona fide at a discount the sale and securities shall be as valid and binding as though they were sold at par. § 5488. The owner of "lands which have been or may be stricken off to the state, or forfeited for non-payment of taxes." may donate the same in aid of the construction of any railroad, in which case all claims on the part of the state shall be discharged. § 5489. Such lands must be conveyed to the company by the state. § 5491. The rates charged by a road not exceeding fifty miles in length may be reduced by the railroad commission, but the annual profits of such road shall not be reduced below ten per cent. of the capital actually invested. § 5498. The offices of the president, secretary and treasurer shall be within the state. The books of the company and records of all proceeding shall be kept at such offices for the inspection of stockholders. § 5506. A violation of the preceding section will forfeit the charter. § 5507. Consolidation of connecting roads running in the same general direction are authorized. § 5511. The companies may agree upon the terms, which must be approved by two-thirds in interest of the issued capital stock at a meeting of the stockholders held after sixty days' notice in a newspaper at Little Rock. § 5512. A certified copy of the articles of agreement must be filed with the secretary of state, and a certified copy from the secretary of state is evidence of consolidation. § 5513. This act does not authorize the consolidation of parallel or competing liens. § 5514. A resolution accepting the provisions of this act, signed by the presidents of the consolidating companies, and attested by their sccretaries. which resolution shall have been passed by a two-thirds vote of the issued capital stock at the above-mentioned meeting, must be filed with the secretary of state. \$ 5515. Any railroad company may aid another in the construction of its road, for the purpose of forming a connection between the two, by subscribing to the capital stock of the road, or otherwise, upon the approval of two-thirds in interest of the stockholders. §\$ 5516 et seq. A corporation of another state, being the lessee of a domestic road, or extending its road into the state, shall keep an office on the line of the road operated within the state where transfer of stock shall be made, and where its books shall be kept for the inspection of stockholders and creditors. §§ 5523-25. Corporations may be formed for the purpose of leasing or purchasing any railroad. \$5527. All shares of stock issued in payment of such purchase shall be deemed full-paid shares. § 5528. A foreign corporation may assume the debt of the road purchased or leased by it, may make any expedient and acceptable arrangements with the bondholders, stockholders and creditors of the leased or purchased line and may for such purpose issue stock, bonds, etc., on the property leased or purchased, and may secure the payment of such evidences of debt by a mortgage or deed of trust of any of its property. § 5532. Railroads must build five miles within five months after incorporation, under penalty of forfeiture of their charter. L. 1889, Act 22. A consolidated company, or a purchaser of a railroad, shall be liable for all the debts or obligations of the roads consolidated or purchased. Id., Act 55. Sections 1, 2, 3, 4 of the act of 1887, prohibiting foreign corporations from operating a road within the state, are repealed. Any domestic railroad company may lease or sell its road, property and franchises to a foreign corporation whose road practically forms a continuous line with it, or may buy or lease, or otherwise acquire, any domestic railroads connecting with its line, or buy the stock and bonds or guaranty the bonds of any domestic or foreign railroad company. But any such transaction shall not be valid without the consent of two-thirds of the stock in each company at a meeting called in accordance with law. A foreign railroad corporation may lease or otherwise acquire a connecting domestic railroad, or may buy the stock and bonds or guaranty the bonds of such domestic road. Any foreign company may extend its line into or through the state. But in all cases the foreign company must file with the secretary of state a copy of its articles of incorporation, or of its charter, thereupon becoming a domestic corporation. L. 1889, Act 34. Sections 3, 4, 5 of article XVII of the constitution are enforced, in regard to railroads, by legislative enactment, L. 1887. Act 81. All discriminations and pooling are prohibited. Id. The penalty for unjust discrimination, pooling or failure to post printed schedules of rates is a fine of \$50 to \$1,000 and costs. The penalty for violating section 5, article XVII, of the constitution is a fine of like amount. The penalty for violating section 4, Id., is \$25 to \$500 per day for an officer thus holding office. Id. The maximum passenger rates are fixed as follows: On a line fifteen miles or less in length, eight cents per mile. On a line over fifteen and less than seventy-five miles in length, five cents per On lines over seventy-five miles in length, three cents per mile. Any officer or corporation violating any provision of this act is subject to a fine of from \$50 to \$300 for each offense. L. 1887, Act 129. Any domestic company desiring to extend its line, or build branches, must proceed in the same manner as required to incorporate a company newly organized, except that a new company need not be organized. L. 1889, Act 116. When a company consolidates with or purchases an unconstructed line, the time mentioned in Act 22, Laws of 1889, begins to run from the date of consolidation or purchase. Id.

Foreign corporations.— Before doing any business in the state, such corporation shall, by a certificate filed with the secretary of state, designate an agent, "who shall be a citizen of this state," upon whom any process may be served. Such certificate shall also state the principal place of business in the state. If this

statute is not observed, "all contracts with citizens of this state shall be void as to the corporation, and no court of this state shall enforce the same in favor of the corporation." Laws 1887, p. 234.

Taxation.— The capital stock of corporations is taxed as personalty. In making up the sum of debts, unpaid subscriptions to stock are not considered. \$ 5585. All investments of residents in bonds, stocks and joint-stock companies are taxed. All corporate property is subject to taxation. \$ 5586, and \$ 5620, Am'd L. 1887, Act. 92. But no person shall be required to include in his list for taxation "any share or portion of the capital stock or property of any company or corporation which is required to list or return its capital and property for taxation in this state." § 5612. Banks shall annually make to the assessor a correct statement attested by the president and cashier, showing the amount of capital stock, the amount of undivided profits, the amount of investment in federal and state securities, and the amount of loans to or deposits with the bank for a term certain. \$\\$ 5529-31. Am'd L. 1887. Act 92. Shares not required to be listed by holders shall be listed. by the president, showing the names of the owners. \$ 5532. The bank shall pay the tax on such shares, and has a lien on the stock for taxes paid. The bank may deduct the amount of taxes thus paid from the dividends of the stockholders. § 5533. Telegraph and express companies are taxed on their gross receipts, including in such receipts "its proportion of gross receipts for business done by such company in connection with lines of other companies outside of the limits of this state." Express companies may deduct from their gross receipts the amount paid to domestic railroads or steamboats for the transportation of their freight. § 3640. Am'd L. 1887. Act 92. An agent of an express or telegraph company failing to make lawful returns is fined from fifty to five hundred dollars and may be imprisoned from one to six months. § 5642, Am'd, id. A state board of railroad commissioners must ascertain the value of all railroad property. § 5647, Am'd, id. Each company must return sworn schedules of taxable property. § 5648, Am'd, The schedules shall state the aggregate value of the whole road, taking intoconsideration the right of way, and everything on the right of way appurtenant to the railroad which adds to its value as an entire thing. This statement must be made out and filed once in two years when required. § 5649, Am'd, id. Movable property is personalty and is denominated "rolling stock" for purposes of taxation. A schedule of all the rolling stock must be filed annually. All locomotives and cars hired for at least six months are taxed, and must be returned in the schedule. The number of miles of track on which the rolling stock is used within and without the state must be given. § 5651, Am'd, id. The board of commissioners appraise the value of the track, as returned according to section 5649, which is assessed as realty and taxed in the county or town in which it lies, \$5652, Am'd. id. All personalty besides rolling stock is taxed in the county where it may be, as also is all realty not denominated railroad track. § 5654, Am'd, id. The entire value of the rolling stock shall be divided by the number of miles of track, and the result multiplied by the number of miles in any county shall be the sum to be taxed in that county as personalty, at the same rate as the personal property of individuals. \$ 5653. The company failing to make statements and schedules as required by this act shall be fined not less than \$1,000 nor more than \$10,000. § 5656, Am'd L. 1887, Act 92. A lien upon a railroad for taxes is decreed against the whole line. L. 1887, Act 27. An annual highway tax of three dollars per mile is levied for each mile of railroad in the state over which any palace or sleeping car or cars may be run against the person or corporation running or causing to be run any such cars. L. 1887, Act 128. Corporations, excepting railroad and telegraph companies, must pay the secretary of state a fee of \$25 for filing articles of Incorporation. Railroad and telegraph companies pay from \$50 for a line not exceeding twenty-five miles in length, to \$200 for a line exceeding two hundred miles in length. R. S. 1884, § 3229.

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§ 938. CALIFORNIA: 1 Constitutional provisions.—"No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislature, nor shall any citizen or class of citizens be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens," Constitution of 1879, art. I. § 21. No state funds shall ever be used to aid corporatious, and no grant of property shall be made thereto by the state. Art. IV, \$ 22. No local or special law shall be passed "releasing or extinguishing in whole or in part, the indebteduess, liability or obligation of any corporation or person to this state, or to any municipal corporation therein;" or "granting to any corporation, association or individual any special or exclusive right, privilege or immunity;" or "chartering or licensing ferries, bridges or roads." Id., § 25. "The legislature shall pass laws to regulate or prohibit the buying and selling of the shares of the capital stock of corporations in any stock board, stock exchange or stock market under the control of any association. All contracts for the sale of shares of the capital stock of any corporation or association on margin, or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction." Id., § 26. "The legislature shall have no power to give or lend, or autherize the giving or lending, of the credit of the state, or of any county. . . . or other political corporation or subdivision of the state," in aid of or to any person or corporation, "or to pledge the credit thereof, in any manner whatever, for the payment of the liabilities" of any individual or corporation whatever: nor shall it give, or authorize the giving of, any public money or thing of value to any person or corporation, or authorize the state, or any political division thereof, to become a stockholder in any corporation. Id., § 31. The rates and charges of telegraph and gas companies shall be regulated by law, and no person appointed to limit such rates shall be a stockholder in, or selected by, the corporation affected. Id., § 33. The legislature shall not delegate to any private corporation or individual "any power to make, control, appropriate, refrain, or in any way interfere with any county, city, town or municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or assessments, or perform any municipal functions whatever." Art. XI, § 13. In any city where no public works are owned and controlled by the municipality for supplying the same with water or light, any domestic company, incorporated for the purpose, may use the streets for laying down pipes, etc., under the regulation of the municipality as to damages, etc., and upon the condition that the municipal government may regulate the charges. Id., § 19. Corporations shall not be created by special act, and all laws respecting corporations may be amended or repealed. Art. XII. § 1. "Dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law." Id., § 2. Every stockholder in a corporatiou shall be "individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation or association." Directors or trustees shall be "jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation or joint-stock association during the term of office of such director or trustee." Id., § 3. Banks may be formed under general laws, but not by special act, and no corporation or individual shall issue or put in circulation, as money, anything but the lawful money of the United States. Id., § 5. "The legislature shall not extend any franchise or charter, or permit the forfeiture of any franchise or charter," of any corporation. Id., § 7. The legislature may always take corporation property and franchises for public use, the same as the property of individuals. Id., § 8. Real estate not necessary for the corporate

 $^{^{\}rm 1}$ The acts of the legislature down to and including the laws of 1893 are included in this synopsis. 1618

business shall not be held more than five years. Id., § 9. "The legislature shall not pass any laws permitting the leasing or alienation of any franchise, so as to relieve the franchise or property held thereunder from the liabilities of the lessor or grantor, or lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise or any of its privileges." Id., \$ 10. "No corporation shall issue stock or bonds, except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void." Stock and bonded indebtedness shall be increased only in pursuance of general law upon a vote of a majority of all the stock at a meeting specially called by a sixty days' public notice. Id., § 11. In all/elections for directors each stockholder may vote his shares for as many persons as there are directors to be elected, or cumulate said shares, giving one candidate as many votes as the number of directors multiplied by the number of his shares shall equal, or distribute them, on the same principle, among any number of candidates. Id., \$ 12. The state shall not loan its credit to or be interested in the stock of any corporation. Id. § 13. A place of business shall be kept within the state where transfers of stock shall be made. and in which shall be kept, for the inspection of interested parties and legislative committees, books containing the names of stockholders, with a record of the amount owned by each, the amount subscribed and paid in, and by whom, the assets and liabilities, and the residences of the officers. Id., § 14. Foreign corporations shall have no greater privileges than domestic. Id., § 15. Any corporation "organized for the purpose, under the laws of this state, shall have the right to connect at the state line with railroads of other states. Every railroad company shall have the right with its road to intersect connect with or cross any other railroad, and shall receive and transport each the other's passengers, tonnage and cars without delay or discrimination." § 17. No officer or employee of any railroad or canal company "shall be interested, directly or indirectly, in the furnishing of materials or supplies to such company, nor in the business of transportation as a common carrier of freight or passengers over the works owned, leased, controlled or worked by such company, except such interest in the business of transportation as lawfully flows from the ownership of stock therein." Id., § 18. Free passes or tickets at a discount shall not be granted to any person holding au office of honor, trust or profit in the state. Id., § 19. No common carrier shall combine with any common carrier or with any vessel leaving or making port so that the "earnings of one doing the carrying are to be shared by the other not doing the carrying." Whenever rates are lowered for the purpose of competition, such reduced rates shall not again be raised without the consent of the governmental authority in which shall be vested the right to regulate rates. Id., § 20. There shall be no discrimination in transportation charges or facilities. charges for a short haul shall not exceed the charges for a long haul. Id., § 21. The state shall be divided into three districts, in each of which a railroad commissioner shall be elected by the people. The commissioners shall have no interest in any railroad. They may examine all books and papers of any railroad company. They may punish for contempt any one who disobers their subpoenas. The commissioners shall prescribe a uniform system of accounts for all such corporations, Said commissioners shall establish rates, and any corporation refusing to conform to such rates or to keep its accounts in the manner prescribed shall be fined a sum not exceeding \$20,000. Any officer or employee who shall demand more than the prescribed rates, or who shall in any manner violate the provisions of this section, shall be fined not more than \$5,000, or be imprisoned not more than one year. The legislature may, in addition to such penalties, enforce the provisions of this article by forfeiture of charter or otherwise, and may confer additional powers on the commissioners. Id., § 22. All property shall be taxed in proportion to its value, the word "property" including bonds, stocks and franchises. Art. XIII. § 1. (Amendment proposed, Laws 1893, ch. 36.) For the purpose of taxation a mortgage shall be deemed an interest in the property affected, and, "except as to

railroads and other quasi-public corporations, in case of debts so recorded, the value of the property affected by such mortgage, deed of trust, contract or obligation, less the value of such security," shall be taxed to the owner thereof." Id., § 4. Every contract by which a debtor is obligated to pay any tax on money loaned, or on any mortgage, deed of trust or other lien, shall, as to the interest specified therein, and as to such tax, be null and void. Id., § 5. All property, except as otherwise provided in this section, shall be assessed in the county, municipality or district in which it is situated. The franchise, road-way, road-bed, rails and rolling stock of all railroads operated in more than one county shall be assessed by the state board of equalization at their actual value, and apportioned to the counties, municipalities and districts traversed by the road in proportion to the number of miles of road in each. Id., \$ 10. No person or corporation shall possess any frontage or tidal lands of a harbor or other navigable water so as to exclude the right of way to such water when it is required for any public purpose, nor obstruct the free navigation of such water. Art XV, § 2. The holding of large tracts of land, uncultivated and unimproved, by individuals or corporations "is against the public interest, and should be discouraged by all means not inconsistent with the rights of private property." Art. XVII, § 2. Corporations are forbidden to employ Chinese or Mongolians in any capacity. Art. XIX, § 2.

Miscellaneous corporations. - Five or more, a majority of whom are residents of the state, may incorporate. Deering's Civil Code of 1885, § 285, Corporations may be formed "for any purpose for which individuals may lawfully associate themselves." § 286. Articles of incorporation must be prepared, stating (1) the name of the corporation; (2) the purpose of incorporating; (3) the principal place of business; (4) the term of existence (not exceeding fifty years); (5) the number of directors or trustees (from five to eleven), and the residences of the members of the first board; (6) the amount of capital stock and the number of shares; (7) the amount actually subscribed, and by whom. § 290. The number of directors may be increased or diminished, within the above-mentioned limits, by a majority of the stockholders. A certificate of such change in the number of directors must be filed as required in section 296. Directors must be members of the corporation. Id. The articles of any railroad, wagon-road or telegraph company must also state (1) the kind of road or telegraph proposed; (2) the termini, and all intermediate branches; (3) the estimated length of the road or line; (4) that at least ten per cent. of the capital stock subscribed has been paid in. § 291. The articles must be subscribed by the corporators, and duly acknowledged by each. § 292. Before filing the articles each railroad company must have received a subscription to its capital stock of \$1,000 per mile of the contemplated road, and each telegraph company \$100 per mile of its proposed line; and ten per cent of the amount subscribed must, in each case, have been paid in. §§ 293-295. The articles must be filed with the county clerk, and a copy, certified by said clerk, must be filed with the secretary of state, who shall then issue a certificate of incorporation. The incorporation is then complete. § 296. No corporation shall purchase, locate or hold property in any county without filing in such county a copy of its articles, certified by the secretary of state, within sixty days after such purchase or location is made. § 299. The corporation must, within one month after filing its articles, adopt by-laws by a majority stock-vote, at a called meeting, or with the written assent of the holders of two-thirds of the stock. § 301. The by-laws may, "where no other provision is specially made," provide for (1) the time, place and manner of calling and conducting meetings, and may dispense with notice of all regular meetings; (2) the number of stockholders constituting a quorum; (3) the mode of voting by proxy; (4) the qualifications and duties of directors, the time of their annual election, and the manner of giving notice thereof: (5) the compensation and duties of officers; the manner of election and the tenure of office of all officers other than directors; (6) suitable penalties for violations of the by-laws, not exceeding \$100 in any case for any one offense; and (7) the news-

paper in the county in which notices shall be published, or, if there is no such paper in the county, the paper to be selected in an adjoining county. § 303, Am'd Supplement, p. 257. All by-laws must be certified by a majority of the directors and the secretary, and copied in a "book of by-laws;" and no by-law or amendment shall take effect until so copied. Such "book of by-laws" shall be open to the inspection of the public during all office hours. The by-laws may be amended or repealed or new hy-laws be adopted by a two-thirds stock-vote, or upon the written assent of two-thirds of the stock. The power to amend, etc., may be delegated to the board by the same vote, or written assent, and in the same manner revoked. § 304. Directors must be stockholders to an amount fixed by the bylaws, and a majority of them must be citizens of the state. Unless the by-laws provide for filling vacancies, they must be filled by an appointee of the board. \$ 305. Cumulative voting is provided for in the language of the constitution. Supra, § 307, Am'd Supplement, p. 258. A majority of the subscribed capital stock must be represented at all votes for any purpose, and every person voting stock, in person or by proxy, must be a "bong fide stockholder, having stock in his own name on the stock-books of the corporation at least ten days prior to the election." Any vote had contrary to the provisions of law is voidable at the instance of an absent or any other stockholder. § 312. The president must be a member of the board. § 308. Directors shall not make dividends except from the surplus profits, "nor create debts beyond the subscribed capital stock," Nor must they divide, withdraw or pay to any stockholder any part of the capital stock, or reduce or increase the capital stock. 'For a violation of this section the directors present, except those who may have caused their dissent to be entered on the minutes at the time, "are, in their individual and private capacity, jointly and severally liable to the corporation, and to the creditors thereof, in the event of its dissolution, to the full amount of the capital so divided, withdrawn, paid out or reduced, or debt contracted; and no statute of limitations is a bar to any suit against such director for any sums for which they are liable by this section:" provided, however, that where a corporation has been or may be formed for the purpose, among other things, of acquiring, holding and selling real estate, water and water rights, the directors may, with the consent of two-thirds of the stock given at a called meeting, divide among the stockholders the land, water or water rights, in proportion to their stock. But such conveyances shall be made subject to the existing corporate debts. § 309, Am'd Laws, 1891, ch. 247. Directors can be removed, but only by a vote of two-thirds of the stock at a general meeting called for the purpose and held after a two-weeks' notice in a county paper, unless the by-laws prescribe the method of giving the notice, and the vacancies thus made may be filled at the same meeting. The president, a majority of the directors, or one-half in interest of the stockholders, may send to the secretary a written request for such a meeting, and if he refuses to give the necessary notice, the request may be sent, or a notice, to the stockholders. § 310. Whenever there is no person authorized to call or preside at a meeting, a justice of the peace may, upon the written application of three stockholders, issue a warrant to a stockholder to call a meeting in accordance with the law aud to preside at such meeting until a clerk is chosen and qualified. § 311. If an election is not made at the time appointed by the by-laws, and no provision for an adjourned meeting has been made in the by-laws or by the directors, a meeting may be called by the stockholders as provided in section 310. § 314. The courts are given jurisdiction to hear complaints and settle disputes concerning elections. § 315. Officers who wilfully give a certificate or make an official report, publish notice or entry concerning the corporation, which is false in any material representation, shall be jointly or severally liable to the person injured for the damages resulting therefrom. § 316. See, also, act of March 29, 1878, under § 321. If all the stockholders are present at any meeting, they may, by written consent, validate any act of such meeting however the same may have been called. § 317. Meetings of stockholders or directors

must be held at the office or principal place of business. § 319. If there is no provision in the by-laws for directors' meetings and the mode of calling special meetings, all meetings must be called by a written notice given to each director by order of the president, or, if there be no president, on the order of two directors. The principal place of business may be changed upon the consent in writing of two-thirds of the stock filed in the office of the corporation. Notice of the change must be published for three weeks in a county paper. § 321. "Each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation, and for a like proportion only of each debt or claim against the corporation." Any creditor may institute joint and several proceedings. Any stockholder who pays his proportion of any corporate debt and of the costs is relieved from further liability upon such debt. A stockholder's liability is determined by the amount of stock held by him when the debt was incurred, and such liability cannot be released by a subsequent transfer. The term "stockholder," as used in this section, extends to every equitable owner, though the stock stands on the books in the name of another. and also to every person advancing instalments or purchase-money of stock in the name of a minor so long as the latter remains a minor, and to every guardian or trustee who voluntarily invests any trust funds in stock. Trust funds in the hands of a guardian or trustee shall not be liable under this section by reason of such investment, nor shall the beneficiary be liable until he becomes able to control the investment. The pledgor of stock is deemed the holder thereof within the meaning of this section. The liability of stockholders in all foreign corporations doing business in the state is the same as that of stockholders in domestic corporations. § 322. Corporations may provide in their by-laws for issuing certificates of stock prior to full payment "under such restrictions and for such purposes as their by-laws may provide." § 323. Shares of stock are personal property. Transfers are not valid, except as between the parties thereto, until entered on the books. § 324. Shares may be held and transferred by a married woman in the same manner and with the same rights as if she were unmarried. \$325. Before entering a transfer of the stock of non-residents an affidavit may be required that the non-resident owner is alive, and, if such affidavit or other satisfactory evidence is not furnished, a boud of indemnity may be required with two satisfactory sureties. § 326. Contracts to relieve directors from any liability imposed by section 3 of article 12 of the constitution shall be null and void. \$ 327. After one-fourth of the capital stock has been subscribed, the directors may levy and collect assessments for the purpose of paying expenses, conducting business or paying debts. § 331. No one assessment must exceed ten per cent of the capital stock named in the articles; provided, (1) that if the whole capital has not been paid up, and the corporation cannot meet its liabilities or satisfy its creditors, the assessment may be for the full amount unpaid on the stock or for any smaller percentage sufficient to raise the necessary amount; (2) that railroad directors may assess the capital stock in instalments of not more than ten cents per month, unless it is otherwise provided in the articles of incorporation; (3) that directors of fire and marine insurance companies may assess such percentage as they deem proper. § 332. No assessment shall be levied while a previous one remains unpaid, unless (1) the power of the corporation has been duly exercised to collect such assessment; or (2) the collection of the previous assessment has been enjoined; or (3) the assessment falls within one of the subdivisions of the proviso to section 332. § 333. An unpaid assessment shall be delinquent after not less than thirty nor more than sixty days from the time of the order making the assessment. § 334. The form for publishing the notice of an assessment is given and prescribed. §§ 335, 336. Every corporation, as such, bas the power of "succession, by its corporate name, for the period limited; and when no period is limited, perpetually;" to purchase, hold and convey such real and personal estate as the corporate purposes may require,

"not exceeding the amount limited in this part;" and "to enter into any obligations or contracts essential to the transaction of its ordinary affairs, or for the purposes of the corporation." § 354. "In addition to the powers enumerated in the preceding section, and to those expressly given in that title of this part under which it is incorporated, no corporation shall possess or exercise any corporate powers, except such as are necessary to the exercise of the powers so enumerated and given." § 355. No corporation shall issue a circulating medium to be used as money. § 356. Corporations must organize and begin business within one year or the corporate powers cease. The right to exercise corporate powers canuot be inquired into collaterally. § 358. "No corporation shall issue stock or bonds except for money paid, labor done, or property actually received, and all fictitious increase of stock or indebtedness is void. Every corporation may increase or diminish its capital stock, create or increase its bonded indebtedness, subject to the foregoing provisions." The capital stock may be increased or diminished by a two-thirds vote of the subscribed stock, but the capital stock cannot be diminished to an amount less than the indebtedness of the corporation." The bonded indebtedness may be "created or increased" by a vote of two-thirds of the subscribed stock. In each case the meeting must be called by the board of directors, by a published notice of sixty days, which notice shall fully state the proposed business of the meeting. The secretary shall also notify each stockholder by letter. A certificate of the proceedings of the meeting, signed by the chairman, secretary and a majority of the board, must be filed with the county clerk and the secretary of state. The meeting shall be held at the principal place of business, in the building where the directors usually meet. In addition, a notice must be mailed to each stockholder sixty days before the meeting. There must be filed with the county clerk with whom the original articles were filed a certificate showing the increase or diminution of the capital, or the creation or increase of bonded indebtedness, and a certified copy thereof must be filed with the secretary of state. § 359, Am'd Laws 1893, p. 191. No more real estate shall be held than is reasonably necessary for the transaction of the corporate business. unless otherwise specially provided. \$ 360. By the unanimous consent of all the directors at any regular meeting, any corporation may own the lots and buildings on which its business is transacted, and may improve the same to any extent convenient for its business. § 363, Am'd Suppl. 1889, p. 261. The articles of association, or certificate of incorporation, may be amended by a majority vote of the directors and the vote, or written assent, of two-thirds of the stock. The amendment shall be filed as the original articles were filed. But such amendment shall not extend the time of existence, or diminish the capital stock, and nothing herein contained shall be construed to amend any defect in the original certificate, "by reason that such certificate does not set forth the matters required to make the same valid as a certificate of incorporation at the time of its filing." And it is provided "that if the assent of two-thirds of the said stockholders to such amendment has not been obtained, that a notice of the intention to make the amendment shall first be advertised for thirty (30) days in some newspaper published in the town or county, or city and county, in which the principal place of business of the association or corporation is located, before the filing of the proposed amendment." § 362, Am'd Laws 1893, p. 131. Complete records of all business transactions, and journals of all directors' or stockholders' meetings, shall be kept for the inspection of stockholders and creditors. § 377. So, also, a "stock and transfer-book." § 378. The governor or legislature may order an examination of the corporate affairs at any time. \$\$ 382, 383. The legislature may at any time amend or repeal any of the provisions respecting corporations, and dissolve any corporation created thereunder. But such amendment, repeal or dissolution shall not impair any remedy against the corporation or stockholders for any liability previously incurred. § 384. The franchise and all rights and privileges of any corporation authorized to receive tolls may be sold under execution in the same way, and with like effect, as any other property. \$388. The purchaser at the sale is entitled to all the proceeds of the franchise, and must coutinue the business, with all the corporate powers and privileges, and subject to all the corporate liabilities. The purchaser or his assignee may recover any penalties recoverable by the corporation for an injury to the franchise or property thereof, or for any other cause occurring while he holds the same. Such a recovery is a bar to any subsequent action therefor by, or on behalf of, the corporation. \$\$ 389, 390. The corporation whose franchise is sold in all other respects retains the same powers, must discharge the same duties, and is liable to the same penalties and forfeitures, as before such sale, § 391. The franchise may be redeemed within one year by tendering to the purchaser the sum paid, with ten per cent. interest thereon. § 392. Upon dissolution, unless other persons are appointed by the court, the directors are trustees of the stockholders and creditors. § 400. The term of existence may be extended to not more than fifty years by a twothirds vote of the stock, or by the written assent of the same. § 401. Foreign corporations must designate an agent in the county of the principal place of business upon whom process may be served, under penalty of forfeiting the benefit of statutes of limitation. \$ 403 (Laws 1871-2, 826). For references as to voluntary and involuntary dissolution, see § 399. All of the provisions of this title (§§ 283-403) are applicable to every corporation "unless such corporation is excepted from its operation, or unless a special provision is made in relation thereto, inconsistent with some provision in this title, in which case the special provision prevails," § 403.

Two or more mining corporations having claims or lands in the same vicinity may consolidate their "capital stock, debts, property, assets and franchises" in such manner and upon such terms as the directors may agree upon, subject to the written consent of two-thirds of the stock. A certificate containing all the reouirements of section 290 shall be filed in the same manner as the original articles. Within thirty days after filing said certificate, a meeting of all the companies must be called to elect new directors for the consolidated company. \$ 361. Any mining corporation organized in the state may maintain agencies in other states for the transfer and issue of stock. Such issues and transfers are as valid and binding as though made upon the books at the principal office in the state. But the agencies must be governed by the by-laws and the directors. § 586. All stock issued at a transfer agency must be signed by the president and secretary of the corporation, and countersigned, when issued, by the agent. "No stock must be issued at a transfer agency unless the certificate of stock in lieu of which the same is issued is at the time surrendered for cancellation." § 587. On a verified petition of a majority of the stockholders in any mining corporation, the county judge shall call a meeting of the stockholders for the removal of any corporate officers. A majority of the stock must be represented at the meeting, or action cannot be taken. Vacancies may be filled at the same meeting. Laws 1871-2. 443, Am'd Laws 1875-6, 730, inserted under § 587. Very careful provision is made for the protection of stockholders in mining corporations by means of books to be kept by the secretary, showing receipts and expenses, and transfers of stock, and of monthly itemized balance sheets to be exhibited by the directors. All books, papers, accounts, reports and correspondence by the superintendent shall be open to the inspection of stockholders. Any stockholder, with his expert, may visit and inspect any part of the mine. The president shall cause the secretary to issue an order to the superintendent to grant all possible facilities for such inspection, and if he refuse so to do, the directors shall at once remove him, and shall he liable to pay the injured stockholder \$1,000 and costs. If the president neglects to issue the required order, he shall be liable to the stockholder in a like sum; and a complaining stockholder may recover a like amount, in a joint or several action. from the directors if they fail to have reports and accounts made as above required. Laws 1873-4, 866, Amendments 1880, 134 and 135 (Ban, ed., 400), (Code.

§ 587). Directors shall not lease, mortgage or dispose of any mining ground belonging to the corporation, or obtain, in any way, additional mining ground, unless such act is ratified by the vote, or written consent, of two-thirds of the capital stock. All stock shall stand on the books in the names of the real owners or their trustees; and the name of the cestui que trust shall always appear on the books and in the body of the certificate. The books of the company shall not be closed more than two days prior to any election. Stock shall be voted by the bona fide owner thereof, unless the certificate be produced at the election, in which case the certificate shall be considered the highest evidence of ownership. Laws 1880, 131 (Ban. ed., 398), (Code, § 587). As to retaining ownership of mining claims, see Laws 1891, 155. One mining company may have the right of way over any mine. Id. Insurance companies may deal in real estate necessary for their corporate business purposes, not exceeding in value \$150,000. If realty is purchased at mortgage or other judicial sales to an amount not necessary for the insurance business, the excess must be disposed of within five years, unless the insurance commissioner allows a longer retention of the same. § 415. With respect to the investments of such companies, the declaring of dividends, the accumulation of a surplus, and the data to be furnished to the insurance commission, see §§ 427, 429, 432, 497, as amended in the Supplement of 1889.

Certain corporations are authorized to act as executor, etc., and the administration of trusts by such corporations is provided for and regulated. Laws 1891, ch. 264.

Railroad directors may be elected at a meeting of the stockholders other than the annual meeting, "as a majority of the fixed capital stock may determine, or as the by-laws may provide." Notice must be given as provided in section 301. No stock in any railroad corporation is transferable until all previous calls or instalments thereon have been fully paid in: "nor is any such transfer valid, except as between the parties thereto, unless at least twenty per cent has been paid thereon and certificates issued therefor, and the transfer approved by the board of directors." § 455. "Railroad corporations may borrow on the credit of the corporation, and under such regulations and restrictions as the directors thereof, by unanimous concurrence, may impose, such sums of money as may be necessary for constructing and completing their railroad, and may issue and dispose of bonds and promissory notes therefor, in denominations of not less than five hundred dollars, and at a rate of interest not exceeding ten per cent. per annum; and may also issue bonds or promissory notes of the same denomination and rate of interest in payment of any debts or contracts for constructing and completing their road, with its equipments and all else relative thereto, and for the purchase of railroads and other property within the purposes of the corporation. The amount of bonds, or promissory notes, issued for such purposes must not exceed in all the amount of their capital stock; and to secure the payment of such bonds or notes they may mortgage their corporate property and franchises, or may secure the payment of such bonds or notes by deed of trust of their corporate property and franchises. Any person, or corporation formed under the laws of this state, or of any other state within the United States, that the directors of the railroad corporation may by unanimous concurrence select, may be trustees in such deed of trust." § 456. The directors must provide a sinking fund "to be specially applied to the redemption of such bonds on or before their maturity," and they may confer on the holder of any bond or note so issued, "for money borrowed or in payment of any debt or contract for the construction and equipment of such road," the right to convert the principal due or owing thereon into stock of the corporation, at any time within eight years from the date of the bonds, "under such regulations as the directors may adopt." If it is ascertained that the capital stock named in the articles is more or less than is needed, the capital must be fixed by a two-thirds stock vote, and a certifi-, cate thereof, and of the proceedings, filed with the secretary of state. § 458,

Within thirty days after the payment of the last instalment of the fixed capital the president and secretary, and a majority of the directors, must file with the secretary of state a verified certificate to the effect that such payment has been made, and giving the amount of the capital stock. § 459. Every railroad corporation has power, among other powers enumerated, (1) to hold and convey, like a hatural person, such voluntary grants and donations of real estate aud other property as may be made to aid and encourage the "construction, maintenance and accommodation" of such railroad; (2) "to purchase, or by voluntary grants or donations to receive, enter, take possession of, hold and use," all such real estate and other property as may be absolutely necessary for the construction and maintenance of such railroad, and for all stations, depots and other necessary purposes: (3) "to construct their road across, along or upon" any stream or other water, street, avenue or highway, or across any railway, canal, ditch or flume, in such manner as to afford security for life and property: but any road. stream or passage thus intersected must be restored to its former state of usefulness, " as near as may be, or so that the railroad shall not unnecessarily impair its usefulness or injure its franchise; " (4) "to cross, intersect, join or unite its railroad with any other railroad," before or after construction, at any point, and upon the grounds of the other corporation, with the necessary sidings, etc., and any railroad thus intersected shall grant to the new road the necessary facilities for such connections; (5) "to purchase lands, timber, stone, gravel or other materials to be used in the construction and maintenance of its road, and all necessary appendages and adjuncts," or acquire them under the right of eminent domain, as provided in the Code of Civil Procedure, § 1238 et seq.: (6) to erect all convenient huildings. § 465. Within a reasonable time after the final location of the road, maps and profiles of the route, certified by the chief engineer and the president and secretary, shall be filed with the secretary of state and the county clerks, and a copy kept in the corporation secretary's office. § 466. The location may be changed by a majority of the directors, but not so as to change the general route, or avoid any points named in the articles of incorporation. New profiles and maps must be filed as required by section 466, and lands acquired for the original location must be relinquished within five years from such change in the route. §§ 467, 465 (7). Construction must be begun within two years after filing the articles, and five miles be put in full operation each year thereafter, or, after one year's neglect, the right to extend the road beyond the point to which it is then completed shall be forfeited. § 468 (16). No street, nor any land or water, in any incorporated city or town, may be used by such corporation, unless the right so to do is granted by a majority vote of the municipal authorities, § 470. Two or more companies may consolidate their "capital stock, debts, property, assets and franchises," in the manner agreed upon by the directors, upon the written consent of three-fourths of the stock of each corporation; but no corporation, or its stockholders, shall be relieved from any liability by such consolidation. Due notice of any such consolidation must be given by publication for one month in a county paper, and in one Sacramento and two San Francisco papers. A copy of the new articles must be filed with the secretary of state. § 473. There is granted to every railroad corporation a right of way over any unused state lands, not including any such lands within three miles of any incorporated town or city. §§ 474, 475. They may also take from such lands wood, stone and other materials for construction purposes. § 476. Any state lands revert to the state when the corporation ceases to exist, or the lands are not used for the corporate purposes. § 477. An annual report must be made to the secretary of state. § 480. The maximum passenger rate is fixed at ten cents per mile, the charge per mile for twenty-five miles or less to be not more than twenty-five per cent, greater than the rate per mile for one hundred miles or more. Equitable differences in rates are made for distances between twenty-five and one hundred miles. The maximum charge for freight is fifteen cents per mile per ton. § 489.

Foreign railway companies of the United States may build roads within the state, exercise the right of eminent domain, and transact any other business which a like domestic corporation could do, with all the rights and restrictions of domestic corporations. Such foreign corporations, or any domestic corporations, doing business within the state, may lease any part of each other's roads, or acquire of the other the right to use, in common with it, any part of its road. Laws 1880, 21 (Ban. ed., 114), (Code, § 491). Upon the completion of any railroad, or any portion thereof capable of being operated, the same shall be put in operation, and upon failure to operate such line for six months at a time, the right to operate the same, in whole or in part, as the case may be, shall be forfeited, and the lands occupied for the purposes of the road, so far as it is not operated, shall revert to the original owners or their successors. This provision does not apply to a case where the income would not pay the expenses of operation, the railroad commissioners having power to determine whether the road will pay expenses. Laws 1880, 43 (Ban. ed., 205), (Code, § 491). A railroad commission is established and provided for in accordance with the constitutional provision. Laws 1880, 45 (Ban. ed., 207), (Code, § 491).

Special provisions apply to insurance corporations, §§ 414-452. Street railroads, §§ 497-511; Laws 1893, ch. 17. Wagon-roads, §§ 512-523. Bridge, ferry, wharf, cbute and pier corporations, §§ 528-531. Telegraph companies, §§ 536-541. Water and canal companies, §§ 548-552, and notes. Homertead corporations, §§ 557-566. Land and building corporations, §§ 639-648. Gas companies must obtain permission of local authorities to lay pipes, and must use meters approved and sealed by local inspectors, § 628.

A recent statute provides that municipalities (cities, counties, towns or districts) may grant franchises or privileges to telegraph, telephone or railroad companies to construct or operate a line or road along a street or highway, only on condition that the application for the franchise or privilege, together with a statement that it is proposed to grant the same, shall be advertised in a local daily paper for at least ten days, beginning at least thirty days before any further action of the municipal authorities is taken. The advertisement shall state the character of the proposed privilege or franchise, the term of its continuance, and, if a street railroad, the route to be traversed, and the day on which bids will be received for the same. The bids must be read in open session, and the franchise or privilege awarded to the highest bidder; provided, that nothing in this act shall affect a special privilege granted for less than two years. Laws 1893, ch. 204. Any railroad authorized to use steam power may substitute electricity, or use both steam and electricity; provided, that in incorporated cities or towns of more than five thousand inhabitants, the consent of the local authorities must first be obtained, in the manner in which franchises are granted, Laws 1893, ch. 175.

Taxation .- "Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent, and the assessment and taxation of such shares and also of the corporate property would be double taxation. Therefore, all property belonging to corporations shall be assessed and taxed, but no assessment shall be made of shares of stock, nor shall any bolder thereof be taxed therefor." Political Code, § 3608. The franchise, roadway, road-bed, rails and rolling stock of all railroads operated in more than one county in the state shall be assessed by the state board of equalization. Franchises granted by any county or municipality are assessed where granted. Those granted by any other authority are assessed where the principal office is kept. § 3628. Corporate property is assessed in the county where it lies. § 3641. Railroad companies whose lines traverse more than one county in the state must furnish the state board of equalization with a sworn statement of the condition of their roads, under headings prescribed by this section. § 3664. The state board must assess the "franchise, roadway, road-bed, rails and rolling stock" of such corporations, the assessment to be made to the corporation

owning the same. The depots and buildings on the right of way, and all other property owned by the corporation, are assessed by the county assessor. The board must apportion the assessment to the counties, or cities and counties in proportion to the number of miles in each. The assessed value of the above-named property in each taxing district, as fixed by the state board, shall constitute the assessment value of said property for taxable purposes in such district. "All such railway property shall be taxable upon said assessment at the same rates, by the same officers, and for the same purposes, as the property of individuals within such city. town, township, school, road and lesser taxation districts respectively." Franchises derived from the United States are not assessed. § 3665, Am'd Laws 1891, ch. 230. Any dissatisfied owner may sue the state treasurer, § 3669, Am'd Id. The state board must assess the franchises, etc., at their actual value. \$ 3692. The secretary of every corporation shall demand from any person desiring the issue to him of aux certificate of stock a fee of ten cents in coin for each certificate, whether the same be an original issue or an issue on a transfer, and the certificate shall not be delivered without such payment. The secretary shall pay the same to the tax collector, or, in San Francisco, to the license collector. Laws 1877-8, 955 (Civ. Code, § 327).

§ 939. COLORADO: 1 The legislature shall pass no law "making any irrevocable grant of special privileges, franchises or immunities." Constitution of 1876, art II, § 11. The legislature shall not pass local or special acts granting the right to lay down railroad tracks, or granting to any corporation, or persou, "any special or exclusive privilege, immunity or franchise whatever." Art. V. 8 25. No act shall authorize the investment of trust funds by executors, etc., in the bonds or stock of any private corporation. Id., § 36. No obligation of a person or corporation to the state, or any municipal corporation therein, shall ever be "exchanged, transferred, remitted, released, or postponed, or in any way diminished" by the general assembly, nor shall such obligations be extinguished except by full payment. Id., § 38. The power to tax corporations and corporate property, real and personal, shall never be relinquished or suspended. Art. X, § 9. All corporations in the state, or doing business therein, shall be subject to taxation for state, county, school, municipal, and other purposes, on the real and personal property owned by them "within the territorial limits of the authority levying the tax." Id., § 10. The rate of taxation, for state purposes, shall never exceed six mills on the dollar. Id., § 11. Neither the state, nor any division thereof, shall lend or pledge its credit or faith, in any manner or for any purpose, in aid of any person or corporation, or become responsible for any debt or liability of such person or corporation; nor become a shareholder in any company; or joint owner with any person or corporation, excepting such ownership as may accrue by forfeiture. escheat, etc. Art XI, §§ 1, 2. The legislature shall provide by general laws for the creation of corporations. Art XV, § 2. The legislature may annul, revoke, etc., any charter judged to be injurious to the citizens of the state, but in a way to work no injustice to the corporators. Id., § 3. Every company organized for the purpose shall have the right to construct and operate a railroad between any designated points within the state, and to connect at the state line with foreign lines. Every railroad company may with its road intersect, connect with or cross any other railroad. Id., § 4. "No railroad corporation, or the lessees or managers thereof, shall consolidate its stock, property or frauchises with any other railroad corporation owning or having under its control a parallel or competing line." Id., § 5. Railroad corporations shall not discriminate in favor of, or against, any individual or corporation. Id., § 6. The right of eminent domain shall not be abridged, or so construed as to prevent the legislature from taking the property and franchises of corporations for public use, the same as the property of individuals. Id., § 8. "No corporation shall issue stock or bonds, except

¹The acts of the legislature down to and including the laws of 1893 are included in this synopsis.

for labor done, services performed, or money or property actually received, and all fictitious increase of stock or indebtedness shall be void. The stock of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding a majority of the stock, first obtained at a meeting held after at least thirty days' notice given in pursuance of law." Id., § 9. Foreign corporations must have a place of business in the state. Id., § 10. Street railroads shall not be established without the consent of the local authorities. Id., § 11. No act retrospective in its operation shall be passed in favor of a corporation or individual. Id., § 12. No telegraph company shall consolidate with, or control, a competing line. Id., § 13. No domestic corporation shall become a foreign corporation by consolidation with a foreign company, and the courts shall retain jurisdiction over the corporate property in the state. Id., § 14. Persons and corporations may have a right of way across private or corporate lands for the construction of ditches, etc., to convey water for domestic use, or for mining and manufacturing purposes, upon payment of just compensation. Art. XVI, § 7.

Miscellaneous corporations.—Corporations may be formed for any lawful purpose. Gen. Stat. 1891, § 472. Any three or more persons (except as hereinafter provided) desirous of forming a company may make and acknowledge certificates, stating (1) the corporate name; (2) the object of the incorporation; (3) the amount of capital stock and the number of shares; (4) the period of existence, not exceeding twenty years, "except as hereinafter provided;" (5) the number of directors, and their names for the first year: (6) the name of the principal place of business, and the name of the county or counties in which the business is to be carried on. Copies must be filed in the said counties and with the secretary of state. If any of the business is to be conducted without the state, that fact must also be stated. § 473. Such corporations may "own, possess and enjoy" any real and personal estate necessary for the transaction of their business, however the same may be acquired, and may dispose of the same when not needed. They may "borrow money and pledge their franchises and property, both real and personal, to secure the payment thereof." § 476. Shares of stock shall not be less than one dollar nor more than one hundred dollars each, and shall be personal property. transferable in a manner fixed by the by-laws. Subscriptions shall be payable in such instalments, and at such times, as the directors may determine. § 480. There shall be from three to thirteen directors, who must be stockholders, and who shall, "except the first year," be elected by the stockholders. There can be no election unless a majority of the stock is represented. Each share has one vote. § 481. Where the election of directors has not been held as legally required, the directors or any two stockholders may notice a meeting under the statute for that purpose. § 482. The directors shall elect the president and subordinate officers. § 483. The stockholders, or the directors if so provided in the certificate, may make by-laws consistent with law. § 484. No such corporation shall use the corporate funds for the purchase of its own stock. § 485. "Each stockholder shall be liable for the debts of the corporation to the extent of the amount that may be unpaid upon the stock held by him," and may be proceeded against separately "to the extent of the balance unpaid by such stockholders upon the stock owned by them respectively, whether called in or not, as in cases of garnishment." § 486. When the last instalment is paid in the president and a majority of the directors must file with the secretary of state a certificate, stating the amount of the capital fixed and paid in. \$ 487. Except in case of railroad and telegraph companies, correct books of account must be kept at the principal office in the state, and all books and papers shall be open to the inspection of stockholders at all reasonable hours. Any officer or clerk who refuses to allow such inspection, or copies to be made, shall be guilty of a misdemeauor, and be liable to a penalty of \$100, § 488. Assessments shall be levied pro rata upon all shares, "except as hereinafter provided." The directors of any corporation may purchase mines, manufactories and other property necessary for

their business and issue stock to pay for the same. Such stock shall be considered full paid, and not subject to any further calls or assessments, "except as hereinafter provided:" nor shall the holders thereof be liable to any further payments under section 486. In all reports and statements of the company this stock shall be reported according to the facts respecting its issue. § 490. The corporation must file with the secretary of state an annual report. And if any corporation whose capital stock has not been paid in, and a certificate filed as required by section 487, shall fail to make such report, all the directors "shall be jointly and severally liable for all the debts of the company that shall be contracted during the year next preceding the time when such report should by this section have been made and filed, and until such report shall be made." § 491. If the directors, or other officers, shall declare and pay any dividend when the corporation is insolvent, or which would make it insolvent, or would diminish the capital stock, all such officers assenting thereto "shall be jointly and severally liable for all debts of such corporation then existing, and for all that shall be thereafter contracted while the capital remains so diminished." § 492. Directors' meetings may be held without the state only when the articles of incorporation so state, or such meeting was authorized, or its acts ratified by a vote of a majority of the stockholders. Business done at a meeting wrongfully held without the state is void. \$ 493. All officers signing a certificate, knowing it to be false, "shall be jointly and severally liable for all damages arising therefrom." § 494. Persons holding stock as executors, etc., are not personally liable as stockholders. § 495. Executors, etc., and pledgors of stock may vote as stockholders. § 496. If any corporation, or its agent, shall do any act which shall forfeit the charter, or allow any execution or decree for the payment of money to be returned "no property found," or to remain unsatisfied for ten days after such demand, or shall dissolve or cease doing business, leaving debts unpaid, equity suits may be brought against all who were stockholders at the time, requiring payment of each stockholder to the extent of his unpaid subscriptions. Courts of equity may also dissolve corporations for good cause. § 497. Any domestic company formed for the purpose, among others, of doing a part of its business in another state or country, may accept any law of such other state or country and operate thereunder. § 498. This act shall not be construed to allow the construction of any street or other railroad, or other structure, within the limits of any city or town, without the consent of the local authorities. But no such consent shall protect any corporation or person against any claim for damages to private property. § 505. Verified statements of affairs must be made upon the written request of fifteen per cent. of the stock, but cannot be required oftener than once in six months. § 507. All corporations, except railroad and telegraph companies, shall keep transfer books, which shall be open to the inspection of stockholders and corporate creditors. Unless recorded within sixty days, no transfer of stock shall be valid for any purpose, except to render the transferee liable for the corporate debts. Any officer or agent neglecting to make entries, allow inspection, etc., shall be guilty of a misdemeanor, and the corporation shall pay the injured party \$50 for each offense, together with damages, And in case of the pledge of stock a memorandum must be made upon the books. or the transfer is likewise invalid. § 508, Am'd Laws 1893, p. 90. Dissolution does not relieve the corporation or officers from any liability incurred before dissolution. Two-thirds of the stock may decree a dissolution. Upon dissolution the directors must convert all corporate property into cash, and within six months from such conversion distribute the same among the stockholders. § 509, Am'd Laws 1891, p. 95. Shares of stock are subject to execution and levv. §§ 2575-2581. Mining companies shall have power to acquire, in any manner, any mining property or materials, and erect necessary buildings. The certificate of a mining company must state, in addition to other matters, that the stock is either assessable or non-assessable, and on each certificate there must be printed either the word "assessable" or "non-assessable." § 581. Full-paid stock may be issued to pay

for mining property, or provide necessary capital, and the same shall be non-assessable "until the balance or whole amount of the capital stock shall have been assessed to the par value thereof and fully paid," after which the stock shall be equally and ratably liable to assessment for the operations of the company. No company shall issue both assessable and non-assessable stock, except as provided in this section. § 582. Where shares are made assessable by the charter or by law, the directors are given full and absolute powers to levy and rescind assessments, declare dividends, and do all acts for the interest of the company. But such assessments must be made by a majority vote, and shall not exceed ten per cent, payable immediately. Default in payment for thirty days makes the stock delinquent. Subsequent assessments shall not be levied within "thirty days after salesday on the previous assessment." Laws 1891, p. 99. There shall be from three to nine directors of such mining corporation, who shall be stockholders. Each share has one vote. § 585. Any such companies may consolidate. § 586.

For telegraph and telephone companies, see \$\$ 587-595.

Amendments shall not be so made as to change the original objects of the corporation. Amendments may be voted upon at the annual or a special meeting, after due published notice. The principal officer shall, upon the written request of one-third of all the subscribed stock, setting forth the nature of the proposed amendments, call a directors' meeting to consider the same. The directors must call a stockholders' meeting to vote upon such amendments, which can only be adopted by a two-thirds vote of all the stock. A certificate, setting forth the fact of the adoption of the amendment, must be filed like the original articles. The act of March 25, 1885, is repealed. Laws 1891, p. 92. The conversion of corporate funds by any officer or employee is larceny. Laws 1893, p. 119.

Railroads.— Five or more may incorporate. The certificate shall, in addition to the matter required in section 473, specify (1) the termini of the road; (2) the time of the commencement of the corporate existence and the period of continuance; (3) the names and residences of the corporators; (4) "in what officers or persons the government of the proposed corporation and the management of its affairs shall be vested." § 599. The corporate existence, in the first instance, shall not exceed fifty years, but renewals may be made for that period, according to law. \$ 600. At all general meetings the holders of a majority of the stock may fix the rate of interest to be paid for loans in aid of construction, and the amount of such loans. § 601. The corporation shall have the same general powers as other corporations. The company may "regulate the time and manner in which passengers and property shall be transported, and the compensation to be paid therefor," and has power "from time to time to borrow such sums of money as may be necessary for completing, improving or operating any such railroad, and to issue and dispose of its bonds, for any amount so borrowed. and to mortgage its corporate property and franchise to secure the payment of any debt contracted by such corporation, for the purposes aforesaid, in such manner as the shareholders representing a majority of the stock of any such corporation may direct." § 602. The corporation must begin the construction of its road within two years from the filing of articles, as required in section 473, supra, and expend twenty per cent, of its capital in five years from its organization, or the corporate powers cease. "Capital," in this section, may mean any amount to which the capital stock has been lawfully reduced. \$603. A domestic line may consolidate with a foreign, to form a continuous road; provided no consolidation be made with a competing line. § 604. For such consolidation the directors shall frame, and a majority of the stockholders of the respective companies shall adopt by vote, an agreement prescribing the terms and conditions of the consolidation, and the mode of carrying out the same; the name of the new corporation; the number, names and residences of the directors, and other officers, for the first year; the number of shares; the principal place of business in each state traversed by the road; the manner of converting the capital stock of the old companies into that of the new corporation; "how and when directors and officers shall be chosen: "and such other matters as are required by law to be inserted in an original certificate. The mode of ratification by the foreign company may be in accordance with the laws of its state. \$ 605. The new corporation shall have all the rights, and be subject to all the liabilities, of the old cornorations. No further act or deed is required to transfer to the consolidated company any of the property of the parties to the agreement, and no existing lines shall be impaired. Any deed of trust or mortgage may be executed by the consolidation. as provided in the agreement, if consistent with the laws of the state. \$\$ 606. 607. An office must be kept in the state. \$ 608. The domestic company shall not become a foreign corporation by such consideration. § 609. Any foreign or domestic company may lease a non-competing line, within or without the state, subject always to the existing laws of the state. \$611. Such lease can only be concluded after a vote of two-thirds of the stock of each company in favor thereof. § 612. Any railroad company may, at any meeting for the election of directors, elect directors in three equal classes, as near as may be, for one year, two years and three years. § 613. Purchasers of a railroad at a judicial sale may organize as a corporation. § 614. The company so organized shall have and exercise all the estate and rights of the old company, and in payment of the purchase price may "issue its capital stock and bonds, and may mortgage its property and franchises with such classification of capital stock and bonds as may be agreed upon by and between such railroad company and the parties beneficially interested, or who may have the ownership and control of such property and franchises," § 615. It shall be lawful for any railroad company, upon good consideration, to "guaranty the payment of any mortgage, mortgage honds, or interest coupons, of any other railroad connecting with said first-named railroad," or, "upon good consideration, as aforesaid, to guaranty to said road the payment of interest upon its capital stock," § 3751. Liens of mechanics and material-men shall attach to and include franchises and charter privileges. §\$ 2872-2875.

A railroad commission was created by act of April 6, 1885 (see R. S. 1891, § 3722 et seq.), This was repealed in 1893, with the proviso that no right of action which had already accrued should be affected by the repeal. Laws 1893, ch. 136

General provisions.—"No corporation shall issue stock or bonds except for labor done, services performed, or money or property actually received, and all fictitions increase of stock or indebtedness shall be void." § 618. Upon a dissolution the directors become trustees of the creditors and stockholders, and are jointly and severally liable to the extent of the property which comes into their hands, for a proper discharge of their trust. § 619. In such case the title to realty vests, by operation of law, in said executors. § 620. Any corporation may convey lands by deed signed by the president. § 622. Any corporation, domestic or foreign, may appoint an agent or attorney to convey lands, in which case the corporate seal is not necessary. § 623. No corporation, for any purpose authorized by this act (vide general laws noted above), shall be formed under any other act. \$ 624. Any corporations of the same kind doing business in the same vicinity may consolidate. Consolidation, change of name, change in the number of directors or in the amount of capital stock, or change of place of business, must be done upon the recommendation of the directors and by a two-thirds vote of the stock. §§ 625-627. But before a consolidation is effected it must be approved by three-fourths of the stock of each company. After such approval the directors shall elect "their proportion of the directors, less one, that are to manage the affairs of the consolidated company, and upon the joint meeting of the directors so elected the said directors shall elect one of the stockholders to be a director and act with them." They shall then prepare a certificate of incorporation, setting forth the facts of the consolidation, and containing the matter required in an original certificate, naming the directors. Such certificate shall be filed where the original certificates were filed.

The directors of the old companies shall convey to the new company all the corporate property and effects, and deposit all transfer books, papers, etc. The new directors shall call in and cancel all the old stock, issuing new stock therefor. § 628. A notice of the change of organization must be published in a county paper. § 629. The legislature may prescribe rules and regulations for any corporation. § 634. A fee of \$10 is to be paid the secretary of state for filing the articles of incorporation, if the capital stock is \$100,000 or less, ten cents per thousand being paid for each \$1,000 in excess of that amount, and for each \$1,000 of any subsequent increase. § 1868. Corporations may make assignments the same as individuals. Laws of 1893, p. 65.

Foreign corporations.—Such corporations shall, upon doing business in the state, file with the secretary of state, and with the county recorder of deeds, a certificate signed by the president and secretary, designating the principal place of business, and an authorized agent, and shall be liable in the same manner as domestic corporations and shall have no greater powers. No foreign or domestic corporation shall purchase or hold real estate, except as provided in this act; and no foreign corporation, doing business in this state, shall be allowed to mortgage, etc., its property in the state to the injury of any individual or corporate creditor in the state, "and no mortgage by any foreign corporation, except railroad and telegraph companies, given to secure any debt created in any other state, shall take effect as against any citizen or corporation of this state until all its liabilities due to any person or corporation in this state at the time of recording such mortgage have been paid and extinguished," unless notice of the intended mortgage to recover a debt created, or to be created, in another state, is given by publication for six successive weeks in the county where the property to be mortgaged is situated; in which case the mortgage shall have effect as against the creditors who do not file their claims. § 499, Am'd Laws 1893, p. 88. Every foreign corporation doing business in the state must file with the secretary of etate a copy of its charter, or a copy of its certificate, if incorporated under a general law. § 500. Failure to comply with the two preceding sections shall render each officer, agent and stockholder, so failing herein, "jointly and severally personally "liable on all corporate contracts made within the state during such de-§ 501. The secretary of state receives fifty cents for filing the certificate. No foreign corporation doing business in the state shall "be permitted to effect a reconstruction, by liquidation or otherwise, nor shall any such reconetruction or liquidation take effect as against any citizen of this state, unless all the rights, shares and interests of any citizen of this state shall have been or shall be protected, and the stock interests of any citizen of this state in such corporation shall have been or shall be fully recognized, and in its original condition, without diminution in number, amount or face value." Laws 1891, p. 99,

Taxation. — Mines and mining claims being precious metals are only taxed on the net proceeds and improvements. § 3766. Railroad realty, "not used for the convenient and proper operation of its railway and improvements thereon," shall not be assessed by the state board, but shall be taxed in the county where it lies. Laws 1891, p. 290, § 1. The company must furnish the board with a statement showing (1) the whole length of main track, "which includes franchises, rights of way and all ground adjacent thereto," bridges, etc., the proportion in each county, and the value thereof per mile; (2) the length of side tracks and turn-outs in each county; (3) real estate not in the right of way, and for the operation of the road: (4) the character and location of depots, etc.; (5) a full list of rolling stock used by the company on any road; (6) all tools, supplies and other personalty. Telegraph and telephone companies shall also make a statement. Failure to make a statement, or falsity therein, shall be punished by adding thirty per cent. to the determined value of the property. Such property shall be valued at its cash value. § 2. Manufacturers must list their materials. § 11. No corporation shall be allowed any deduction "on account of any subscription to or instalment payable on the capital stock of any company." § 13. Rolling-stock companies must report to the state board. Gen. Stat., § 3802. All railway property shall be taxed by the same officers and in the same manner as the property of individuals. Shares of stock are taxed. § 3791, and Laws 1891, p. 297. Stock may be sold for non-payment of taxes. § 3861. The property of a consolidated railroad company which lies within the state is taxed as domestic railroad property. § 610.

§ 940. CONNECTICUT: 1 Constitutional provisions.— "No man or set of men are entitled to exclusive public emolument or privileges from the community." Constitution of 1875, art. I, § 1. No municipality shall ever "subscribe to the capital stock of any railroad corporation, or become a purchaser of the bonds, or make donation to, or loan its credit, directly or indirectly, in aid of, any such corporation." Art. XXV of Amendments.

Miscellaneous corporations.—Three or more may form a joint-stock corporation for any lawful business within the state, and such business outside the state as may be incidental to the business within it, "such business not to be either trust, insurance, buying and selling real estate, banking or trading in bonds, notes, or other evidences of indebtedness, or trafficking in letters patent or patent rights," Such corporation may be formed to carry on, outside the state, any lawful business not herein forbidden, provided the secretary and treasurer and a majority of the directors shall always be residents of the state. Gen. Stat. of 1888, § 1944. Articles must be signed setting forth (1) the agreement; (2) the corporate name, commencing with "The" and ending with "company" or "corporation;" (3) the purpose of incorporating; (4) the name of the location of the company; (5) the amount of the capital stock (not limited), and the number of shares (each to be of the par value of \$100, \$50, or \$25, as may be prescribed in the articles). Id. The first meeting may be called by any two corporators at such time and place as they may designate by a fifteen days' published notice in the county paper. Such notice may be waived by a writing signed by all the subscribers, specifying the time and place of meeting. Written or printed personal notice of subsequent meetings must be furnished stockholders by the president or secretary. § 1945. At the first meeting three or more stockholders must be elected directors, and by-laws must be adopted. By-laws can be adopted, amended or repealed at a subsequent meeting called for the purpose. § 1946. Business shall not be commenced until all the capital is bona fide subscribed for, and twenty per cent, thereof paid in cash; "and in case any portion of the balance of said stock shall be paid for in property, real or personal, such property shall be estimated for such purpose at the actual value thereof." § 1947. The articles must be published in a county paper, and a copy of the same, with a sworn certificate, stating that the required twenty per cent. has been paid in, must be filed with the secretary of state. § 1948. The directors shall choose one of their number to be president, and choose a secretary, treasurer and other officers. If the treasurer resides outside of the state, an assistant treasurer must be appointed who resides within the state. § 1950. The purposes of the corporation may be changed to any lawful business allowed by section 1944, provided amended articles, subscribed by twothirds in interest of the stockholders, shall be published and recorded as required in case of the original articles. § 1951. Every such corporation may hold any property necessary for its business, including real estate and patent rights, and such other property as may be taken in payment of or as security for debts due to it. § 1952. The statements and books shall be kept in the town where the corporation is located, and shall at all reasonable times be open for the inspection of any stockholder; and at least once a year a true statement of accounts shall be exhibited to stockholders. § 1953. The capital and the number and par value of the shares may be increased or reduced at a special meeting by a two-thirds vote of the stock. Certificates of such increase or reduction must be recorded and

 $^{^1}$ The acts of the legislature down to and including the laws of 1893 are included in this synopsis. 1634

published as required in case of the original articles, the publication to be for two successive weeks. In case of any reduction of capital which will render the company insolvent, "the stockholders assenting thereto shall be jointly and severally liable for all debts of the corporation existing at the time of such reduction, after judgment obtained against the latter and a return of execution unsatisfied." \$ 1954. Twenty per cent. of the increase must be paid in in cash, or by surplus earnings, before any record shall be allowed in the office of the secretary of state. \$ 1955, Am'd Laws 1889, ch. 64. The president and treasurer shall make an annual report. \$ 1956, Am'd Laws 1889, ch. 65. The place of business may be removed. \$ 1957. If the directors shall knowingly pay any dividends when the corporation is insolvent, or which would render it insolvent, those directors assenting thereto shall be "jointly and severally liable for debts due at the time of the declaration or payment." § 1958. All officers of such corporation who intentionally fail to perform any of the duties required by law shall be "jointly and severally liable for all its debts contracted during the period of such failure." § 1959. Stock shall be transferred only on the books, in the form prescribed by the by-laws. The corporation shall have a lien "upon all the stock owned by any person or estate therein for all individual, joint and partnership debts due it from him or such estate, and for any contingent liability to it as indorser, acceptor, guarantor or surety upon any negotiable or commercial paper." § 1960. The equity of redemption in pledged stock may be sold by the corporation to satisfy a debt. § 1963. The superior court may decree a dissolution, upon good cause, on the petition of one-third of the stock; provided, that no limitation for the presenting of claims of creditors shall be less than four months, and that the court may, in lieu of decreeing dissolution, order the receiver to sell the property and franchises. purchasers at such a sale shall succeed to all the rights and privileges of the corporation, and may reorganize the same, under the direction of the court. \$ 1965. Am'd Laws 1893, ch. 112. Whenever the corporation votes to wind up its affairs and dispose of its property, the superior court may order the property to be sold at public auction upon the petition of one-sixth of the stock. § 1966. The corporation may be dissolved upon the request of any stockholder or creditor, after failure for two successive years to make the required annual reports. § 1967. The fee of the secretary of state for filing and recording each certificate is \$1.

For regulation of fire insurance companies, see Laws 1893, chs. 7, 60, 202. For street railways, see Laws 1893, ch. 169.

Railroads.—Twenty-five or more may incorporate. § 3433. The articles shall state (1) the corporate name; (2) the location of the principal office (which shall be and continue in the state); (3) the termini, and the towns through which the line will run; (4) the length of the road, as near as may be; (5) the amount of the capital_stock (which shall not be less than \$10,000 for each mile of road); (6) the names and residences of not less than nine directors, to be chosen by the original subscribers, and a majority of whom shall always be residents of the state. The amount of the funded and floating debt shall at no time exceed the cash paid in on the capital stock. § 3434. The shares shall be of the value of \$100 each, and each subscriber shall state how many shares he will take. When the articles are filed with the secretary of state, the incorporation is complete. § 3435. The articles shall not be filed unless accompanied by a report of a skilful engineer as to the feasibility of the route and an estimate of the cost of construction; nor until at least \$5,000 of stock for each mile has been subscribed and ten per cent, thereof paid in cash. § 3436. No subscription shall be taken without a payment of ten per cent. thereof. Construction shall not be begun until at least \$10,000 per mile is subscribed. § 3437. Real estate necessary for the purposes of the organization may be held. § 3438. The corporate powers shall cease unless construction is hegun and ten per cent. of the subscribed capital expended in two years from filing the articles, and the road finished in five years, but the railroad commission shall, in either case, extend the time two years, if the company has been hindered by litigation or opposition. § 3440. As to the construction of railroad bridges across navigable streams, see § 3441. No other railroad company shall directly or indirectly, subscribe for take or hold any stock or bonds of any railroad company formed under this act, unless specially authorized by the legislature. § 3442. Any domestic company formed to build and operate a road extending to or heyond the state line may consolidate its capital stock, franchises and property with those of any other company, whose line, built or to be built, is wholly outside the state, to form a continuous line to a point in the adjoining state; provided the aggregate outstanding bonds of the companies do not exceed one-half of what has been actually expended upon the consolidating railroads. No competing or parallel lines shall consolidate. § 3443. The respective boards of directors shall make an agreement under the corporate seals, prescribing, among other things, the number and names of directors, and other officers; the number of shares and the par value of each; the manner of converting the capital stock of the old companies into that of the new. The capital stock shall not exceed the sum of the capital stock of the consolidating companies, or the par value thereof, "nor shall any bonds or other evidences of debt be issued for a consideration for, or in connection with, such consolidation." § 3444. If such agreement is adopted by a two-thirds stock vote of the respective companies at special meetings, the same shall be filed with the secretary of state and have full force according to the terms and conditions thereof. § 3445. The consolidated company shall have all the rights and liabilities of the old companies, but the consolidation shall not confer upon any company any privilege not granted to all companies of the state under this act. § 3446. Said consolidated company may issue bonds, "and secure the same by a mortgage of its entire franchise and property, both within and without the state, existing or to be acquired, or any part thereof, to one or more trustees, to be nominated by said company and approved by the governor of this state." The mortgage may provide for a foreclosure or sale of the entire consolidated road and franchises. § 3447. The provisions of section 3570 shall apply to such bonds and mortgage. § 3448. Such consolidated company may sue and be sued in any county in the state cut by its line. At least six directors shall be residents of the state. § 3449. A written application must be made to the railroad commissioners for any increase of capital stock. § 3450. Only the commissioners can authorize such increase. § 3452. This chapter shall not be construed to authorize the construction of a horse railroad; "or the taking or using the track, wharves, depot or depot grounds of any other company without its consent, except for the purpose of crossing or connection." § 3453. Each share has one vote. § 3456. No person shall vote at a stockholders' meeting of a railroad company by virtue of a power of attorney not executed within one year next before the meeting, nor shall such power be used at more than one annual meeting. § 1927. The company may prohibit the officers from voting upon any stock not their own. § 3457. Stockholders in arrears for assessments or instalments shall not vote. § 3458. Every railroad company, before applying to the commissioners for their approval of the location of the road, must deposit with the state treasurer eleven dollars per mile of the proposed road, to be used for paying the expenses and salary of the board. § 3459. "No railroad shall lay out and finally locate its road without the written approbation of the location" by the said commissioners. § 3460. The commissioners have power to regulate all matters relating to the construction of the road. §§ 3461-3500. The company shall be liable to laborers employed by contractors, if, within twenty days from the completion of their labor, such laborers shall notify the company's treasurer that they have not been paid. § 3470. "Any railroad company may make lawful contracts with any other railroad company with whose railway its tracks may connect or intersect in relation to its business or property, and may take a lease of the property or franchise of, or lease its property or franchises to, any such railway company," and may construct branches from the main line to any place in the state. § 3472. No lease of a railroad shall be binding for more than a year, unless approved by two-thirds of the stock of the respective companies at special meetings. § 3473. All conveyances of any interest in the location of a railroad, to be used for railroad purposes, may, and if in the nature of a lease for more than a year shall, be recorded by the grantee or lessee in the office of the secretary of state. \$ 3474. The penalty for non-compliance with the orders of the commissioners is, in some instances, a forfeiture of \$100 per month, in other cases \$100 for each offense. §§ 3485, 3494, 3496. The commissioners shall regulate the running of trains, the carrying of freight and passengers, the connections with other roads, and the general conduct of the road. §§ 3523-3569. Every railroad company may borrow money, and may secure the repayment of the same by its bonds. Such bonds must be registered in the office of the comptroller of the state. No bonds shall be issued of a less denomination than \$100, nor shall any company have bonds outstanding at any one time to a greater amount than one-half the actual cost of construction of the road, or onehalf the amount actually expended upon the road. "Such company may dispose of its bonds as shall be authorized by its stockholders." § 3570. Said bonds may be secured by a mortgage of any or all of the corporate property. § 3571. When any trustee, to whom railroad property has been mortgaged for the security of creditors, shall have taken possession of such property, he shall operate the railroad for the benefit of such creditors, and shall not be personally liable, except for wilful mismanagement. § 3574. Such trustee may, in his discretion, bring an action to foreclose such mortgage. § 3576. If a trustee neglects his duty, any creditor may apply to the superior court for his removal. § 3577.

Annual returns, for which a blank is furnished, must be made to the commissioners, and for failure to make such report the company shall forfeit \$25 for each day's delay. The books shall always be open for the inspection of a legislative committee. §\$ 3586-3590. For the further duties of the commissioners see \$\$ 3413-3432.

Any railroad company must apply to a judge of the superior court for a proper appraisal, before taking possession of any highway or private road. Laws 1889, ch. 170. Railroads shall not furnish to members, or members-elect, of the legislature, any free transportation or reduced rate. Laws 1889, ch. 198.

Every railroad company guarantying the payment of the principal or interest of any bonds, or dividend on any stock, of another corporation, shall cause such bonds and the certificates for such stock to be registered with the comptroller, and a "certificate thereof" shall appear on the face of such bonds and certificates of stock. "And the comptroller shall cancel any bonds and certificates of stock so registered which may be brought to him for that purpose." But honds or stock shall not be guarantied to an amount which, together with the outstanding bonds of the guarantying company, shall exceed one-half the actual expenditure of said company in constructing its road. Laws 1889, ch. 218.

Conditional sales of equipment or rolling-stock are provided for. Laws 1893, ch. 119.

General provisions.— The name of the corporation must indicate that it is a corporation. § 1905. Where no other provision is specially made, the corporation may receive, purchase, hold, sell and convey real and personal estate for corporate purposes, not exceeding the limits of the charter; "elect in such mauner as it may determine all necessary officers, fix their compensation, and define their duties and obligations;" and make by-laws. § 1906. Any charter shall become void unless a bona fide organization takes place within two years from the approval of the charter, and a sworn certificate thereof is filed with the secretary of state. § 1910. When any amendment or alteration of a charter is made, unless otherwise provided in the resolution making the same, it shall not become operative unless accepted by the corporation at a special meeting held within six months and a copy of such acceptance filed with the secretary of state. Such acceptance shall operate to make the original charter, and all alterations and

amendments of the same, subject to alteration, amendment, or repeal, at the pleasure of the legislature. \$ 1911. Upon failure to hold the annual meeting, if no provision for such contingency is made in the charter or articles, not less than one-fourth of the stockholders, holding one-third of the capital stock, may, upon the refusal of the president vice-president or directors to call a special meeting. issue a call for such meeting. \$ 1920. When not otherwise provided in the charter, stock shall be personalty, and be transferred only on the corporate books, in such form as the directors may prescribe; and the corporation shall always have a lien upon all stock owned by any person for all debts due it from him. \$ 1923. Shares may be pledged by executing and delivering a power of attorney for its transfer, with the certificate of stock therein mentioned to the party to whom the pledge is made; but such pledge shall not be effectual to hold stock against any one but the pledgor, his executors and administrators, unless there is an actual transfer, and a record of the power of attorney with the corporation. § 1924. Each share has one vote, in person or by proxy. §§ 1925, 1926. The directors may call in subscriptions by justalments, in such proportion and at such times and places as they think proper, and upon such notice as they deem/reasonable, if the by-laws do not prescribe the notice. § 1929. Taxes imposed by a corporation upon its shares may be collected by levy and execution under the warrant of a justice of the peace. § 1930. No annual dividend shall exceed ten per cent. until the surplus fund equals twenty per cent. § 1931. No dividend shall be declared while the capital is impaired, and all officers knowingly voting in favor of such dividend shall be "jointly and severally liable, in an action on this. statute," for all losses resulting therefrom, and be guilty of a misdemeanor. § 1932. When the capital stock of any specially chartered corporation, whose stock has been fully paid in, shall become impaired, the capital, and the par value of the shares, may be reduced to an amount justified by its assets; but no assets shall be distributed before such reduction, and no reduction be made without the vote of the stockholders, approved by a vote of two-thirds of the directors, a copy of which shall be filed with the secretary of state. \$ 1933. Corporations are authorized to divide a portion of their profits among employees. §§ 1935, 1936. Corporations not required to report to some state officer shall, annually, make a detailed sworn return to the town clerk. § 1937. Intentional neglect, or refusal, to comply with the last section renders an officer "liable for all the debts of said corporation contracted during the period of such neglect," provided action is brought within three years after the debts are due. § 1938. Any secretary refusing to give to creditors of stockholders, or their attorneys, information as to stockholders, shall forfeit \$100 to any person prosecuting therefor. § 1939. The superior court may order a dissolution and appoint receivers when the stockholders have voted to wind up the corporate affairs, \$\$ 1942, 1943. Any stockholder may apply for a writ of mandamus to compel a corporation to obey the statutes. § 1296. Dividends on stock held in trust shall go to the remainderman. Laws 1889, ch. 72. No injunction against voting shall be granted within ten days prior to a stockholders' meeting, except to restrain voting on matters others than the organization and adjournment of the meeting. Laws 1889, ch. 39.

Any corporation, "not engaged in the business of either trust, insurance, buying or selling of real estate, or banking or trading in bonds, notes, or other evidences of indebtedness," which has the power to increase its capital stock, may increase the same by the issue of preferred stock, which shall be entitled to dividends of an agreed amount, before any dividends are declared upon the stock already issued. The issue must be authorized by a two-thirds stock vote, which vote shall determine the amount the number of shares, the dividend, and whether the same shall be cumulative or not. Before the stock is issued, a majority of the directors shall sign a certificate setting forth the facts, and file the same with the secretary of state. The articles of association may provide for the issue of preferred stock.

"Any joint-stock corporation uniting with any other corporation may change

the whole or any part of its stock into preferred stock by a two-thirds vote, as aforesaid, and increase its capital by the issue of common stock, upon filing the certificate thereof required by law." Laws 1893, ch. 102.

Taxation.—"The whole property of every corporation in this state, whose stock is not by law liable to taxation, and which is not required to pay a direct tax to the stock in lieu of other taxes, and whose property is not by law expressly exempt from taxation," shall be taxed like the property of individuals. \$3832. Real estate not required for the corporate business shall be taxed according to the last section, unless specially exempted. § 3833. The real estate is taxed in the town in which it lies, the personalty in the town, or towns, where the business establishments are located. Stockholders are exempt if all the corporate property is taxed. § 3834. The cashiers or secretaries must, under penalty of forfeiting \$50 to the town, send to the town assessors the names of the stockholders residing in their respective towns, giving the number of shares owned by each, and its market value. § 3837. Transfers to avoid the tax, or giving a false residence, submits the offender to a penalty of one per cent, of the value of the stock transferred. 88 3839, 3840. The cashier or secretary of each corporation "whose stock is liable to taxation, and not otherwise taxed by the provisions of this title," shall deliver to the comptroller a sworn list of all the stockholders residing without the state. with the number and market value of the shares of each, and shall pay to the state a tax of one per cent, of such value, for which payment the corporation shall have a lien on the stock so taxed. An officer shall forfeit \$100 for failure herein, and pay the tax besides. §§ 3916, 3917. The secretary or treasurer of every railroad corporation shall make to the comptroller a full return of the condition of the company, the details of which return are prescribed herein. § 3919. The company shall annually pay to the state one per cent, of the valuation of its stock, as furnished by the state board, and one per cent. of the par value of "such funded and floating indebtedness, as required to be contained in said statement," as valued by the state board, "after deducting from such valuations the amount of any bonds or other obligations of said company, or of their market value, if below par, which may be held in trust for said company as a part of any sinking fund belonging to it," and also deducting the taxes paid during the year on any corporate realty not used for railroad purposes. This tax shall be in lieu of all other taxes. § 3920. When only a portion of the road is in the state the tax shall be "one per" cent, on such proportion of the above-named valuation as the length of its road lying in this state bears to the entire length of said road." No branch, which the state board determines to be of less value per mile than one-fourth of the average value per mile of the trunk line, shall be included; but such branch shall pay one per cent, on its true value. § 3921. Taxes paid by a lessee may be deducted from payments due the lessor. § 3922. Every railroad company which holds, by lease or otherwise, a road in another state, not a part of its own road, is allowed a deduction from its funded and floating debt and stock of the funded and floating debt occasioned by, or the stock issued for aid in, the construction or permanent improvement of such road in another state, or for the purchase of equipment for exclusive use thereon. § 3923. Mortgagees or trustees in possession shall report, annually, to the comptroller the value of the road and pay the taxes. §\$ 3924-25. Express companies pay two per cent, on the gross amount of express charges paid to them in the state, or, if they fail to make returns, \$10,000 will be accepted in lieu of all taxes. § 3928. Special provisions are made for taxing different kinds of insurance companies, §\$ 3933-3942. As to the manner of determining the market value of railroad stock, see § 3931. In listing returns, railroad companies are to give the market value of their funded and floating indebtedness, if the same is below par. § 3919. Bonds issued by, or loans made to, foreign railroad companies are taxed, when such bonds are owned, or loans made, by residents of Counecticut. § 3830. Every joint-stock company pays \$1 for recording each certificate required. § 1968. No application for a charter for a company authorized

and intending to have its principal business without the state will be entertained until \$100 is paid. § 1912. No such corporation shall commence business until it has paid to the state from \$100 to \$5,000, as determined by the state board. § 1913. The corporations mentioned in section 1912, having a special charter from the legislature, shall pay \$100 to \$5,000 before making any increase of capital authorized by the legislature. § 1914, Repealed Laws 1889, ch. 204. The charter shall not issue until the payment required by sections 1912 and 1913 have been made. § 1915. Payments made under the above provisions are in lieu of all other tax upon the franchise of the corporation, but not in lieu of any tax ou the corporate property, or on the shares held by individual stockholders residing in the state. § 1916. Telegraph and telephone companies are specially taxed. Laws 1889, ch. 178.

§ 941. DELAWARE: ¹ Constitutional provisions.—No act of incorporation shall be enacted "without the concurrence by two-thirds of each branch of the legislature, and with a reserved power of revocation by the legislature;" and no such act shall continue in force for more than twenty years, "without the reenactment of the legislature, unless it be an incorporation for public improvement." Constitution of 1831, art. 2, § 17. An amendment was ratified in 1875 authorizing the legislature to enact a general incorporation act "for religious, charitable, literary or manufacturing purposes, or for the preservation of animal and vegetable food, or as building and loan associations, or for draining low lands." Ch. 1, L. 1875. Under this amendment such an act was passed, L. 1875, ch. 119, but it was repealed and another substituted by ch. 147, L. 1883. A substituted amendment was proposed by ch. 1, L. 1883, which should extend the power to include all municipal and private corporations, excepting railroad and canal companies.

Manufacturing corporations.—Three or more may incorporate. Laws of 1883, ch. 147, § 10. The charter must set forth (1) the corporate name; (2) the object and the location of the principal place of business; (3) "the amount of capital stock, the number and par value of shares, and the amount to be paid in before commencing business, which shall not be less than ten per cent of the whole capital;" (4) the names and residences of the original subscribers; (5) the dates of commencing and terminating business, the period to be limited to twenty years: and (6) "the value of the real and personal estate of which the corporation may become seized and possessed." "The certificate may also contain any limitation upon the powers of the corporation, the directors and the stockholders. . . . provided such limitation does not attempt to exempt the corporation, the directors or the stockholders from performance of any duty" imposed by law. The certificate must be signed and acknowledged by a majority of the original corporators. Amendments must be made by a supplementary certificate, presented and filed in the same manner in every respect as is provided in case of the original certificate. § 11. The certificate, after acknowledgment, must be presented to the associate judge of the county, after notice of the intention to incorporate has been published "daily (if there be a daily paper published in the county) in two newspapers of the county for at least ten days immediately prior to the application. If there is no daily paper in the county, then for three successive issues." The judge, if he allows the application, causes the certificate to be filed with the secretary of state, A majority of the corporators must be residents of the state. § 12. Upon the filing and recording of the certificate as aforesaid, the incorporation is complete. But power is reserved to the legislature to repeal or amend the charter at pleasure. § 14. Any company thus organized may carry on part of its business out of the state, and have one or more offices out of the state, and may hold and convey real and personal estate out of the state, as if the same were in the state, provided the certificate of organization shall state as nearly as possible what portion of the

 $^{^1}$ The acts of the legislature down to and including the laws of 1891 are included in this synopsis. 1640

business is to be done outside of the state, and at what places such portion of the business is to be transacted. § 16. There shall be at least three directors, and all directors must be stockholders. Vacancies in any office may be filled as provided in the by-laws. § 17. The by-laws may determine what number of shares shall be entitled to a vote, what number of stockholders must attend a meeting, and what number of shares shall constitute a quorum. Any stockholder may vote by proxy, authorized in writing. Unless all the corporators agree upon a time of holding the first meeting, a notice signed by a majority of them must be published, or a personal notice must be served on all the parties named in the certificate. Every such company may, at a meeting called for the purpose, increase its capital, and the number of shares, to the amount named in the original certificate. All shares are deemed personalty, and may be transferred ou the books in such manner as the by-laws provide. When stock is transferred as collateral security such fact must be mentioned in the entry of the transfer. If more capital is ordered, two-thirds in interest must make and present a certificate as provided in case of the original certificate. \$ 18. Two-thirds in interest may direct the directors to assess upon each share, from time to time, an amount not exceeding in the aggregate the par value as named in the certificate. § 19. When the last instalment of the capital limited in the charter shall have been paid in, or when an increase of capital stock has been made, the president, secretary and treasurer and a mafority of the directors must make a certificate of the fact and cause the same to be recorded with the recorder of deeds of the county. For failure therein such officers are, after thirty days from a written request by a creditor or stockholder, jointly and severally liable for debts "contracted before such certificate shall be recorded." § 20. After the first election of directors, no stock shall be voted at any election which shall have been transferred on the books within twenty days next preceding such election. A list of stockholders entitled to vote must be prepared for the inspection of stockholders ten days before any election. § 22. Guardians, executors, etc., may vote the stock they represent in person or by proxy. If any corporation purchase any of its own stock, such stock cannot be voted at any election for directors. § 23. The superior court has jurisdiction in the matter of complaints as to elections and may order new elections. § 24. The associate judge resident in the county may punish as for contempt of court the directors who refuse to obey an order for an election. If an election goes over and is held later, only those may vote who were entitled to vote at the regular time. § 25. The judge may summarily order an election at the request of a stock-Id. No hy-laws regulating the election of officers shall be valid unless made thirty days before the election, and for that time subject to the inspection of stockholders. § 26. All meetings of stockholders must be within the state, at the principal place of business. The directors may hold meetings, have an office, and keep books (except stock and transfer books) outside of the state if the bylaws so provide. But the company must always keep a principal office or place of business within the state, and have an ageut in charge thereof, wherein must be kept the stock and transfer books for the inspection of those interested. The chancellor or superior court may, upon proper cause shown, order all books to be brought within the state, to be kept at such place and for such time as the chancellor or court may think proper, under penalty of the forfeiture of the charter. For disobedience of the order the officers may be punished as for contempt of court. § 27. When a legal meeting cannot be called, three stockholders may, after a ten days' notice in the county newspaper, call a meeting, and if no regular officers are present they may elect such. § 28. Loans of money to stockholders are prohibited, and the officers making such loans shall be liable for all debts contracted before the repayment of the loan. Nothing but money shall be considered as payment for capital "except as hereinafter provided for the purchase of property." § 29. The directors may purchase mines, manufactories or other property necessary for their business, and may issue stock therefor. The stock so issued shall be considered full-paid stock. \$ 30. Officers issuing false certificates or notices are held liable for all debts contracted during their term of office. § 31. Upon dissolution, the directors and president are made trustees of the corporation for settling up all its business. § 32. Upon dissolution, the corporate existence is continued for settling up the business. § 34. The chancellor may appoint receivers instead of the trustees aforesaid. § 35. In case of the insolvency of any corporation. all the employees of such corporation shall have a first lien on the assets for one month's wages. On final dissolution all property not disposed of shall vest in the stockholders, to be held by them as tenants in common. § 39. Any officer or stockholder who shall pay any debt of the company for which he is made liable may recover the same from the company, but the property only of the company is liable to be taken in such action. § 42. The period of corporate existence may be extended, not more than twenty years, by filing a certificate declaring a desire for such extension. § 44. Any corporation may "hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter," and such other real estate as may have been mortgaged to it by way of security, or conveyed to it in satisfaction of debts previously contracted in its dealings, or purchased upon judgments obtained for such debts, and may mortgage any such real and personal estate with its franchises. § 1. Penalties for breach of the by-laws shall not exceed \$20. Id. When the whole capital has not been paid in, the stockholders are bound to pay their proportionate share of the deficiency. § 4.

As to the appointment of receivers for insolvent corporation, see Laws 1891, p. 359.

Railroads.- There is no general incorporating act.

Taxation.— Every person or corporation transporting passengers shall pay ten cents monthly for every passenger carried during that month. Failure therein on the part of a corporation will work a revocation of the charter. Rev. Code. 1874, p. 29. In lieu of the above tax any railroad may pay to the state treasurer a gross annual sum, which shall be such a part of its gross receipts from passenger business as \$13,000 is of the like receipts of the Philadelphia, Wilmington & Baltimore Railroad Company. p. 31. Railroad and canal companies must pay an additional tax of ten per cent on their net earnings or income. p. 41. For each locomotive belonging in whole or in part to such company, and used within the state at any time during the year, there shall be paid a tax of \$100; for each passenger car \$25, and for each freight car \$10. There shall also be levied upon such companies an additional tax of one-half of one per centum upon the cash value of every share of the capital stock. p. 42. The owner or holder of shares in a banking corporation is taxed one-fourth of one per centum on the cash valuo thereof. p. 45. In addition to all other taxes, all shares or stock owned by resident individuals or corporations in any foreign corporation, "and all investments in public loans and stocks whatever" by such residents, are taxed. p. 53. Manufacturing corporations must pay a license fee of \$5 and a tax of ten per centum on the annual cost value of their products. But if the annual cost value does not exceed \$1,000 the tax is \$1 per year, provided that if the aggregate cost value is not more than \$500 the product shall be exempt from taxation and the license fee be remitted. p. 56. On certifying any charter, or renewal thereof, the secretary of state shall demand, for the state, \$20 for a capital exceeding \$50,000, and \$10 for a smaller capital. Laws 1883, ch. 147, § 46. Several special acts provide for the commutation of the special railroad taxes above mentioned. L. 1887, ch. 7. and ch. 241. The real estate of railroad companies, other than the realty within the limits of the right of way, is taxed for county and municipal purposes in the same manner as like property of individuals. But a building in the right of way is taxed. L. 1887, ch. 141. Any foreign insurance company must pay a license fee of \$50 and an annual tax of two and one-half per centum on all premium receipts. The penalty for default herein is the forfeiture of the right to do business in the state. L. 1885, ch. 423, amending ch. 117, p. 31, of the code. Telegraph and telephone companies are taxed annually as follows: Sixty cents per mile for the longest wire within the state, thirty cents for the next longest, and twenty cents for each and every other wire within the state. For failurs to make proper returns the tax is increased twenty-five per cent.

§ 942. FLORIDA: 1 Constitutional provisions.—"No tax shall be levied for the benefit of any chartered company of the state, nor for paying the interest on any bonds issued by such chartered companies, or by counties, or by corporations, for the above-mentioned purpose." Constitution of 1885, art. IX. § 7. The state shall not pledge its credit to, nor become a joint owner or stockholder in, any company or corporation. The legislature shall not authorize any public cornoration to become an owner in, or give its credit to, any such corporation. Id., \$ 10. The property of all corporations, unless held for charitable, etc., purposes, shall be taxed. Id., art. XVI, § 16.

The compensation for property taken for the use of a corporation shall be irrespective of any proposed improvement by the corporation. Id., § 29. Free passes to members of the legislature or to salaried state officers are prohibited. Id., § 31.

Miscellaneous corporations.—The legislature shall provide by general laws for forming corporations. Digest of 1881, ch. 34, § 1. Any number may incorporate for any lawful business. \$2. The period of succession, unless limited in the articles of incorporation, shall be twenty years. All corporations may "hold, buy, mortgage, or otherwise convey," the real and personal estate necessary for the purposes of the corporation, "not exceeding the amount limited in its articles of incorporation," and such other real and personal property as it may be necessary to take in order to secure the payment of debts due to the corporation. The stockholders may, by a vote cast in accordance with the by-laws, increase the number of directors or diminish the number to not less than three. In like manner the corporate name may be changed. A certificate of such change in the name of the corporation or in the number of directors must be filed with the secretary of state. § 3. Before beginning any business other than organization, the officers must file with the secretary of state a copy of the articles of incorporation, and, at the same time, a copy must be filed in the office of the county clerk. The corporate existence dates from the filing of the articles as herein provided. § 4. "The capital stock of all corporations shall be divided into shares of not less than \$10 each, and no company shall be deemed to be lawfully organized until ten per centum of the stock shall be subscribed and paid, and all payments of stock and of interest money shall be made in the lawful currency of the United States, unless it shall be stated in the articles and notice of incorporation that the capital stock or some therein designated portion thereof shall be payable in property at a valuation to be fixed by the corporators, which valuation, as well as a general description of said property, shall be contained in said articles and notice." L. 1889, ch. 3907 (No. 61). Any corporation thus organized may enter upon any public or private land which is most convenient and take therefrom any timber, earth, stone or other materials necessary for constructing or keeping in repair its works. Digest, ch. 34, § 5. Due compensation must be paid the owner. § 6. The capital stock may be increased to any amount by a vote of a majority of the stock present at the meeting. The date of the increase, the amount and subscriptions for the new stock shall be reported to the secretary of stats, and from the time of filing the same the increase shall be a part of the capital. § 8. Notice of corporate meetings shall be sent to each stockholder two weeks before the meeting or published in the nearest newspaper the same length of time in advance. § 10. If no provision is made in the by-laws for calling a meeting, and there are no authorized officers, or if such officers refuse to call a meeting and a legal meeting cannot be otherwise called, a justice of the peace of the county where the meeting

¹ The acts of the legislature down to and including the laws of 1891 are included in this synopsis, 1643

is to be held may issue a warrant upon the request of one-third of the members in interest authorizing any of said members to call a meeting. \$11. The member thus issuing the call shall preside in the absence of the proper officer. \$12. When all the members holding a majority of the stock shall be present at any meeting however called, and shall sign a written consent thereto on the records. the acts of the meeting shall be valid. § 13. The by-laws shall provide the amount of instalments and the manner of paying the same. § 14. The stock is personalty, and cannot be transferred until all previous calls are paid. § 15. Corporations may sue members for all dues, etc., in the same manner as they may sue other persons. \$ 16. Suits against corporations shall be begun only in the county where they have an office. § 17. If the directors declare any dividend when the company is insolvent or a dividend which would render it insolvent, they shall be jointly and severally liable for all debts then existing and for all thereafter contracted while they remain in office. § 19. Upon the dissolution of a corporation leaving debts unpaid, suits may be brought for unpaid debts against individual stockholders, who shall be liable to the extent of the par value of their stock, "the collection to be made from the property of each stockholder respectively." If any number of the stockholders shall not have sufficient property to satisfy the debt sought to be recovered, the deficiency shall be apportioned pro rata among the remaining stockholders, first deducting an amount proportioned to the stock held by the creditor bringing the suit. § 20. Administrators, etc., are not personally liable as stockholders. Id. Upon a voluntary dissolution, the president and directors shall be trustees of the corporation for the settlement of its affairs, and shall be jointly and severally liable to the creditors and stockholders for the corporate property. In the event of a dissolution for any other cause, a receiver may be appointed upon the application of any three or more creditors or stockholders. § 21. Any corporation may convey lands by deed. § 23. If a shareholder shall transfer a share to avoid taxation, he shall forfeit to the county in which he resides one-half the par value of the shares thus transferred. \$24. The treasurer or cashier must keep a list of the number of shares beld by each, to be exhibited to any stockholder upon written application. Failure herein subjects such officer to a fine of \$50. § 25. All corporations shall continue bodies corporate for a term of three years after dissolution for the sole purpose of settling their affairs. § 27. No body of persons shall be allowed to set up as a defense to an action against them as a corporation any want of legal organization, nor can such defense be set up by any person sued by a corporation on a contract. § 28. Any corporation organized and put into successful operation shall have "exclusive privileges for the purposes of its creation" for twenty years. But this provision must not operate to deprive future legislatures of their proper powers, § 30. Notice of the formation of all corporate bodies shall be published for four weeks in succession in the nearest newpaper. The notice shall contain (1) the corporate name and the place of business; (2) the general nature of the business; (3) "the amount of capital stock authorized and the time and conditions upon which it is to be paid in;" (4) the time of commencing and terminating the corporation; (5) by what officers the business is to be directed and the times at which they are to be elected; (6) the highest amount of liability to which the corporation can at any time subject itself. § 33. Any corporation may amend its articles by a vote of three-fourths of its stock at a stockholders' meeting held for the purpose after a three weeks' notice in the nearest newspaper. A copy of the amendment shall be filed with the secretary of state and with the county clerks of the counties in which the company does business. Publication shall be made as required by section 33. § 34. A copy of the by-laws, with the names of all officers, shall be posted in the principal office and published in the nearest newspaper. § 35. statement of the capital subscribed, the amount paid in and the indebtedness shall be published every six months in the nearest newspaper, and annually in a newspaper at the capital. § 36. The diversion of the funds to any other purposes

than those mentioned in the articles of incorporation, "or the payment of dividends leaving insufficient funds to meet outstanding liabilities," shall be criminal offenses. Failure to comply substantially with the provisions of any of the five preceding sections shall cause a forfeiture of all powers, "A court of equity shall, upon bill filed, proceed to close the corporation." § 38. The finaucial officer shall annually make a return to the comptroller, giving the name and residence of each shareholder, and the number of shares held by each; the whole amount of capital stock and the amount actually paid in: the real estate subject to taxation and the personal estate. A fine of one hundred to one thousand dollars is imposed for failure herein. § 42. "Each and every stockholder in any corporation organized under the general incorporation laws of this state shall be individually liable to the creditors of said corporation for so much as may remain unpaid upon his or her subscription, and no further; and all property, whether real or personal, of any stockholder in any corporation aforesaid shall be exempt from the debts and liabilities of such corporation contracted in its corporate capacity, except the stock or shares of said stockholder of or in said corporation to the extent mentioned aforesaid." All conflicting laws or parts of laws are by this act repealed. L. 1888, ch. 3729 (No. 49). The "shares of stock in any corporation incorporated by the laws of this state shall be subject to the levy of attachments and executions, and to sale under executions on judgments or decrees of any court in this state." Such levies may be made by a notice to the officer holding the transfer books. No transfer not entered on the books at the time of the levy will be valid. L. 1889, ch. 3917 (No. 71).

For provisions for the forfeiture of franchises, grants, rights, privileges, licenses and immunities granted to corporations by municipalities, and for the plan of procedure, see Laws 1891, p. 89.

Railroads.—Three or more may incorporate, L. 1889, ch. 3906 (No. 60), amending ch. 39, sec. 1, of the Dig. of 1881. Ninety days' notice must be given in three official newspapers. Id. The corporators must make and sign articles which shall state (1) the name of the company; (2) the termini of the road, and its length as near as practicable; (3) the name of each county into which the road will be made: (4) the amount of capital stock: (5) the number of shares, each of which shall be of not less than ten dollars in value; (6) the names and residences of the directors for the first year. Id. There shall be not less than three nor more than thirteen such directors. Each subscriber shall sign his name and residence, stating the number of shares he will take, and there shall be indorsed thereon an affidavit, made by at least three of the directors named, that the signatures are genuine, and that the articles are made and signed in good faith. The articles are then filed with the secretary of state, whereupon there shall be issued a certificate of incorporation, which shall constitute as a body corporate the subscribers, and all who shall become stockholders. Id. Any foreign corporation may construct any portion of its line within the state, and shall have all the powers and bear all the liabilities of a domestic company, upon filing a copy of its charter with the secretary of state. Id. A majority of the stock voted at the election, in person or by proxy, elects directors, who hold office for such time as the by-laws determine. In the election of directors each share has one vote. Vacancies in the board are filled as provided in the by-laws. Directors must be stockholders, holding in their own right, or as trustees or as personal representatives. If the directors are not elected at the time prescribed by law, they may be elected at any time afterward, after twenty days' notice. A majority of the directors, or the holders of a majority of the stock, may call such an election. But at any meeting of all the stockholders it shall be lawful to waive notice and elect directors. Digest, ch. 39, § 4. Subscriptions must be paid in such manner and in such instalments as the directors require. § 6. Stock shall be deemed personalty, and shall be transferable in the manner prescribed in the by-laws, but no share shall be transferred until previous calls have been fully paid. All prop-

erty of stockholders, except their stock, is exempt from all corporate liability. § 7. If the capital stock is found insufficient for the purposes of the company, it may be increased with the concurrence of two-thirds of all the stock at an annual meeting, or at a meeting called by the directors, who shall give twenty days' notice to each stockholder personally or by letter. The object of the increase and the amount thereof, must be entered on the records of the proceedings. § 8. The company is authorized to "purchase, hold and use all such real estate and other property as may be necessary for the construction and maintenance of its road or canal and the stations and other accommodations necessary to accomplish the objects of its incorporation, and to sell, lease or buy any land or real estate not necessary for its use." The road shall not exceed two hundred feet in width. \$ 10 (2d-4th). The company shall have the right to intersect, and connect with, any other road. § 10 (6th). The corporation may borrow money in such sums, and at such rates of interest, as the directors may agree upon, and may execute trust deeds and mortgages of any of its franchises or property. The company may make any provisions whatever in such deed of trust or mortgage for transferring any of its rights or property, and any purchaser at a sale by virtue of any trust deed or mortgage shall have all the rights enumerated in such instrument. Such purchasers may organize anew in the manner provided in this chapter for forming the original corporation. § 10 (10th). Any such trust deed or mortgage may be recorded with the secretary of state, and such record shall be notice to all persons of the lawful existence of such deed of trust or mortgage without the same being recorded elsewhere. § 11. In order to extend the road, or build a branch, a resolution of the board must be entered on the records of the company, and a certified copy of the record must be filed with the secretary of state. Such resolution must designate the proposed route of the new road. § 12. The directors may by a two-thirds vote change the route of a line in process of construction, or completed, in order to improve the line. § 21. "Any railroad or canal company in this state shall have the power, and authority is hereby grauted, to make and enter into contracts with any railroad or canal company which has constructed or shall hereafter construct any railroad or canal within this state, or another state, as will enable said companies to run their roads in connection with each other, and to merge their stock or to consolidate with any such company within or without this state, or to lease or purchase the stock and property of any other such company, and hold, use and occupy the same in such manner as they shall deem most beneficial to their interests." Any railroad company may "build, construct and run as a part of its corporate property" any number of steamboats or vessels to facilitate its business. § 27. The corporate name may be changed. \$ 37. All rolling-stock is declared to be fixtures, "and all such property and additional right of way, depot grounds and other real property acquired subsequently to any deed of trust or mortgage, which may be described as provided for therein, shall be subject to the same lien as is created by such trust deed or mortgage upon the property therein described, and to which the company had titles at the time of its execution." § 30. The directors may, annually or oftener, set aside fifty per cent. of the net earnings to pay off corporate debts. § 31. Any domestic railroad corporation may exercise its franchises in any other state, under the law of that state, and may have the benefit of any power or privilege granted by such state, applicable to its business and lawful purposes. § 38. It is declared a misdemeanor for any railroad official to give to any member of the legislature, or any salaried state officer, or for any such officer to receive, a free pass, or a ticket at a reduced rate. The penalty for violation of this law is a fine of from \$100 to \$1,000, or imprisonment for one year. L. 1887, ch. 3741 (No. 61). A railroad commission exists and has general supervision of all railroad business done in the state. L. 1889, ch. 3862 (No. 16), amending L. 1887, ch. 3746. All unjust discriminations of any kind, against individuals or competing lines, are unlawful. Id., § 4. The commission shall "make and fix reasonable and just rates of freight and pas-

senger tariffs;" shall make rules and regulations to prevent discrimination, and "shall have full power by rules and regulations to designate and fix the rates of freight and passenger transportation, to be allowed for louger and shorter distances, on the same or different railroads, and to fix what shall be the limit of longer and shorter distances." § 5. The commission shall require railroads to furnish schedules of rates. Such schedules shall be fairly and justly revised by the commission, and, after they are adopted by the commission, the schedules must be posted by the corporation at all stations. § 6. The company may, within ten days after the adoption of a schedule by the commission, protest to the commission against the enforcement of any provision of the schedule and unless such protest is made the schedule must stand as adopted. § 7. Any company or person affected by any tariff or regulation imposed by the commission may appeal to the courts. § 21. If any railroad company doing business in the state shall violate any of the rules of the commission regulating rates, etc., and if, after notice of such violation is given to the agent of the company, full recompense is not given to the injured party within ten days, or if, after such notice, the company neglects to comply with the rates or rules as prescribed, such company shall pay a penalty of not less than \$100 nor more than \$5,000; and any officer or agent who wilfully violates any of the regulations of the commission shall be guilty of a misdemeanor, and shall be fined not more than \$500, or imprisoned not more than six months, or shall be subject to both penalties. § 11. In case of such violation, damages may also be recovered by the injured party. § 12. A full and complete annual report of the business and condition of the corporation must be sent to the commission. The report must be verified by the affidavit of the principal officers; and an officer who shall swear falsely to any matter in the report shall be punished by a fine of not less than \$500, or by imprisonment for one year. or by both. § 17. The commission is authorized to investigate all books and papers of any railroad company. L. 1887, ch. 3746, § 15. All agreements between railroad companies doing business in the state as to tariffs must be submitted to the commission for approval; also all arrangements whatever as to the division of any earnings by competing lines, so far as such arrangements affect any rules of the commission regarding reasonable rates. Id., § 16. The consolidation of parallel or competing lines is forbidden except upon special authority of the railroad commission. L. 1887, ch. 3745 (No. 65).

Taxation. - Shares of stock are deemed personalty and are taxed. L. 1887, ch. 3681 [No. 1], § 3. The real estate of corporations "liable to taxation shall be assessed in the city, county or town in which the same shall be in the same manner as real estate of individuals," and may be returned and sold in the same manner. § 6. The holder or owner of stock in a corporation which is taxed on its capital "shall not be taxed as an individual for such stock." § 8. An annual state tax of twenty-five cents on each share of stock issued is levied on banking corporations. Digest 1881, ch. 35, § 19. The license tax for banks ranges from \$20 for a capital stock of \$25,000 or less, to \$100 for a capital stock of \$100,000. L. 1887. ch. 3681 [No. 1], § 9 (11th), Am'd L. 1889, ch. 3847 [No. 1], § 1 (11th). press company must pay to the state annually five hundred dollars before it shall do business within the state. Id. The manager of any railroad wholly or partly within the state shall return to the comptroller the total length of such railroad; the total length and value of the part within the state, and the total length and value of the part within any county, city or incorporated town in the state, "as of the first day of January." Also a return shall be made of the number and value of all rolling stock and appurtenances. The comptroller then apportions the value of the rolling stock, etc., "to each mile of main track," and "the comptroller shall notify the assessor of each county through which such railroad runs of the number of miles of track and the value thereof, and the proportionate value of personal property taxable in their respective counties, and he shall also apportionate the same among the cities and incorporated towns into which said road runs; and

upon the value thus ascertained and apportioned, taxes shall be assessed the same as upon the property of individuals." L. 1887, ch. 3681, § 44. Every telegraph line, with all its property, rights and franchises, shall be returned and assessed in the same way. Id. For non-payment of the taxes thus assessed the corporate property is liable to execution and sale in the manner provided. \$ 45. The same officers shall make a return to the assessors of each county in which the corporation owns real property of the value of the corporate realty in that county. § 46. § 943, GEORGIA: 1 Constitutional provisions.—No law shall be passed making any irrevocable grants of special privileges or immunities. Constitution of 1877, art. I, § 3. Grants of special privileges shall not be revoked, except in such a manner as to work no injustice. Id. The legislature "shall have no power to grant corporate powers and privileges to private companies, except banking, insurance, railroad, canal, navigation, express and telegraph companies, . . . but it shall prescribe by law the manner in which such powers shall be exercised by the courts." Art. III. § 7. The legislature shall not authorize the construction of any street passenger railway within any incorporated town or city without the consent of the local authorities. Id. Domestic and foreign life insurance companies must deposit \$100.000, as a guaranty fund, before doing business. Id., § 8. Power is given to the legislature to prevent unjust discriminations to railroads and regulate rates. Art. IV, § 2. The exercise of the right of eminent domain ehall never be abridged or so construed as to prevent the legislature from taking corporate property and franchises the same as the property of individuals. Id. The legislature shall have no power "to authorize any corporation to buy shares or stock in any other corporation in this state, or elsewhere, or to make any contract or agreement whatever with any such corporation which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses, or to encourage monopoly, and all such contracts and agreements shall be illegal and void." Id. No railroad company shall give any rebate, or bonus in the nature thereof, directly or indirectly, or do any act intended to deceive the public as to the real rates charged. Id. "The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the state shall be a party." Art. VII, § 2. The credit of the state shall not be pledged or loaned to any individual or corporation, and the state shall not become a joint stockholder or owner in any corporation. Id., § 5. The legislature shall not authorize any county or political division of the state to become a stockholder in, or appropriate money for, or loan its credit to, any corporation (excepting educational, etc.). Id., § 6. The legislature shall not, "by vote, resolution or order. grant any donation or gratuity in favor of any person, corporation or association." Id., § 16.

Miscellaneous corporations.—Private corporations may be formed hereunder for any purpose, except banking and insurance. The persons desiring a charter shall file with the clerk of the superior court where they desire to transact business a declaration specifying (1) the object of the incorporation; (2) the corporate name; (3) "the amount of capital to be employed by them actually paid in;" (4) the place of business; (5) the period of corporate existence (not exceeding twenty years). The declaration shall be published for four successive weeks in the paper nearest the proposed place of business before the court shall grant the order of incorporation. Code of 1882, § 1676, Am'd Laws 1890-91, p. 70. If the court is satisfied with the application, it shall order the incorporation. The corporators shall have the privilege of removal for a like period of twenty years, according to the provisions above set forth. Id. (2). No such corporation shall exercise any corporate privileges until ten per cent of the capital stock is paid in, and the effect of the charter shall cease in two years, unless the corporators, within that time, begin to exercise the charter powers. In case of such failure, "the

 $^{^{\}rm 1}$ The acts of the legislature down to and including the laws of 1892 are included in this synopsis.

stockholders shall be bound, in their private capacity, to any creditor of said corporation, for the amount of stock subscribed for by him, until the said subscription is fully paid up, or until the stockholder shall have paid, out of his private property, debts of the said corporation to an amount equal to his unpaid subscription." Id. (3). The clerk shall receive the usual fees for like services. Id. (4). Such corporations shall make no contract or purchase, and hold no property, except such as is necessary for the legitimate corporate business, or for securing corporate debts. Id. (5). The powers conferred in this section shall extend to all amendments, whether the original charter was granted by the legislature or the court. Id. (6). Foreign corporations are recognized in the courts only by comity. "and so long as the same comity is extended in their courts to corporations created by this state." § 1675. Foreign corporations are forbidden to hold land to the extent of five thousand acres or more, unless they incorporate in Georgia. \$ 1675 (a). "Stocks representing shares in an incorporated company holding lands, or a franchise in or over lands, are personalty, except mining and manufacturing companies, whose principal investments are in realty and machinery attached thereto, in which case the stock shall be deemed realty; but the stock representing shares in manufacturing companies may be transferred from one person to another, for any purpose whatsoever, by the same means as are, or may be, allowed by law for the transfer of personal property." Laws 1882-3, p. 56. Special inducements are offered to encourage the construction of telegraph lines. Laws 1889, pp. 141, 175.

Railroads.—All corporate powers and privileges to railroads shall be issued and granted by the secretary of state, subject to the provisions of this act and of the constitution. But if he is disqualified by reason of interest the comptrollergeneral shall take his place. Laws 1892, No. 68, § 1. Ten or more may incorporate, but before receiving a certificate of incorporation they must file a petition to the secretary of state, stating (1) the names and residences of the corporators; (2) the name of the corporation; (3) the length, termini and general direction of the road, with the names of the principal places along the line: (4) the amount of the capital stock; (5) the number of years the corporation is to continue; (6) if the capital is to consist of common and preferred stock, the amount of each class, and the rights of the latter over the former; (7) the location of principal office; (8) that they jutend in good faith to receive subscriptions to the stock, and go forward with the construction and operation of the road; (9) that they have given a four weeks' notice of their intention to apply for a charter, by the publication of the said petition in a paper in which the sheriff's notices are published, in each county to be traversed by the road. There shall be annexed to the petition an affidavit. made by three of the corporators, that the names subscribed are the correct signatures of the persons named therein, and that the facts stated in the petition are true. The petition shall then be filed with the secretary of state, who shall keep a record of the same open to public inspection. § 2. The secretary of state shall then issue to the company a certificate (the form of which is prescribed in this section), authorizing the petitioners and all who may become stockholders to be a corporation. But, before issuing such certificate, the sum of \$100 shall be paid to the state treasurer. § 3. When the certificate has been issued the persons named therein, in case the whole stock has not been subscribed, may open subscription books, "after giving such notice as they may deem expedient." The capital stock shall be divided into shares of \$100 each. § 4. "When the amount of the capital stock has been subscribed," a majority of the corporators may call a meeting for organization, which meeting shall be held in a town or city where the principal office is located. Every subscribing stockholder shall have notice of the meeting. At such meeting the holders of a majority of the stock subscribed shall constitute a quorum. From five to fifteen directors shall be elected by a plurality vote, each share having one vote, in person or by proxy. The election shall be governed by such by-laws as the company may prescribe, the directors thus chosen to be continued in office until their successors are elected. Directors must be stockholders in their own names, and a majority of them must be citizens and residents of the state. Notice of such organization meeting shall be given by a notice to each stockholder in writing, stating the purpose of the meeting, delivered or posted ten days before the time of meeting. The directors shall select from their number a president. Vacancies in the board shall be filled as the by-laws prescribe. § 5. Construction shall not be commenced until all the capital stock specified in the petition has been subscribed. The directors may require the subscriptions to be paid in such instalments as they deem proper, "and may receive cash or property. real or personal, at the agreed value thereof in the payment of such instalments." § 6. Stock is personal property, transferable as the by-laws direct; but no share shall be transferable until all previous calls thereon shall have been fully paid in. "All property, whether real or personal, of any stockholder in this state shall be exempt from the debts or liabilities of said company, except to the amount of the unpaid subscription of said stockholder to the capital stock of said corporation." In no case shall the road be bonded or the capital increased except by a vote of "two-thirds of the capital stock of said corporation represented at an annual or special meeting of stockholders called for that purpose," after each stockholder has been notified as above (§ 5), and, in addition, a notice has been published in a local paper, where the principal office is located, once a week for four weeks, The notice shall fully state the purpose of the meeting. A majority of the stock must be represented at such meeting or its action will be void. § 7. All powers and privileges shall cease at the expiration of two years from the date of the certificate of incorporation, if at that time there be not equipped and in operation at least fifteen miles of the road, or the whole of the road if less than fifteen miles in length. The corporate existence shall not continue for more than one hundred and one years "unless the same be continued by the laws of force at the expiration of said one hundred and one years." § 8. Voluntary grants of real estate or other property may be received to aid in the construction, maintenance and accommodation of the road, but the real estate must be held and used for the purposes of the grapt only. The corporation shall have power (1) "to acquire, purchase, hold and use all such real estate and other property "as may be necessary for the construction, maintenance and accommodation of the road, "and to condemn, lease or buy any land necessary for its use:" (2) to lay out its road, not exceeding in width two hundred feet, and for cuttings, embankments and material to take as much land as may be necessary; (3) to construct the road across, along or upon any stream or water-course, street, highway or canal, provided the consent of the municipal or county authorities is secured for the use of any street or road; (4) to "cross, intersect, join or unite" its railroads with any other railroad, with the necessary switches, etc., and to run over any part of the right of way of another railroad, necessary to reach its freight depot; (5) "to borrow such sums of money, at such rates of interest and upon such terms" as such company shall authorize or agree upon, "and may execute one or more trust deeds or mortgages, or both, if the occason may require, on said railroad in process of construction, or after the same has been constructed, for the amount or amounts borrowed, or owing by such company, as its board of directors shall deem expedient;" and the company may make such provisions in the trust deed or mortgage for transferring the railroad track, and all the railroad frauchises, privileges and property, which may then belong to the company, "or shall thereafter belong to it as security, for any bonds, debts or sums of money as may be secured by such trust deeds or mortgages as they shall think proper," and all such deeds or mortgages shall be recorded in each county traversed. All such rights respecting bonds, mortgages, etc., shall be exercised under the limitations and in the manner prescribed by the law of the state. § 9. "In case of sale any railroad heretofore incorporated by virtue of any general or special law, or which may hereafter be incorporated by virtue of this act, or any part thereof constructed or in course of construction,

or by virtue of any trust deed, or any foreclosure of any mortgage thereon, or any judicial sale," the party or parties acquiring titles under such sales, and their associates, successors or assigns, shall acquire and exercise the same rights, powers, etc., in and by the trust deed enumerated and conveyed, as belonged to the company making the deed or mortgage, or contracting the debt, so far as the same relate or pertain to that part of the road described and conveyed. purchaser or purchasers, their associates, successors or assigns, may proceed to organize anew by filing a petition to the secretary of state, with a request therein to be substituted for the original petitioners and stockholders," with all their powers, etc., and may then proceed anew by electing directors as provided in this act, "and may distribute and dispose of stocks, and may conduct the business generally as provided in this act." But no debt, trust deeds, mortgages or other liens shall be created by the first company, or by the purchasers, except on the terms and conditions prescribed in section 7 of this act. § 9. [See also, Laws 1882-3, p. 116, and Code of 1882, \$\\$ 1689 (V.), 1689 (W.). Also as to issuance of bonds by such companies, \$ 1689 (X.)]. Extensions and branches may be built, after the board have, by resolution, designated the route, and advertised the same in all the counties to be traversed, in the manner provided in section 2, and have filed a certified copy of the resolutions and advertisement with the secretary of state. The company shall pay the state treasurer a fee of \$25 for each extension or branch. The construction shall begin within one year from the filing of the resolution, and if the company shall fail to construct twenty miles of such branch or extension within two years, or to complete the same, if less than twenty miles in length, the powers and privileges to do so shall cease. All provisions of this act relative to the "insurance" [issuance] of stocks and bonds on the road authorized under the original petition shall be applicable to, and control, the "insurance" [issuance] of stocks and bond on the extensions. § 10. For method of procedure for condemning right of way see § 11. The original route may be changed by a two-thirds stock vote; but no change shall be made in any city or town, after the road is constructed, without the consent of the municipal authorities. § 12. The company "shall have the power and authority is hereby granted to make and enter into contracts with any railroad company which has constructed or shall hereafter construct any railroad within this state or any other state as will enable said company to run their railroads in connection with each other and merge their stocks, or to consolidate with any such company within or without this state, or to lease or purchase the stock and property of any other such company and hold, use and occupy the same in such manner as they may deem most beneficial to their interest." But this provision shall not authorize the purchase of a competing line, or any contract with such line which would lessen competition "in this state." Any such companies may construct and run, as part of their corporate property, any number of steamboats or vessels necessary to facilitate their business operations. § 13. The custodian of the "books, records. papers or other property" of the company shall keep the same in his possession during husiness hours, open to the inspection of any officer, or committee of the stockholders, to whom transcripts of the records shall be furnished on application. § 13. Such railroad company may exercise all of its rights, franchises and privileges in any other state or territory, subject to the laws thereof, and may accept therefrom any additional power or privilege applicable to its business operations. If the termini are to be the same as those of any other road already constructed, or about to be constructed, the new route shall be at least ten miles from the line of the company whose route is already selected. But this limitation shall not apply to any point within ten miles of either terminus. § 15. The corporation shall have full power "to sell, lease, assign or transfer its stock, property and franchises to, or to consolidate the same with," any other railroad company formed under the laws of this or any other state, whose road, within or without the state, shall form therewith a continuous connecting line, upon such terms as may be agreed upon; and, conversely, may "purchase, lease, consolidate with, absorb, and merge into itself the stock, property and franchises" of any other such railroad company, upon such terms as may be agreed upon. Such consolidated company shall have power "to issue its bonds and stock as provided for in this act in such amounts as they may deem necessary for the purpose of paying or exchanging the same for or retiring any bonds or stocks theretofore issued by either of said companies or corporations so merged, purchased or consolidated, or for any other purpose, and to the amount authorized by the laws of the state under which either of said companies or corporations so consolidated was organized, and to secure the same, in case of honds, by mortgages or trust deeds upon its real or personal property, franchises, rights and privileges, whether within or without the state;" provided, that no contract shall be made under the provisions of this act which shall tend to "defeat or lessen competition in this state or to encourage monopoly." § 18. This act shall not apply to suburban or street railroads. § 16.

In damage suits all railroad companies shall be sued in the county where the cause of action originated: "and also on all contracts made or to be performed in the county where suit is brought." Any judgment rendered in any other county is void. But if the cause of action arises in a county where the company has no agent, the suit may be brought in the county of residence of the company. Laws 1892, No. 80. None of the rights, powers and franchises herein granted shall be assigned or transferred till at least ten miles of said railroad has been constructed and equipped. But if the railroad contemplated is not over ten miles in length such assignment or transfer shall not be made before oue-half the road is built and equipped. Laws 1890-91, No. 752, § 13. Whenever the part within the state of a consolidated line extending into another state has been sold by judicial sale, the purchaser or purchasers, if they have not formed a company, may reconvey to the original company, which shall then enjoy its former privileges. upon filing with the secretary of state a record of the sale and reconveyance. Code of 1882, § 1689 (gg). As to the power of such companies (purchasers of judicial sale) to establish a sinking fund, to issue or increase the capital stock, to amend the articles, to issue preferred stock, to determine the power of bondholders to vote, etc., see Laws 1882, No. 1. Respecting an increase of capital stock by any corporation, see Code, § 1689 (h). A principal office must be kept within the state. \$ 1689 (s). All railroads must file copies of their charters with amendments, names of officers, etc., with the secretary of state, within twenty days after notification by the governor, under penalty of \$500 for each twenty days' delay. Laws 1882-3, p. 148. These returns must be published with the session acts. Laws 1884-5, p. 132. There is a uniform law for the amendment of special charters. By amendment corporations organized under special charters may have the same rights and powers as corporations formed under the general law. Laws 1890-91, p. 154. The conditional sale of railroad equipment or rolling stock, and the leasing of the same, are provided for. Laws 1889, p. 188. Unjust discriminations against other railroads in the state are prohibited under a penalty of \$1.000. Laws 1890-91, p. 155. A railroad commission exists, whose duty it is to fix reasonable rates, prevent discriminations of any and every kind, prevent extortion, supervise all contracts and agreements as to tariffs, compel the delivery and carriage of freight and passengers by connecting lines, regulate charges for long and short hauls, prevent false billing, settle claims for overcharges, facilitate railroad service, etc. §§ 719 (a)-719 (t), Am'd Laws 1888, p. 37; Laws 1889, pp. 130-138; Laws 1890, p. 15; Laws 1890-91, p. 155. Respecting street railroads, see Laws 1890-91, pp. 167-170.

General provisions.—"The power to create corporations in this state rests in the general assembly and the courts, by whom all charters must be granted." § 1674. Corporations have continuous succession for the period limited in their charters, "notwithstanding the death of their members." If a charter granted

by the legislature does not specify the time of existence, such period shall be thirty years. \$ 1678. All corporations have the common right "to receive donations by gift or will, to purchase and hold such property, real or personal, as is necessary to the purpose of their organization, and to do all such acts as are necessary for the legitimate execution of this purpose." § 1679. The state always has the right to withdraw a franchise unless that right is negatived in the charter. § 1682. A charter is forfeited by the death of all the members without provisions for a rescission. §§ 1684, 1687. Misuser or non-user may forfeit the charter. § 1685. Shares of stock may be sold under an attachment. § 2626, Am'd Laws 1890-91, p. 73. It is declared a misdemeanor for an officer or agent to use or borrow the corporate funds for himself, without the permission of a majority of the directors, or of a committee appointed by the board authorized to act. The penalty is a fine of \$1,000 or imprisonment for six months, in the discretion of the court. Laws 1887, p. 94; Code, § 4310. "When a stockholder in any bank or other corporation is individually liable under the charter and shall transfer his stock, he shall be exempt from such liability, unless he receives written notice from a creditor, within six months of such transfer, of his intention to hold him liable; provided, he shall, within ten days thereafter, cause notice of such transfer to be published once a week for four weeks in the newspaper which publishes the sheriff's sales of the county in which such corporation shall keep its principal office." Laws 1892, No. 38.

Taxation. - Manufacturing and other corporations, other than railroads and other quasi-public corporations, shall return their property at its true market value to the county tax receiver, to be taxed for state and county purposes as other property is taxed. Certain additional questions are prescribed for manufacturers to answer. Laws 1890-91, p. 35, § 7. All companies, including railroad companies, doing an express or telegraph business and charging the public therefor, shall pay two and a half per centum on their gross receipts. The chief officer of such corporation shall make a quarterly return. The tax shall be paid at the time of making the return. Id., § 8. Telephone companies pay annually one dollar for each box. Id. All insurance companies pay one per centum of all premium receipts. Id., § 5. Railroad companies shall make returns to the comptroller-general, "as now provided by law for the taxation of property, of the gross receipts or net income of such railroads, and shall pay to the comptroller-general the tax to which such property or gross receipts or net income may be subject according to the provisions of this act, and the laws now in force relating to the tax on railroads." Id., \S 11. (The above are provisions of the general law levying taxes for 1891 and 1892.) Railroad companies shall make annual returns to the comptroller-general for taxation in each county through which the road runs showing (1) the aggregate value of the whole property: (2) the value of the real estate and track-bed of said company; (3) the value of the rolling stock and all other personal property; (4) the value of the company's property in each county traversed. Laws 1889, p. 29, § 1. All property of such companies shall be subject to taxation "in each and every county through which the same passes to the same extent and in the same manner that all other property is taxed in the manner hereafter set out." Id., § 2. The comptroller-general shall assess the corporate property in each county as follows: (1) "Upon the property located in each county upon the basis of the value given by the returns required by section first of this act;" (2) the amount of the tax on rolling stock is as follows: "As the value of the property located in the particular county is to the value of the whole property, real and personal, of the said company, such shall be [the] amount of rolling stock and other personal property, to be distributed for taxing purposes to each county. These two, the value of the property located in the county and the share of the rolling stock and personal property thus ascertained, and apportioned to each of such counties, shall be the amount to be taxed to the extent of the assessment in each county." Id., § 3. If

any railroad is subject to taxation on its net income and not as hereinbefore provided, the company shall report to the comptroller-general the entire length of its road, and the number of miles in each county. The income shall then be taxed by each county in the proportion that the road in such county bears to the whole length of the road. Such income shall be taxed at the rate fixed by the charter. Id., \S 4.

The above provisions for county taxation are made applicable to municipalities. and the returns above noticed must also include a statement of the property iu any municipal corporation. Laws 1890-91, p. 152. Counties are forbidden to exempt from taxation any manufacturing company, or any property of any kind, Laws 1889, p. 35. All railroads, including all kinds of street railroads, shall annually return to the comptroller-general "the value of the property of their respective companies, without deducting their indebtedness:" and such property shall be taxed, as nearly as may be, "as other property of the people of the state." The returns shall be made under the regulations provided in the case of other corporations which make returns to the comptroller-general. The said railroads shall be taxable for city purposes also, and any law making railroads taxable by counties shall apply to street railroads of every kind. Laws 1889, p. 36. Any railroad company failing to pay its taxes by October 1st shall forfeit \$500. Laws 1889, p. 130. Railroad property not used for the corporate purposes is taxed by the counties or municipalities where it lies, like the property of individuals. Laws 1882-3, p. 41. Companies operating railroads extending into other states shall be taxed as to the rolling stock and other personal property appurtenant thereto not permanently located in any of the states as follows: "Said railroad companies shall be liable to pay taxes on so much of the whole value of said rolling stock and said personal property as is proportional to the length of the said railroad in this state, without regard to the location of the head office of such railroad companies." Laws 1882-3, p. 42. All the real and personal estate of persons and corporations is taxable, unless specially exempted. Code, § 799. All bonds of foreign corporations are taxable. § 801. "All lands held under warrants and certificates, but not granted, are liable to taxation; and all moneyed or stock corporations, unless exempted or differently provided for in their charters, are liable to taxation upon such capital stock as other property." § 802. Non-resident owners are not taxed at a greater rate than resident owners. § 803. All corporations other than banks, for which no different method is provided, "pay the same rate per cent, upon the whole amount of their capital stock paid in as is levied on other capital, together with the same rate per cent, upon their net annual profits." Loan and building associations are exempt. § 816. Railroad companies by whose charters a higher tax is forbidden, and such as do not pay a dividend exceeding six per cent, "shall pay only one-half of one per cent, upon the net annual income of each until they pay a dividend of eight per cent. per annum, in which shall be included the reserved fund, at which time they are to be taxed as other capital." § 818. All foreign railroad companies having a terminus in the state shall pay taxes upon their property in the state, "except their right of way and track, including bridges;" if they have no terminus in the state they shall "pay a tax upon their net earnings as railroad companies of this state, in the proportion that the length of the road in this state bears to the whole length of said road." But if the tax on the net earnings shall amount to a greater sum than the tax on their property, such companies shall pay the tax on their earnings. § 819. Mining companies make their returns in the county where the mine is worked. § 828.

§ 944. IDAHO: ¹ Constitutional provisions.—The legislature shall not pass special or local laws creating any corporation; licensing or chartering ferries, bridges or roads; or exempting property from taxation. Constitution of 1889,

 $^{^1}$ The acts of the legislature down to and including the laws of 1893 are included in this synopsis. 1654

art. III. § 19. The credit of the state shall not be given or loaned to, or in aid of, any individual or corporation; nor shall the state, directly or indirectly, become a stockholder in any corneration. Id., art. VIII. \$ 2. No municipality shall lend or pledge its credit or faith, directly or indirectly, to or in aid of any individual or corporation or become responsible for any debt, contract or liability of any person or corporation, within or without the state. Id., § 4. Corporations shall be provided for by general law, but no corporations shall be specially chartered. or specially authorized to amend or extend its charter provisions. Id., art. XI. § 2. The legislature shall provide that every stockholder may cumulate his votes, in person or by proxy, Id., § 4. The property of corporations may always be taken for public use, the same as that of individuals. Id., § 8. "No corporation shall issue stock or bonds, except for labor done, services performed, or money or property actually received, and all fictitious increase of stock or indebtedness shall be void. The stock of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding a majority of the stock, first obtained at a meeting held after at least thirty days' notice given in pursuance of law." Id., § 9. The legislature shall pass no law for the benefit of any corporation, retroactive in its operation, or which imposes on any county or other municipal subdivision of the state a new liability in respect to transactions or considerations already past. Id., § 12. If any domestic corporation shall consolidate, by sale or otherwise, with any foreign corporation, the same shall not thereby become a foreign corporation, but the state shall retain jurisdiction over that part of the property within the limits of the state, as if such consolidation had not taken place. Id., § 14. The legislature shall not pass any law permitting the leasing or alieuation of any franchise so as to release or relieve the frauchise or corporate property from any liability of either party to the transaction, "contracted or incurred in the operation, use or enjoyment of such franchise, or any of its privileges." Id., § 15. The term "corporation" shall include all joint-stock companies and associatious exercising any powers not held by individuals or partnerships. Id., § 16. "Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable in any amount over or above the amount of stock owned by him." Id., § 17. Trusts and combinations "for the purpose of fixing the price or regulating the production of any article of commerce or of produce of the soil, or of consumption by the people," are prohibited, and this provision shall be enforced by the legislature. Id., § 18. No municipal subdivision of the state shall, by vote of its citizens or otherwise, ever become a stockholder in any corporation, or raise money for, or make donation or loan its credit to, or in aid of, any corporation; provided, that cities and towns may contract indebtedness for schools, water. sanitary and illuminating purposes, owning their just proportion of the property thus created, and receiving its just proportion of the income therefrom. Id., art. XII, § 4. The legislature shall have power to regulate and control by law the transportation charges of railroads and other common carriers from one point to another in the state. Any corporation organized for the purpose "shall have the right to construct and operate a railroad between any designated points within the state, and to connect within or at the state line with railroads of other states and territories. Every railroad shall have the right with its road to intersect. connect with or cross any other railroad under such regulations as may be prescribed by law and upon making due compensation." Id., art. XI, § 5. No transportation company shall make any discrimination between persons or places within the state. Id., § 6. No foreign corporation shall do any business in the state without a known place of business and an agent within the state; nor be allowed any greater rights or privileges than a domestic company of like character. Id., § 10. No street or other railroad shall be built in any city or town without the consent of the local authorities. Id., § 11. The legislature shall provide by general law for the organization and operation of telegraph and telephone

companies. Id., § 13. The legislature shall provide that every person or corporation shall pay a tax in proportion to the property owned. The legislature may impose a license tax upon persons and corporations; and may exempt from taxation a limited amount of improvements upon land. Id., art. VII, § 2. All taxes shall be uniform, and be levied under general laws. But exemptions which may seem necessary and just may be made. Duplicate taxation of property for the same purpose is prohibited. Id., § 5. The power to tax corporations shall never be relinquished or suspended. Their property shall be taxed for state, municipal and other purposes, unless exempted by this constitution (no exemptions are specified). Id., § 8. All laws of the territory of Idaho are continued in force until they are repealed or expire by their own limitation. Id., art. XXI, § 2.

Miscellaneous corporations .- Five or more may incorporate for any purpose "for which individuals may lawfully associate themselves." A majority of such persons must be bona fide residents of the state. R. S. 1887. title IV. §§ 2576, 2577. Articles must be prepared setting forth (1) the corporate name; (2) the purpose of incorporation: (3) the principal place of business: (4 the period of existence, not exceeding fifty years; (5) the number of directors, and the names of those appointed for the first year; provided, the number may be increased by a "majority of the stockholders" to not more than eleven, who shall be "members of the corporation;" (6) the amount of the capital stock and the number of shares; (7) the amount actually subscribed, and by whom. § 2579. The articles of a railroad, wagon-road or telegraph company shall also state (1) the kind of road or telegraph intended; (2) the termini and all the intermediate branches; (3) the estimated length of the line. § 2580. The articles must be subscribed and acknowledged by five or more persons, a majority of whom shall be resident freeholders. § 2581. The corporations specified in section 2580 must, before filing the articles, have received bona fide subscriptions to the amount of \$1,000 per mile for railroads; \$100 per mile for telegraph lines; and \$300 per mile for wagon roads, § 2582. Before the secretary of state shall issue a certificate of the filing of the articles, an affidavit of the president, secretary and treasurer named in the articles, that the required amount of capital stock has actually been subscribed, must be filed in his office (it is not clear whether this refers to corporations in general, or to those named in section 2580). § 2583. Upon the filing of the articles with the recorder of the county in which the principal place of business is situated, and a copy thereof with the secretary of state, "and the affidavit named in the last section, where such affidavit is required," the secretary of state or the county recorder must issue a certificate stating those facts, which completes the incorporation. § 2584. No corporation formed under the provisions of this title shall purchase, hold or locate property in any county of the state without filing a certified copy of its articles with the recorder of that county, within sixty days after the purchase or location is made. § 2587. Within one month after filing the articles, the corporation must, with the assent of a majority of the stock at a special meeting, adopt a code of by-laws. If no meeting is called the written assent of the holders of two-thirds of the stock must be secured. § 2588. The bylaws may, where no other provision is specially made, provide, among other things, for the time and manner of calling and conducting meetings; the number of stockholders necessary for a quorum; the mode of voting by proxy; the time of the annual election of directors, and the manner of giving notice (but there must be a published notice of at least two weeks); the duties and compensation of officers; the manner of election, and the terms of office of all officers other than directors; and suitable penalties for violations of the by-laws, not exceeding \$100 for any one offense. § 2590. All by-laws must be certified and copied in a book at the principal office, which book shall be open to public inspection. No by-law shall take effect until so copied. Repeals and amendments and new bylaws must be noted in the book. Such amendments, etc., may be made by a twothirds stock vote, or the power to make such charges may, by a like vote, be

delegated to the directors. § 2591. There shall be from five to eleven directors, who shall be stockholders, and a majority of them citizens and bona fide actual residents of the state. The amount of stock which directors must hold shall be fixed by the by-laws. \$ 2592. At the first meeting at which by-law are adopted, or at such subsequent meeting as may be there designated, the first board of directors shall be elected. § 2593. At all elections voting must be by ballot, and each share has one vote: § 2594. The directors must not make dividends, except from the surplus profits; nor must they divide, withdraw or pay to stockholders any part of the capital stock, or reduce or increase the capital stock except as herein provided; and for a violation hereof they shall be jointly and severally liable to the corporation or its creditors for the amount withdrawn. \$ 2596. Directors can be removed by a two-thirds vote. § 2597. Officers of a corporation who wilfully make a false entry or report are jointly and severally liable for any damage resulting therefrom. § 2603. Meetings of stockholders or directors must be held at "its office or principal place of business." § 2606. The principal place of business may be changed with the written consent of two-thirds of the stock. after a three weeks' published notice. § 2608. "Each stockholder of a corporation is individually and personally liable for its debts and liabilities to the full amount unpaid upon the par or face value of the stock or shares owned by him." Any creditor may bring action against any of the stockholders jointly or severally. But this act must not be construed to render a stockholder liable for debts, assessments or calls to an amount exceeding the balance unpaid upon bis stock, "or the difference between the amount that has been actually paid upon his stock and the par or face value thereof," except when so liable on the ground of fraud, etc., or for misconduct as officer, agent or stockholder. "No corporation shall issue any stock as paid up, in whole or in part, or credit any amount, assessment or call as paid upon any of its stock, except for money, property, labor or services," actually received or paid upon the corporate debts. The liability of stockholders is determined by the amount of stock owned at the time the debt or liability was incurred by the corporation; and such liability is not released by any subsequent transfer of stock. When such liability does not arise upon contract, it shall be deemed to be incurred when judgment is obtained against the corporation. The term stockholder, as used in this section, includes every equitable owner of stock, though the same appears on the books in the name of another; and also to every person who has advanced the instalments or purchase-money, or subscribed for stock, in the name of a minor, so long as the latter remains a minor; and to every guardian or trustee who voluntarily invests any trust funds in the stock. When stock is pledged, the pledgor, and not the pledgee, is thus personally liable. This liability extends to foreign corporatious. § 2609, Am'd Laws 1891, p. 172. Certificates may be issued before full payment, under such instructions and for such purposes as the by-laws may provide. § 2610. The by-laws may provide that no transfer shall be made on the books until all obligations of the holder to the corporation are discharged. § 2611. After one-fourth of the stock has been subscribed, the directors may, for business purposes or paying debts, levy assessments on the subscribed stock. § 2614. No one assessment shall exceed ten per cent. of the capital named in the articles; excepting that, if the whole capital has not been paid up, the assessment may, if necessary, be for the whole amount unpaid, and that, unless the articles otherwise provide, railroad assessments may be ten per centum per month. § 2615. Generally, no assessment shall be made while any portion of a previous one remains unpaid. § 2616. A corporation may purchase its own stock when sold at auction to pay assessments, but cannot vote upon it, § 2627. The succession of a corporation may be perpetual, unless a period is limited (but see section 2579, supra). § 2633. The company must organize and begin business within one year. § 2636. The capital may be increased or diminished (but not to an amount less than the corporate indebtedness or the estimated cost of any works which it may be the object or purpose of the corporation to construct), upon a two-thirds stock vote, or the written consent of three-fourths of the stock. § 2637. The corporation may acquire real estate necessary for its business transactions, or the construction of works; or such as may be specially authorized. \$ 2638. Records and transfer books, open to the inspection of directors. stockholders and creditors, must be kept. \$\$ 2039, 2640. To satisfy any judgment against a corporation authorized to receive tolls, its franchise, etc., may be sold. §\$ 2642-2647. Upon dissolution, the directors become trustees. \$ 2648. Every corporation may extend its period of existence to a period not exceeding fifty years from the time of its formation (see section 2633, supra). § 2649. No corporation, except railroad corporations, any of whose members are aliens or have not declared their intentions of becoming citizens of the United States, shall have any interest in any real estate in Idaho, except mining lands: provided, that this act shall not prevent the enforcement of a lien or judgment, or the collection of a debt, by purchase or otherwise. But land thus acquired must be disposed of within five years. Laws 1891, p. 108. There are some special provisions for certain corporations, such as ferry, telegraph, canal, insurance and homestead companies. \$ 2694 et seq. As to guaranty companies, see Laws 1893, p. 86. Any person, "citizen or alien, natural or artificial," except Chinese, may own any land for mining purposes. Laws 1891, p. 119.

Foreign corporations must, within three months after commencing business in the state, designate an agent in the county where the principal office is located, and shall then have all the privileges of domestic corporations, including the right of eminent domain. R. S., § 2653.

Railroad corporations are subject to the following additional provisions: They may borrow, under the regulations and restrictions of the directors, such sums as may be necessary for "contracting and completing" their road, and may issue and dispose of bonds or promissory notes therefor, in denominations of not less than \$500, at a rate of interest not exceeding ten per centum, and may also issue such bonds or notes "in payment of any debts or contracts for constructing and completing their road, with its equipments and all else relative thereto;" and to secure the payment thereof, they may mortgage their property and franchise. The amount of bonds or notes shall not exceed the capital stock. R. S., § 2664. The directors shall establish a sinking fund for the redemption of such bonds, and may confer upon the holders the right to convert the principal owing on the same into stock at any time within eight years from their date. § 2665. They may purchase, or take by voluntary grant, any real estate to aid in the construction or maintenance of the road. § 2666. They also have power to intersect any other railroad, at any point, and to fix the rates of toll, within the limits prescribed by law, and subject to the will of the legislature. \$ 2666. The construction of the road must be commenced within two years after filing the articles, and five miles must be completed each year. § 2669. No street can be used in a city or town, unless the right is granted by a two-thirds vote of the municipal authorities. "Two or more railroad corporations may consolidate their capital stock, debts, property, assets and franchises in such manner as may be agreed upon by their respective boards of directors," after the written consent of the holders of three-fourths of the stock in each corporation. § 2673. Any railroad corporation. domestic or foreign, "may take, purchase, hold, sell and dispose of, or guaranty the payment of, the bonds and securities of any other railroad corporation whose line of railroad is continuous of, or by lease, traffic contract, or otherwise connected with, its own line." Laws 1891, p. 17. Any domestic or foreign company, authorized to do business in the state, may extend its road, or build branches from any point on its line, or on a convecting line. Laws 1891, p. 124, § 1. Any such corporation may consolidate with any other railroad corporation, within or without the state, when such other corporation does not own any competing line. upon such terms as may be agreed upon. Articles stating the terms must be approved by the holders of a majority of the stock. Any domestic or foreign corporation, whose line is wholly or partly within the state, may lease or purchase and operate the whole or any part of the railroad of "any other railroad corporation," together with all appurtenances thereof; provided, that the capital stock of the consolidated company shall not exceed the sum of the capital of the contracting companies, at its par value, and that no bonds or other evidences of debt shall be issued as a consideration for, or in connection with, such consolidation. § 2. Any foreign company whose line may extend to the state boundary may continue the same to any point in the state, and build branches. § 3.

Taxation.— The capital stock of a corporation is exempt where the property of the corporation has been assessed. R. S., § 1401, Am'd Laws 1893, p. 150, and § 1440. The property of every corporation must be assessed in the county where it is situated. § 1442. Every tax is a lien upon all the property, real or personal, of the delinquent. §§ 1412–1414. The state board has exclusive power to assess and value all "railroad track" and "rolling stock." The former includes the right of way and all superstructures and improvements thereon, and the latter includes all movable property used in connection with the road. All railroad property not included in these two terms shall be assessed by the county assessors like all other property. Officers must furnish statements to the state board, which shall apportion the values of the "railroad track" and "rolling stock" to the counties traversed, in the proportion which the main line bears to the part within the respective counties. Laws 1893, p. 72.

§ 945. ILLINOIS: 1 Constitutional provisions.—No law shall be passed making "any irrevocable grant of special privileges or immunities." Constitution of 1870, art. II, § 14. Special laws granting the right to lay down railroad tracks, or amending existing charters for such purpose, or granting to any corporation or individual any special or exclusive privilege, immunity or franchise whatever, are prohibited. Art. IV, § 22. Taxation shall be such that "every person and corporation shall pay a tax in proportion to the value of his, her or its property." But the legislature shall have power to tax "persons or corporations owning or using franchises and privileges in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates." Art. IX, § 1. County authorities shall never assess taxes which, in the aggregate, shall exceed seven and a half mills on the dollar, except to pay debts existing at the adoption of the consolidation, unless authorized by a vote of the people of the county. Id., § 8. No corporation (except charitable, etc.) shall be created by special law, or its charter changed or amended, but general laws shall provide for all incorporation. Art. XI, § 1. The legislature shall provide by law that in all elections of directors, every stockholder may vote, in person or proxy, for the number of shares owned by him, for as many persons as there are directors to be elected, or to cumulate said shares, "and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them on the same principle among as many candidates as he shall think fit." Elections shall not be held in any other manner. Id., § 3. No legislative act shall grant the right to construct a street railway without the consent of the local authorities. Id., § 4. Stockholders in banks are liable to corporate creditors to the amount of stock held by them for liabilities "accruing while he or she remains such stockholder." Id. § 6. Every railroad corporation organized or doing business in the state shall have a public office in the state. when transfers shall be made, and in which shall be kept, for public inspection. stock books, giving also the assets and liabilities and the residence of officers, and the directors shall make annual reports. Id., § 9. Rolling stock, and all movable property, shall be personalty and be liable to execution and sale. Id., § 10. The consolidation of parallel or competing lines is forbidden, and no consolidation shall take place except on public notice of sixty days. A majority of the direct-

The acts of the legislature down to and including the laws of 1893 are included in this synopsis.

ors shall be citizens and residents of the state. Id., § 11. "No railroad corporation shall issue any stock or bonds, except for money, labor or property actually received, and applied to the purposes for which such corporation was created; and all stock dividends and other fictitious increase of the capital stock or indebtedness of any such corporation shall be void." There shall be no increase of the capital stock without sixty days' notice. Id., § 13. Corporate property may be taken under the right of eminent domain, like the property of individuals. Id., § 14. The legislature shall pass laws to correct abuses and prevent unjust discrimination and extortion in rates, and to enforce such laws may even cause a forfeiture of the corporate property and franchises. Id., § 15. No municipality shall ever subscribe to the capital stock of any railroad or private corporation, or make donation to, or loan its credit in aid of, such corporation. Art. XIV.

Miscellaneous corporations. -- Corporations may be formed hereunder for any lawful purpose, except banking, insurance, real-estate brokerage, "the operation of railroads" and the business of loaning money. Horse and dummy railroad companies, and corporations formed for the construction of railroad bridges. are not railroad corporations within the meaning of this section. Revised Statutes of 1891, ch. 32, § 1. There shall be three to seven incorporators. They shall make and duly acknowledge a statement, setting forth (1) the corporate name and the object of the incorporation; (2) the capital stock and the number of shares: (3) the location of the principal office; (4) the duration of the corporation (not exceeding ninety-nine years). The statement shall be filed with the secretary of state, who shall thereupon issue to the corporation a license as commissioners to open subscription books at such times and places as they desire. But no such organization shall be effected unless at the time of filing such statement the incorporators shall pay to the secretary of state \$25, to be in lieu of all other fees for issuing incorporation articles. Id., \$ 2, Am'd Laws 1893, p. 88. "As soon as may be after the capital stock shall be fully subscribed," the commissioners shall convene a meeting of the subscribers to elect directors and transact other business. Ten days' notice of meeting shall be given by mail. The language of the constitution (supra, art. XI) is affirmed in regard to voting. Directors may, by a resolution of the stockholders, be elected in three classes, the term of office of the first class to expire on the day of the next annual election, the second one year thereafter, etc. Elections after such classification shall be for a term of three years, the number elected being equal to the number whose terms expire on the year of such election. Id., § 3. The commissioners mentioned above must make a full report of the proceedings and of the election of directors, a copy of which report, sworn to by a majority of the commissioners, shall be filed with the secretary of state, who shall thereupon issue a certificate of complete organization. The company may then proceed to business. Unless the company organizes and begins business within two years from the date of their license, the license shall be deemed revoked, and all proceedings thereunder void. Id., § 4. Such corporation may "own, possess and enjoy" the real estate necessary for their business and may "sell and dispose of the same" when not needed. They may borrow money at legal rates of interest "and pledge their property, both real and personal, to recover the payment thereof;" and may have all the powers necessary to carry into effect all the objects for which they were formed. But "all real estate so acquired in satisfaction of any liability or indebtedness, unless the same may be necessary and suitable for the business of such corporation, shall be offered at public auction at least once every year," after four weeks' notice in a county paper; "and said real estate shall be sold whenever the price offered for it is not less than the claim of such corporation, including all interest, costs and other expenses." If the land is not thus sold in five years the state's attorney shall proceed to sell the same, and the proceeds, after deducting all expenses, shall be paid to the corporation. Id., § 5. The number of directors shall not be increased or diminished, or their term of office changed, without the consent of the

owners of a majority of the stock. The officers shall consist of a president, secretary and treasurer, and such other officers and agents as the directors may determine upon. The directors may adopt by-laws. They may require bonds from officers, with such conditions and sureties as they may deem proper, and may remove any officer when they think the interest of the corporation requires it. officers shall hold office for the period provided by the by-laws. Id., § 6. shares of stock shall not be less than \$10, nor more than \$100 each, and shall be personalty, and be transferable in the manner provided by the by-laws. Subscriptions shall be made payable to the corporation, in such instalments and at such times as the directors may determine. The corporation may maintain an action to recover instalments, and the directors may provide other penalties for a failure to pay such instalments, "but no penalty working a forfeiture of stock, or of the amounts paid thereon, shall be declared as against any estate before distribution shall have been made, or against any stockholder before demand shall have been made" and notice given. Id., § 7. "Every assignment or transfer of stocks, on which there remains any portion unpaid, shall be recorded in the office of the recorder of deeds of the county within which the principal office is located. and each stockholder shall be liable for the debts of the corporation to the extent of the amount that may be unpaid upon the stock held by him." No assignor of stock shall be released from any such indebtedness by reason of any assignment of his stock, "but shall remain liable therefor jointly with the assignee until the said stock be fully paid." Stockholders may be proceeded against individually to the extent of the balance unpaid on their stock, "whether called in or not, as in cases of garnishment." Every assignee or transferee of stock shall be liable to the company for the amount unpaid thereon, "to the extent and in the same manner as if he had been the original subscriber." The legislature shall have power to prescribe regulations and provisions which shall be binding on any corporation formed under this act. Id., § 9. Any corporations whose powers have expired shall continue bodies corporate for two years for the sole purpose of settling their affairs. § 10. No dissolution shall affect any remedy against the corporation, its officers or stockholders, for any obligation incurred before dissolution. Id., § 12. The directors shall cause to be kept correct books of account, open for the inspection of stockholders. Id., § 13. Failure to elect directors on the day fixed by the bylaws, or for which notice was given, shall not dissolve the corporation, "but such election may be held at any time after proper notice." Id., § 14. Assessments shall be levied pro rata. Id., § 15. "If the indebtedness of any stock corporation shall exceed the amount of its capital stock, the directors and officers of such corporation, assenting thereto, shall be personally and individually liable for such excess to the creditors of such corporation." Id., \$ 16. An annual statement giving a description of all realty acquired in securing any debt or liability, with the time of acquiring the same, shall be recorded with the county recorder and filed with the secretary of state. Id., § 17. Any person or persons being, or pretending to be, an officer or agent of any stock corporation, or pretended stock corporation, assuming to exercise corporate powers, or using the name of such corporation, "without complying with the provisions of this act, before all stock named in the articles of incorporation shall be subscribed in good faith," shall be "jointly and severally liable for all debts and liabilities made by them and contracted in the name of such corporation or pretended corporation." Id., § 18. For declaring and paying any dividend while the corporation is insolvent, or which would render it insolvent or diminish the capital stock, all officers or agents assenting thereto "shall be jointly and severally liable for all the debts of such corporation then existing, and for all that shall thereafter be contracted, while they shall respectively continue in office." Id., § 19. The by-laws shall provide for calling directors' meetings, but when all the directors shall be present at a meeting, however called, or shall sign a written consent thereto on the record of the

meeting, the acts of such meeting shall be valid: provided, that the action of any meeting held beyond the limits of the state shall not be valid unless the meeting was authorized, or its acts ratified, by a two-thirds vote of the directors at a regular meeting. Id., § 20. All the officers who knowingly sign a false statement or public notice "shall be jointly and separately liable for all damages arising therefrom." Id., \$21. Two-thirds of the paid-up stock may call a stockholders' meeting. Id., § 22. Pledgees, executors, etc., are not personally liable as stockholders. Id., § 23. Executors, etc., and pledgors may vote. Id., § 24. Courts of equity may appoint a receiver of an insolvent corporation when the stockholders' liabilities are not sufficient to pay the corporate debts. Id., § 25. Foreign corporations shall have no other or greater powers than domestic companies, and shall not hold real estate except as provided in this act in case of domestic companies. Id., § 26. Whenever the board of directors may desire to change the corporate name, the corporate business, the place of business, increase or decrease the capital or the number of directors, or to consolidate with another corporation, existing or to be organized, they may call a special stockholders' meeting, at which a two-thirds stock-vote, in person or by proxy, is necessary for authorizing any such change. The number of directors shall not be less than five nor more than eleven. No removal shall be made from a municipality which, or any inhabitant of which, shall have in any manner contributed any valuable thing to induce a location of the company in such municipality. Consolidation under this act shall only take place between corporations engaged in the same general business, in the same vicinity; and no more than two existing corporations shall consolidate. Notice of the meeting shall be given by mail to each stockholder thirty days (in case of railroads, sixty days) before the meeting, and published for three weeks (in case of railroads, six weeks). Id., §§ 50-52, 57. If the vote is in favor of the proposition, a certificate thereof must be filed with the county recorder and the secretary of state, whereupon the change voted will be accomplished. Corporatious (other than manufacturing) availing themselves of this act shall be subject to all the general laws of the state regulating corporations of like character. Id., § 53. A notice of any such change shall be published in a county paper. Id., § 54. No such change shall affect pending suits. Id., § 56. Respecting the matter of changing from an even to an odd number of directors, see Id., §§ 59-64. Any consolidated company shall be liable for all the debts and liabilities of each consolidating company. Id., § 65. Foreign corporations, except railroad companies, may appoint an agent with power of attorney to perform all acts lawful for the corporation to do in the state. Any scrawl or seal written by such agent shall be valid. Id., § 66. Any foreign corporation "authorized by its charter to invest or loan money may invest or loan money in this state," under the same rights and conditions as individual citizens of the state; and if a sale is made "nnder any judgment, decree or power in a mortgage or deed," such corporation may purchase, in its corporate name, the property offered for sale, and become vested with the title like a natural person. But such land must be offered for sale and disposed of in accordance with the provisions of section 5, supra. Id., § 83.

For provisions regarding elevated ways, see Id., §§ 84-88.

Manufacturing and mining corporations may own and hold stock and securities in railroads connecting their plants with each other, or with other railroads or harbors, but shall not hold stock in more than one railroad connecting the same points. Laws 1893, p. 165.

Trusts and combinations on the part of any corporation or individual whatever, made with intent to limit or fix the price or lessen the production and sales of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article produced or sold in the state, are declared to be conspiracies to defraud. No corporation shall issue or own any trust certificates. For any violation of this act, corporations shall be fined \$500 to \$2,000 for the first offense, \$2,000 to \$5,000 for the second offense, \$5,000 to \$10,000 for

the third offense, and \$15,000 for each subsequent offense. Officers shall be fined from \$200 to \$1,000, or be imprisoned for not more than one year, or be both fined and imprisoned. Any contract in violation of any provision of this act shall be void, and any purchaser of any article from any person or corporation doing business contrary to any provision of this act shall not be liable for the cost of the same. Officers must annually make affidavit that their corporations are not violating any provision of this act. Laws 1891, p. 206, Am'd Laws 1893, p. 90. In another statute the term "trust" is defined, and it is declared that any corporation which is a party to a trust shall, if a domestic company, forfeit its charter, or if a foreign corporation its right to do business in the state; and that any person who may be a party to a trust shall be fined from \$2,000 to \$5,000. The provisions of the act do not apply to agricultural products or live-stock in the hands of the producer or raiser. Laws 1893, p. 182.

Railroads. - Five or more may incorporate. Any such corporation may purchase and operate any railroad "sold or transferred under order or powers of sale or decree of, or sale under, foreclosure of mortgage or deed of trust," and companies heretofore organized shall possess all the powers and privileges given by this act. Ch. 114. § 1. Articles must be signed and recorded with the county recorder of each county through which the road will run, and the secretary, setting forth (1) the corporate name; (2) the termini of the road; (3) the location of the principal place of business; (4) the time of the commencement and the period of existence of the corporation; (5) the capital stock and the number and amount of the shares; (6) the names and residences of the corporators; (7) the names of the first board and in what officers the management of affairs shall be vested. Id., §§ 2, 3. The corporation "may declare the interests of its stockholders transferable," establish by-laws and make all regulations for the management of its affairs. Id., § 4. The incorporation shall not be for more than fifty years, but renewals for that or a shorter period may be made upon a vote of three-fourths of the stock. Id., § 5. A public office must be kept in the state, where transfers shall be made, and in which shall be kept for public inspection books giving full information respecting capital stock, stockholders, assets and liabilities, etc. Id., § 7. Directors shall be stockholders, and be elected annually within the state. The number of directors, the manner of their election, and the mode of filling vacancies shall be specified by the by-laws, and shall only be changed at the annual meetings. "The first board of directors shall classify themselves by lot in such manner that there shall be as nearly as practicable three directors in each class." The first class shall go out of office in one year, the second in two years, and so forth, "and all vacancies occurring by reason of expiration of time shall be filled by election for a term of years equal to the number of classes," Id., § 8. Special meetings may be called by the directors, or by one-fourth of the stock, by giving thirty days published notice in each county traversed. Two-thirds of the stock must be represented at such meeting, or business cannot be done. The meeting may adjourn from day to day, for not more than three days, waiting for such a majority. Id., § 9. Full reports are required from the president and directors at the annual meeting, or at any meeting if a majority of those present in person or by proxy demand it. Id., § 10. At all general meetings a majority in value of the stockholders may fix the rates of interest to be paid for loans "for the construction of such railway and its appendages," and the amount of such loans. Id. At any special meeting two-thirds of the stock may remove any president or other officer and fill the vacancies. Id. All books and papers shall be open to the inspection of stockholders at all reasonable hours. Id. If directors are not elected on the day fixed by the bylaws, the corporation shall not for that reason be dissolved, if an election is held within ninety days thereafter. But not less than a majority vote of the stock shall elect the directors, and a majority of the board shall be citizens of the state. Id., § 11. See, also, Laws 1893, p. 164. The directors shall elect a president from their own number. Id., § 12. Subscriptions may be called in in such manner, and

in such instalments, as the directors deem best. Id., \$ 13. Stock is personalty and transferable in the manner prescribed by the by-laws. But no shares shall be transferable until all previous calls thereon are paid. No corporation may use its funds in the purchase of its own stock, or that of any other corporation, or loan any of its funds to any officer, or permit them to use the same for any other than the legitimate purposes of the corporation: provided, that any railroad company in the state may own and hold the stock and securities of a connecting road in another state, such ownership or holding to comprise at least two-thirds of the stock of such corporation. But the company or companies so purchasing stock shall take and pay for all shares so purchased, and the terms of purchase of all shares shall be the same for all stockholders. Id., § 14. The capital may be increased to an amount sufficient for the construction and operation of the road upon a two-thirds vote of the stock. Id., § 15. Executors, etc., and pledgees are not personally hable as stockholders. Id., § 16. Each stockholder "shall be held individually liable to the creditors of such corporation to an amount not exceeding the amount unpaid on the stock held by him, for any and all debts aud liabilities of such corporation, until the whole amount of the capital stock of such corporation so held by him shall have been paid." Id., § 17. The corporation may take from any land adjacent any material necessary for construction purposes. except wood and fuel, paying proper damages therefor. Id., § 19. Voluntary grapts in aid of construction may be taken. A street cannot be crossed or taken without the consent of the local authorities, but a highway may be condemned if the usefulness of the road is preserved by opening the same elsewhere. Canals and turnpikes may be thus taken. The corporation has the right "to cross, intersect, join and unite its railways with any other railway before constructed at any point on its route, and upon the ground of such other railway company, with the necessary turnouts," etc. And proper connections shall be made with the new railway. The corporation has power, upon a vote of two-thirds of the stock, "to borrow such sums of money as may be necessary for completing, finishing, improving or operating any such railway, and to issue and dispose of its honds for any amount so borrowed, and to mortgage its corporate property and franchises to recover the payment of any debt contracted by such corporation for the purposes aforesaid:" and the directors shall be empowered "to confer on any holder of any bond for money so borrowed, as aforesaid, the right to convert the principal due or owing thereon into stock of such corporation, at any time not exceeding ten years after the date of such bond, under such regulations as may be provided in the by-laws of such corporation." Id., § 20. Rolling stock and all other movable property shall be personalty, and be liable to execution and sale. Id., § 21. Article XI, section 13, of the constitution is here re-enacted. Id., § 22. Competing lines shall not consolidate. Id., § 23. The directors shall make an annual report to the state auditor. Id., § 24. The legislature may enact laws to prevent abuses and discriminations, and fix maximum rates. Id., § 25. Cumulative voting is provided for in the language of article XI, section 3, of the constitution. Id., § 26. The work of construction must be begun within two years from the filing of the articles, twenty-five per cent of the capital spent in five years, and the road put in operation in ten years, or the corporate existence and powers shall cease. Id., § 28. All railroad companies "shall have the power to make such contracts and arrangements with each other, and with railroad corporations of other states, for leasing or running their roads, or any part thereof; and also to contract for, and hold in fee-simple or otherwise, lands or buildings in this or other states for depot purposes; and also to purchase and hold such personal property as shall be necessary and convenient for carrying into effect the object of this act." Id., § 34. Companies may connect with each other, and with the lines of other states, "on such terms as shall be mutually agreed upon by the companies interested in such connection." Id., § 35. Companies owning a bridge shall allow other railroads to use it by proper connectious. Id., § 36. Domestic

companies operating connecting roads in other states under a lease for not less than twenty years may purchase all the interest of the lessors in such road, on terms to be agreed upon between the parties. Id., § 37. Any company may own and use water-craft for connecting purposes. Id., § 39. For relocation, see Id., 88 41b. 41c. 41d. Unjust discrimination and extortion are punished by a fine of \$1,000 to \$5,000 for the first offense, \$5,000 to \$10,000 for the second offense, \$10,000 to \$20,000 for the third offense, and \$25,000 for each subsequent offense. Id., \$\$ 110-113. A full report, for which a form is printed in this section, shall be made annually to the commissioners. Id., § 158. The commissioners shall examine the condition of the roads of the state. Id., § 163. They may examine all books and papers at all times during business hours. Id., § 165. Every corporation or officer refusing to report, or obstructing the commission's duties in any way, shall forfeit from \$100 to \$5,000 for each offense, and a like sum for each tendays' neglect to report. Id., \$ 168. Conditional sales of rolling stock by manufacturers to railroad companies shall be in writing. Id., §§ 172-177. For further provisions for the conditional sale of equipment or rolling stock, see Laws 1893. p. 166. Whenever a consolidated road, situated partly in this state, and partly in one or more other states, has been sold pursuant to a decree of court, "and the same has been purchased as an entirety, and is now, or hereafter may be, held in the name or as the property of two or more corporations incorporated respectively under the laws of two or more of the states in which said railroad is situated, it shall be lawful for the corporation so created in this state to consolidate its property, franchises and capital stock with the property, franchises and capital stock of the corporation or corporations of such other state or states in which the remainder of such railroad is situated, and upon such terms as may be agreed upon between the directors, and approved by the stockholders owning not less than two-thirds in amount of the capital stock of such corporations." This does not authorize parallel lines to consolidate. A majority of the directors of the consolidated corporation shall be citizens and residents of the state. Id., § 178. The consolidation takes effect upon the filing of the articles of consolidation with the secretary of state, and certified copies with the recorders of the counties traversed. Id., \$ 179. Such companies must keep an office within the state, at which shall. be kept a complete list of stockholders, and the amount held by each. Id., § 180. Any domestic company or companies operating any connecting line or lineswithin or without the state may purchase such line or lines, and hold in feesimple or otherwise all the property and franchises connected therewith, on such terms as may be agreed upon between the directors and approved by two-thirds of the stock of the respective companies. But a competing line may not be thus purchased. Id., § 180a. Any domestic company "shall have power from time to time to borrow such sums of money as may be necessary for the funding of its indebtedness, paying for constructing, completing, improving or maintaining its lines of railroad, and to issue bonds therefor, and to mortgage its corporate property, rights, powers, privileges and franchises, including the right to be a corporation, to secure the payment of any debt contracted for such purposes;" and to increase its capital stock for such purposes, not exceeding in amount the cost of the roads and works owned or constructed and equipped by it, "in such manner and in accordance with and subject to such regulations, preferences, privileges and conditions as the company at any general or special meeting of its shareholders, held at the time such creation of new shares may be authorized, shall think fit," But no stock or bonds shall be issued except for money, labor or property actually received and applied to the purposes for which the corporation was created. The Illinois Central Railroad Company cannot take advantage of this section for the subversion of its charter obligations. Id., § 180b. For failure to keep an office and transfer stock books within the state, railroad companies shall forfeit \$4,000 annually. Id., §§ 181, 182. As to railroad and improvement aid bonds see ch. 113. "When any railroad company, formed by a consolidation of a company

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or companies of this state with a company or companies of another state or states, shall make a further consolidation with a company or companies of another state or states, owning a continuous and connected but not competing line, the constituent companies shall have power to fix by the agreement for such consolidation the terms and conditions upon which the same shall be made, which terms and conditions may include the payment and retirement of the preferred stock of either or both of the constituent companies, if they have such. And in case the new company shall issue preferred stock, the par value of the shares thereof may be fixed by the agreement of consolidation or by the resolution for the issue thereof without regard to the par value of the shares of the common stock of such company." Laws 1893, p. 166.

Miscellaneous provisions.— A transferee of certificates of stock is protected as against a subsequent attachment or execution levied by a creditor of the transferrer, even though the transfer is not recorded on the corporate books. L. 1883, p. 110; Gen. St. 1885, pp. 1410, 1411. But dividends declared in the meantime go to such creditor of the transferrer.

Taxation. - Bonds and stocks, shares of stock, and the capital stock of all corporations formed under the laws of the state are taxed. Ch. 120. \$ 1. The capital stock of corporations created under the laws of the state (except those required to be assessed by local assessors) shall be so valued by the state board as to determine the fair cash value of such capital stock, including franchises, "over and above the assessed value of the tangible property of such company or association." But if the tangible property or capital stock is assessed, shares of stock are not assessed or taxed. Companies organized for purely manufacturing purposes, or for mining and sale of coal, or printing or publishing newspapers, or for improving or breeding stock, pay only a local tax the same as individuals. Id., § 3. Am'd Laws 1893. p. 172. Capital stock and franchises, except as may be otherwise provided, shall be listed and taxed in the county, town or district where the principal place of business is located. Id., § 7. Corporations, except banks and manufacturing companies, must, in addition to the other property required by this act to be listed. return to the assessor a sworn statement of the amount of capital stock authorized, the amount paid up, and the market value of the shares; the total indebtedness, except for current expenses (not including the amount paid for the purchase or improvement of property); and the assessed value of all tangible property. Id., § 32, Am'd Laws 1893, p. 172. Every person owning or using a franchise granted by the state must list the same as personal property. Id., § 34. The right of way of a railroad, including buildings thereon, side or second track and turnouts, shall be realty and be denominated 'railroad track." The value of the "railroad track" shall be listed and taxed in the several counties, towns, villages, districts, etc., "in the proportion that the length of the main track in such county, town, village, district or city bears to the whole length of the road in this state," except the value of second or side track, turnouts, etc., and station houses, machine shops or other buildings, which shall be taxed in the county, town, etc., where located. Id., \$\$ 40-43. The movable property of railroads shall be denominated "rolling stock," and be personal property for the purpose of taxation. "Rolling stock" shall be listed and taxed in the several counties, towns, etc., "in the proportion that the length of the main track used or operated in such county, town, village, district or city bears to the whole length of the road used or operated by such person, company or corporation, whether owned or leased by him or them in whole or in part." Id., §§ 44, 45. All other railroad property, real or personal, is taxed where it lies, like the property of individuals. Id., §§ 46, 47. The schedules of all the abovenamed property shall be returned to the various county clerks on the 1st of May. Id., § 41. A full report of all the above-named railroad property shall be sent to the state auditor at the time of listing said property. The report shall include the statement required by section 2, supra. Id., § 48. For failure to make returns to the county clerk or to the auditor, the company shall forfeit from \$1,000 to \$10,000.

Id., § 49. The auditor reports to the state board, who assess the "railroad track," "rolling stock" and capital stock of the corporation, and apportion the same among the counties, towns, etc. Id., §§ 109, 110. Article IX, section 8, of the constitution is here re-enacted. Id., § 121.

§ 946. INDIANA: 1 Constitutional provisions.—"The general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." Constitution of 1851, art. I, § 23. Stockholders in banks are personally liable to corporate creditors for the par value of their stock in addition to the subscription. Art. II, 8 6. The credit of the state shall never be given or loaned in aid of any person, association or corporation; nor shall the state become a stockholder in any corporation. Art. XI. § 12. Corporations other than banking shall only be formed under general laws. Id., § 13. Dues from corporations other than banking "shall be secured by such individual liability of the corporators, or other means, as may be prescribed by law." Id., § 14. "No county shall subscribe for stock in any incorporated company, unless the same be paid for at the time of such subscription; nor shall any county loan its credit to any incorporated company, nor borrow money for the purpose of taking stock in any such company." Art. X, § 6.

Miscellaneous corporations.—Three or more may incorporate for manufacturing, mining, mechanical and a few other specified purposes. They shall make and acknowledge a certificate stating (1) the corporate name; (2) the object; (3) the amount of capital stock; (4) the term of existence (not to exceed fifty years); (5) the number of directors and the names of those chosen for the first year: (6) the names of the town and county in which the business will be done. The certificate must be filed with the county recorder, and a copy be filed with the secretary of state. Rev. Stat. 1888, \$ 3851. Real estate necessary for the corporate business may be held and conveyed. § 3852. Manufacturing companies may, in addition, take and hold "such real estate as may be mortgaged to such companies to secure any debt, or may be taken in payment of any indebtedness previously contracted, or may be purchased on judgments, decrees, or mortgages obtained or made for such debts." § 3853. Any of the above-mentioned companies shall elect from three to eleven directors, who shall be stockholders and residents of the United States. The directors shall elect a president. § 3854. Stockholders may vote by proxy and each share has one vote. § 3855. amount of capital stock shall be fixed by the company, but the company may increase its capital stock and extend the period of its existence (not to exceed fifty years from its first organization) by a vote of the stockholders at any annual meeting, and such capital stock shall be divided into shares of not more than \$100 each. A copy of the record and proceedings of such meeting must be filed with the secretary of state within thirty days. § 3857, Am'd Supp. 1892, § 7514. The stock is personalty, and when fully paid in shall be transferable in the manner fixed by the by-laws. The company shall not use its funds for the purchase of stock in any other corporation, except with the written consent of all its stockholders and of all the stockholders of the company whose stock is sought to be purchased. § 3858, Am'd Id., § 7515. The capital stock shall be paid in within eighteen months from the incorporation, in such instalments as the by-laws direct. § 3859. Within thirty days after the payment of the last instalment of the original capital, or of any increase thereof, a certificate of the fact must be filed with the clerk of the circuit court. § 3861. The capital stock may be reduced by a vote of the stockholders at a special meeting. A certified copy of the vote shall be filed with the clerk of the circuit court, and a duplicate with the secretary of state; and in default thereof the directors shall be "jointly and severally liable for debts contracted after the said thirty days and before the record of such

¹ The acts of the legislature down to and including the laws of 1893 are included in this synopsis. 1667

vote." § 3862. A verified annual report shall be published in the nearest newspaper. § 3863. Any officers who fail to furnish any required report or public notice, or who falsify the same, "shall be jointly and severally liable for all damages resulting from such failure on their part while they are stockholders in such company." § 3865. If a dividend is declared while the company is insolvent, or which would make it insolvent, all the directors who do not file their objection thereto with the secretary of the company and the county clerk shall be jointly and severally liable for all corporate debts due at the time of such dividend. They are liable in like manner for any debts contracted after any violation of the law which will cause insolvency. §\$ 3867, 3868. Stockholders of manufacturing and mining companies "shall only be liable for the amount of stock subscribed by them respectively:" provided, that such stockholders shall be "individually liable for all debts due and owing laborers, servants, apprentices and employees for services rendered such corporation." § 3869. Manufacturing companies may hold stock in water-power companies. § 3872 (a). A mining or manufacturing company may condemn land for a canal or race. §§ 3873-3878. The place of business may be changed by a resolution of the directors. § 3878 (b). The number of directors may be decreased or increased to not more than thirteen by a resolution of the board. § 3878 (d). The corporate objects may be enlarged if all the stockholders make a certificate in writing showing the consent of the stockholders. § 3870. Subscribers to stock in gas, electric light or water companies may bind themselves by a writing at the time of subscription to grant to a board of trustees the power of holding and voting the capital stock. Supp. 1892, \$ 7509. The word "mining," as above used, shall include boring, etc., and operating wells for petroleum and natural gas. Supp. 1892, § 7537. For further regulations respecting such companies, see Id., \$\\$ 7538-7577. For telegraph companies, see Rev. Stat., §§ 4162-4180; also §§ 4018, 4019. Respecting telephone companies, see §§ 4181-4192, with amendment, § 7600. Voluntary associations may be formed for dealing in real estate. § 3502.

Railroads.—Fifteen or more subscribers for stock may incorporate. "Whenever stock to the amount of at least fifty thousand dollars, or one thousand dollars for each and every mile of the proposed road, shall have been subscribed, the subscribers to such stock shall elect directors for such company from their own number, and shall severally subscribe articles of association," setting forth (1) the corporate name; (2) the amount of capital stock (which may be increased from time to time, to meet the requirements of construction and operation), and the number of shares; (3) the number of directors and their names; (4) the termini and the names of the counties to be traversed; (5) the length of the road, as near as may be. Each subscriber shall give his residence and state the number of shares he will take. § 3885. A copy of the articles shall be filed with the secretary of state, which completes the incorporation. §§ 3886, 3888. The directors shall open subscription books at such time and place as a majority may decide upon, due notice to be given. § 3887. The board may, by a vote, from time to time, increase the capital stock to any amount necessary for railroad purposes not exceeding \$15,000 per mile of the road. § 3890. A certificate thereof must be filed with the secretary of state. § 3931. The stockholders may, by a majority vote at any meeting, determine that there shall be from five to thirteen directors. § 3891. There shall be an annual election of directors in one of the counties through which the road runs. § 3892. The directors or one-fourth of the stock may call special stockholders' meetings. If a majority shall not appear, the meeting shall be adjourned from day to day for three days only. Directors must be stockholders, qualified to vote at the meeting at which they are elected. Each share owned for ten days next preceding the election may be voted, in person or by proxy. §§ 3892, 3893. A majority of those present at any stockholders' meeting may demand a statement of the condition of affairs. At any general meeting the president, or any director, may be removed and another elected in his place,

provided notice has been given of the intended removal. \$ 3894. The directors may call in subscriptions in such instalments as they deem proper, provided that payments shall not be required except in equal instalments of not more than ten per cent. a month. § 3896. The directors may make by-laws. § 3897. The stock is personalty, transferable according to the by-laws. But no shares shall be transferable until all previous calls thereon have been paid, or the shares have been forfeited. § 3898. When the capital stock is all paid in the president and directors shall file a certificate of the fact with the secretary of state. § 3899. Lands necessary for railroad purposes may be received "by purchase or by subscription of stock," § 3900. Real estate may be received for subscriptions, but that portion of the same not necessary for railroad purposes must be disposed of within a reasonable time, and the proceeds applied to the management of the road. § 3901. A map and profile of the route must be filed with the clerk of the counties traversed. § 3902. Real estate may be taken by voluntary grant or otherwise for the use of the road. § 3903. The company may "cross, intersect, join and unite" its road with any road before constructed, at any point, with necessary switches, etc. Id. As to crossings, see §§ 3904-3905 (c). As to proceedings to appropriate realty see §§ 3906-3910. The company may, from time to time, "borrow such sums of money as it may deem necessary for completing or operating its railroad, and issue and dispose of its bonds for any amounts so borrowed, for such sums, and at such rate of interest as is allowed by the laws of the state where such contract is made, and may mortgage its corporate property and tranchises to secure the payment of any debt contracted by such company." The directors may allow the principal due on such bonds to be converted into stock, at any time within fifteen years from the date of the bond, under such regulations as the company may adopt. The company may sell its bonds, within or without the state, "at such rates and prices as permitted by law, and such sales shall be as valid as if such honds should be sold at par value." § 3911. To provide means for paying debts, and for the construction or equipment of the road, preferred stock may be issued to an amount not greater than one-half the capital, with such priority in the payment of dividends as the directors may determine, and as shall be approved by a majority of the stockholders. § 3912. "For the purpose of exchanging the same for its common stock, or for such part thereof as the directors of such company may determine, and shall be approved by a majority of the stockholders, any railroad company heretofore or hereafter organized may issue preferred stock to an amount not exceeding one-half of the amount of its capital, with such priority over the remaining stock of such company in the payment of dividends as the directors of such company may determine, and shall be approved by a majority of the stockholders;" provided, that the total capital be not diminished thereby. Laws 1893, ch. 60. The location may be changed by the directors from time to time, but not so as to avoid any point named in the articles of association. No track shall be laid in any city without the consent of the common council. §§ 3913, 3914. An annual report shall be made to the secretary of state. \$ 3918. If construction is not begun and five per cent. of the capital expended within three years, and the road put in full operation within ten years, the act of incorporation shall become void. § 3930. The capital stock may be increased to any necessary amount. § 3931. "The stockholders shall be individually liable to laborers, their executors, administrators and assigns, for all labor done in the construction of said road that shall remain unpaid after the assets of the corporation shall have been exhausted." § 3934. If a majority in interest of both the creditors and etockholders shall agree upon a plan for the re-adjustment or capitalization of the debt and stock, either before or after a judicial sale of the road and a purchase by trustees on behalf of the parties to the agreement, all the franchises and powers, including the franchises to act as a corporation, conferred by the charter, shall pass by such sale and vest in the said trustees, together with the railroad and all property embraced in the sale. In case any railroad wholly or partly within the state, or any part within the state, shall, in pursuance of such agreement, be sold under foreclosure, or pursuant to any power in the mortgage or deed of trust, the purchaser or purchasers, their survivor or survivors, or they and their or he and his associates, may form a corporation by filing with the secretary of state a certificate, "under their or his signature," specifying (1) the corporate name, and the number of directors and their names for the first year; (2) the amount of the original capital and the number of shares. This section shall not be construed to legalize any consolidation, and shall be construed to confirm the sale of only the road-bed, depot grounds, and the realty necessary for the operation of the road. together with the necessary equipments. §§ 3937, 3946. The new corporation shall have all the rights, and be subject to all the liabilities, of the old company. It shall have power, "at any time after the formation of the corporation as aforesaid, to assume any debts and liabilities of the former corporation," and to make any such settlement with any stockholder or creditor of the old corporation as may be deemed expedient, and for such purpose to use such portion of the bonds and stock of said corporation as may be deemed advisable and in such manner as said corporation may deem proper; provided, that all subscribers to the original stock, their heirs, etc., shall, "by the acceptance or adoption of this act by any purchaser or purchasers of any such railroad, as above provided, be released and discharged from all their unpaid subscriptions which shall not have been previously arranged by agreement or compromise;" provided, further, "that all holders of such capital stock which shall have been paid up, and all creditors of such railroad company, shall have the right to accept and avail themselves of any trusts, agreements and provisions for recapitalization, for and during the period of six months from and after the passage of this act." (Act of March 3, 1865.) \$ 3947. Said corporation shall have power to make and issue bonds, bearing such interest, not exceeding seven per cent. per annum, payable at such times and places, and in such amount, as it may beem hest; "and to sell and dispose of said bonds at such prices and in such manner as it may deem proper, to secure the payment of any bonds which it may make, issue or assume to pay by mortgage or mortgages or deed or deeds of trust of its railroad, or any part thereof, and of its real and personal property and franchises." Purchasers under a sale to satisfy such lien may form a corporation. § 3948. The said corporation has power to establish a sinking fund for the payment of liabilities, and to issue capital stock to an amount not exceeding the limits of the certificate; "make preferred stock; make and establish preference in respect to dividends in favor of one or more classes of stock over and above other classes, and secure the same in such order and manner and to such extent as said corporation may deem expedient; and may confer upon the holders of any of the bonds which it may issue or assume to pay. the right to vote at all meetings of stockholders (not exceeding one vote for each one hundred dollars of the par amount of said bonds), if deemed expedient, which right to vote, when once fixed, shall attach to and pass with said bonds, nnder such regulations as said corporation may prescribe, but shall not subject the holder to any assessment made by said company or to any liability for its debts, or entitle any holder thereof to dividends." Such corporation may "hold, enjoy and exercise," within other states, the aforesaid powers and privileges and such others as may be conferred upon it by any law of this state or of any other state in which any of its road may lie, or in which any of its business may be done; "and may hold meetings of stockholders and of its hoard of directors, and do all corporate acts and things without this state as validly, and to the same extent, as it may do the same within this state, on the line of such road;" and may make by-laws, rules and regulations. § 3949. No purchaser or purchasers shall take advantage of this act till they shall first assume and pay, in money or first-class securities, to be issued by the new corporation, as the creditors may elect, all ticket-balances and back charges for freight, with interest, however the debt may be due, which the old company owed to any connecting road, wholly or partly

within the state. § 3943. If any road, wholly or partly within the state, shall become vested in a foreign corporation, such corporation may exercise and enjoy, in this state and in its own state, "for the purposes of such railroad and its business." all the powers and privileges of this act. \$ 3950. Any company incorporated under the provisions of this act shall have the power "to acquire, by purchase or contract, the road road-bed, real and personal property, rights and franchises of any other railroad corporation or corporations which may cross or intersect the line of such railroad company or any part of the same, or the use or enjoyment thereof, in whole or in part; may also purchase or contract for the use and enjoyment in whole or in part of any railroad or railroads lying within adjoining states; and may assume such of the debts and liabilities of such corporations as may be deemed proper. Upon purchasing any such railroad or railroads, all the real and personal property of such corporations so purchased, and also the rights, powers and franchises of the same, shall become vested in the railroad company so purchasing the same, together with all the rights, powers, privileges and franchises conferred by the charters of the roads so purchased and all amendments thereto and the provisions of this act; and the company so purchasing or acquiring the title to or use of such railroad or railroads shall have nower to complete maintain and operate the same: . . . and shall also have power to consolidate with other railroad corporations in the continuous line either within or without this state, upon such terms as may be agreed upon by the corporations owning the same;" and may also construct branch roads to any point in the state. All purchased roads, and all branch roads, shall be subject to the regulations governing the company so purchasing or building such roads or branches. The corporation so purchasing or contracting the same shall have authority "to issue new stock to such extent as may be considered advisable, and the same to dispose of as hereinbefore provided; to issue and sell bonds to such extent as may be deemed expedient: and to recover the same by mortgages and deeds of trust upon all real and personal property, rights, powers and franchises of any railroad so purchased, constructed or in course of construction, as hereinbefore provided." This act shall not be so construed as to authorize any railroad company organizing under the same to consolidate with or acquire, by contract or purchase, any property in "any railroad already built, equipped and operated within the state of Indiana, and which may cross or intersect the line of the road of any company organizing under, this act; but the powers of consolidation and purchase shall be and are hereby limited and restricted to such roads within the state of Indiana as may cross and intersect the same, and which have not been equipped and operated in whole or in part." § 3951. Any domestic company whose line extends across the state may, upon the petition of a majority of its stock, guaranty the payment of the principal and interest of the bonds of any company in an adjoining state, the construction of whose line or lines would be beneficial to the business or traffic of such domestic company. § 3951 (a). Such guaranty shall not exceed one-half of the par value of the stock of the company so indorsing or guarantying. § 3951 (c). The provisions of sections 3946-3951 shall apply to sales and purchases under judicial decrees or judgments of any railroad in the United States. § 3952. If any company has executed, or shall execute, a mortgage upon the whole or any part of its road, the company may, upon thirty days' public notice, with the consent of a majority of the stock, settle and compromise with the mortgagees, and release and convey to them such part of the road mortgaged, and upon such terms, as may be agreed upon; and thereafter such vendees shall be a body corporate, with all the rights, etc., of the vendors over the portion of the road so conveyed. They may issue stock not exceeding \$20,000 per mile, and sell the same, and issue certificates assignable upon such terms as they may prescribe. § 3953. Two or more companies running lines to, or near, the same city or town may locate and operate a union line of one or more tracks, connecting their railroads, for business purposes.

\$\$ 3954-3964 (s). Whenever any two or more railroad companies, "jointly making or running their roads under contracts formed or to be formed by such companies," desire to assume a common name, they may, by a resolution of the respective boards, entered upon their records, adopt such name as may be agreed upon. The resolutions must be recorded with the recorders of the counties traversed. The companies may sue and be sued in their original names for rights accrued, or liabilities incurred, before the change of name. \$\$ 3965, 3966. "Any railroad company organized and incorporated under the general laws of this state for the purpose of building a railroad from any point in the state to any point on the state line shall be authorized to connect with any other railroad already made from such point on the state line at any convenient point of intersection withiu this state." The agreement shall be made as provided in sections 3965-66 above. 88 3967-68. "Any such railroad company so connecting with the road of another company shall not be required to complete its own road to the state line so long as it shall continue to be thus associated with the company owning such other road already built from the state line, but its franchises and powers to build and complete its own road to the terminal point on the state line, whenever it shall be necessary so to do, shall remain unimpaired." § 3969. Any company so forming a connection shall be deemed a company owning and operating a road to the state line. § 3970. Any railroad company authorized to construct a road to the state line may extend its road into or through any other state or states. § 3972. Any company that may form connections with a foreign road at the state line shall have power to make such contracts and agreements with such foreign roads, "for the transportation of freight and passengers, or for the use of its said road," as the directors may think proper. § 3973. Any railroad company in the state "shall have the power to intersect, join and unite its railroad with any other railroad constructed or in progress of construction for with the road of any company hereafter organized in this state or in any adjoining state, at such point on the state line or at any other point as may be mutually agreed upon by said companies; and such railroad companies are authorized to merge and consolidate the stock of the respective companies, making one joint-stock company of the two railroads thus connected, upon such terms as may be by them mutually agreed upon, in accordance with the laws of the adjoining state with whose road or roads connections are thus formed; provided, their charters authorize said railroads to go to the state line or to such point of intersection." §§ 3971, 3975. All roads must report annually to the state auditor. § 3985. For the laws governing the construction of lateral railroads not exceeding ten miles in length, by mining companies, etc., see \$\$ 3987-3993. Railroads in Ohio and Illinois may be extended into Indiana far enough to form connections, and may hold the real estate necessary for such purpose. § 3994. As to change of name, see §§ 4009-4011. The board of directors of any road passing through the state into adjoining states may so classify the members thereof that one-fourth (as near as may be) shall terminate their official term at the next annual election, and one-fourth at each subsequent election. After such classification the stockholders and bondholders shall elect only the number necessary to fill the vacancies. § 4012. Any railroad company may extend branches to the boundary line of any county in which it has a terminus, such boundary line being also the state line, and may take stock in any railroad bridge company on the route or at the terminus, for the use and benefit of such road. § 4013. Any domestic company may build and operate branch roads from any point or points on its main line to or through any lands containing coal, iron or building stone, not exceeding fifty miles from the nearest point on the main line; provided less than one-third of the stock objects thereto. § 4014, Am'd § 7584. Any railroad may be extended beyond either original terminus. §§ 4016-17. An agent upon whom process may be served must be kept in each county traversed by the road. § 4039. Townships or counties may aid railroad construction to an amount not exceeding two per centum, in any one period of two years, upon

the "taxables" of the township, after an election held upon the petition of twenty-five freeholders. The location of the road must precede the tax. The county or town may take stock. Border counties, townships or cities may likewise aid roads in an adjoining state to form connections with state lines. §§ 4045-4094, Am'd § 7586. As to rights of way, see § 4094-4098 (e). For street railways, see §§ 4143-4161; and §§ 7598-7598. Any person furnishing labor or material for the construction or repair of a railroad, whether a contractor or not, shall have a lien upon the right of way, franchises or buildings in the county in which the labor was performed or the material furnished. § 5303 (a), Am'd § 8224. "A railroad company may become a stockholder in any telegraph company." § 4169. Conditional sales of rolling stock or equipment may be made, the title remaining in the vendor until payment is made. Such contracts must be in writing. §§ 8082-8035.

See, also, Laws 1893, ch. 132.

General provisions.— Where no other provision is made, corporations shall have power to elect, in such manner as they shall determine, all necessary officers. fix their compensation and define their duties; to determine the number that shall constitute a quorum and the number of shares that shall entitle the members to one or more votes (provided each stockholder shall have one vote for each share held by him for ten days next before the meeting); the mode of voting by proxy; the payment of assessments and the term of office of the various officers. § 3002. Shares shall be numbered in progressive order, beginning at number one. § 3003. Unless otherwise provided, the first meeting shall be called by a notice signed by three or more members. § 3004. Corporations whose charters expire in any manner shall continue bodies corporate for three years to close up their business. § 3006. If any part of the capital stock is withdrawn and refunded to the stockholders before the payment of all the corporate debts, "all the stockholders of such company shall be jointly and severally liable for the payment of such debts." § 3007. Persons holding stock as executors, etc., or as collateral security, are not personally liable as stockholders. § 3008. A stock-book shall be kept open for the inspection of interested parties during business hours. § 3010. For failure to keep such book open to inspection, the company shall pay \$50 to the party aggrieved, and all damages; also \$50 to the state for each day's failure. \§ 3011. After the expiration of the charter the circuit court may appoint receivers or trustees at the request of any creditor or stockholder, and may continue the corporate existence beyond the said three years in its discretion. § 3012. If a judgment (except against a bank) remains unpaid for one year, and execution is not legally stayed, the circuit court may declare a forfeiture of the franchise. "All companies organized under the laws of this state heretofore incorporated or hereafter incorporated within this state shall have full power and authority from time to time to borrow money at any rate of interest not exceeding the legal rate of interest allowed by law of the state where the loan may be negotiated or money borrowed, to be agreed upon between the parties, for the purpose of enabling such company to purchase real estate, erect buildings for all necessary machinery and fixtures, and necessary funds to carry on the improvements and operations of such company, and, as an evidence of such loans or for the purchase of materials and necessary improvements, on time, may issue its corporate bonds or promissory notes and secure the repayment thereof, with the interest which shall accrue, may mortgage its franchise, real estate, income and all other property, and may, by its president or other officers or agents, sell, dispose of or negotiate such bonds, notes or the stock of such company, at such time and at such places, either within or without this state, and at such rates and for such prices, as in the opinion of the company shall best advance its interest." § 3019, Aur'd § 7007. "And if such bonds, notes or stock are thus sold at a discount, such sale shall be as valid and binding in every respect as if sold at their par value." The company may authorize the holders of any such bond or note to convert the same into stock at any time. § 3020. This act shall not be construed to repeal, change or restrict

any provisions of any act incorporating railroad companies. § 3021. Shares of stock in any corporation may be levied upon and sold. § 723. Every corporation shall file copies of its articles of association with the secretary of state. \$ 7009. Any manufacturing, mining or other domestic corporation now organized or to be created shall have the power to issue preferred stock in shares of not more than \$100 each, the aggregate amount of which shall at no time exceed double the amount of the common stock. Laws 1893, ch. 92, § 1. The articles may state the proposed amount of preferred stock and the number of shares. § 2. But if the company is already organized, preferred stock may be created and issued at any meeting by a unanimous vote of the holders of the common stock, and the company may, by a vote of the majority of the common stock, authorize the directors to "dispose of and issue" such stock upon terms prescribed by the company. A certificate of such issuance must be filed with the secretary of state within thirty days after the issue has been authorized. § 3. Such preferred stock shall be subject to redemption at par at such time or times, and upon such terms and conditions, as shall be expressed in the certificates thereof, and the holders shall be entitled to receive a semi-annual dividend, expressed in the certificates, not exceeding four per cent. "In no event shall the holders of such preferred stock be individually or personally liable for the debts or other liabilities of such company, but in case of insolvency, or upon the dissolution of such company, such debts or other liabilities shall be paid in preference to such preferred stock:" but the preferred stock shall always have priority over the common stock in payments out of the assets of the company (\$4), but only to the extent of the par or face value of such preferred stock, together with arrearages of interest or dividends. § 5. It shall not be voted at any meeting, nor shall the holders thereof, as such, have any voice in the management of the corporate affairs, excepting that the company shall not convey its real estate, or mortgage any of its property, without the written consent of the holders of a majority of such preferred stock: nor shall the company, without such consent, declare any dividend on the common stock which will impair the capital. \$5. When the preferred stock is redeemed, a certificate of that fact shall be filed with the secretary of state within thirty days, and, in default thereof, the directors shall be "jointly and severally liable for all debts and liabilities of such company contracted after said thirty days and before said certificate is filed." § 6. This act shall not apply to any company which, by any existing law, is authorized to issue preferred stock or which may hereafter be specially authorized to do so. § 7.

Foreign corporations.—An agent must file with the county clerk his authority to act. § 3022. He shall also file a sufficient authorization from the board of directors giving residents the right to sue the corporation in the state in the case of any claim arising from any transaction in the state with such agent, and authorizing the service of process on such agent. § 3023. Compliance with the above provisions is a prerequisite to the transaction of business. § 3025. Any agent neglecting or refusing to comply with this law shall be fined not less than fifty dollars. § 3028. Every foreign corporation that shall do any business in the state, "or acquire any right, title, interest in or lien upon real estate in this state. that shall transfer or cause to be transferred from any court of this state to any court of the United States," save by regular course of appeal, any action commenced by or against such corporation in any state court by or against any resident of the state; or that shall begin in a federal court of the state, on any contract made in the state or liability accrued therein, any suit or action against any resident of the state, shall thereby forfeit all right to do business in the state or hold an interest in realty therein; and all contracts made with citizens or residents shall be voidable or enforceable at the option of the said residents. § 3029. The above provisions are made conditions precedent to doing business, or holding title to or liens upon real estate, in this state. § 2030. Foreign corporations for manufacturing and mining purposes "shall have the same right to purchase and hold real estate for the purpose of their business, and to convey or mortgage the same," as similar domestic corporations. § 3879 (6).

Taxation .- Shares of stock in all domestic corporations are taxed "where the property of such corporation is not exempt or is not taxable to the corporation itself." Shares in foreign corporations owned by residents are taxed. "Shares in corporations, all the property of which is taxable to the corporation itself, shall not be assessed to the shareholder." Supp. 1892, § 8524. All corporate property, including capital stock and franchises, unless other provision is made by law, shall be assessed to the corporation as to a natural person. The place where its principal office is kept shall be deemed the residence of the corporation. § 8532. The track of a street railway company is held to be personalty. § 8538. Every franchise of a person or corporation shall be taxed as personalty. § 8545. facturers shall pay a tax on the materials on hand to be used in manufacturing, as well as on the manufactured articles. Foreign insurance companies shall pay. semi-annually, three dollars on every hundred of receipts within the state, less actual losses paid. § 8587. Foreign express companies shall pay, annually, one dollar on each hundred of gross receipts within the state after deducting therefrom the amount paid to railroads in the state, the amount paid to employees in the state, and the amount paid for tangible property within the state. Such tangible property shall be liable to taxation. § 8588. Foreign telegraph companies pay, annually, one per cent. of their gross receipts within the state and a tax on their tangible property in the state. § 8589. Foreigh telephone companies pay one-fourth of one per cent. on their gross receipts within the state. § 8590. Foreign sleeping-car companies pay two per cent, of their gross receipts annually. Domestic corporations (except railroads and banks) shall make an annual return. in addition to the other property required by this act to be listed, containing a sworn statement of the amount of their capital stock, with a full description of the same; the total indebtedness (except for current expenses); the value of all tangible property and the difference in value between it and the capital stock; the name and value of each franchise or privilege. § 8593. Taxes shall be collected on the amounts assessed at the rate paid by individuals. If the capital stock exceeds in value the tangible property, such excess shall be taxed. If there is no tangible property the capital stock is taxed at its true cash value. If any of the capital stock is invested in tangible property, such capital shall not be assessed "to the extent that it is so invested." Every franchise or privilege is taxed at its true cash value. Where the full value of any franchise is represented by the capital stock listed for taxation such franchise shall not be taxed. But if the franchise is of greater value than the capital stock, the franchise, and not the capital, shall be taxed. § 8594. Twenty-five per-cent shall be added to the valuation for failure to make a return. § 8595. Railroad companies shall return to the auditors of the counties cut by their road a statement showing the property held for right of way, and the length of the main and side tracks in such county, and in each city and town of the county; also the value of improvements on the right of way. \$ 8597. Such right of way, including all superstructures, improvements and appliances (except machinery, stationary engines and other fixtures, which are personalty), shall be held to be realty, and denominated "railroad track," The value of the "railroad track" shall be listed in the several counties, townships, cities and towns in the proportion that the length of the main track in such municipality bears to the whole length of the main track in the state. But the value of the side tracks, or second tracks, station houses and other buildings shall be taxed where the same are located. §§ 8598, 8599. Movable property is personalty, and is denominated "rolling stock." The same shall be listed and taxed in the counties and municipalities in the proportion that the length of main track in such municipalities bears to the whole length of the main line in the state. § 8600. All persoualty not specially taxed, including tools and fixtures, shall be taxed wherever found on April 1st. § 8601. All realty, other than "railroad track," is taxed

where it lies. § 8602. A full return must be made annually to the county auditors of the several counties cut by the road. § 8603. Also to the state auditor. § 8605. For failure to return the company forfeits from one thousand to five thousand dollars. § 8606. The state board shall assess the "railroad track" and "rolling stock" at its cash value, and apportion the value among the county auditors. The taxes shall be levied at the same rate as taxes against other property. § 8657.

The secretary of state shall receive and collect for the state the following fees: (1) For filing articles of incorporation, or a certified copy thereof, \$10 if the capital stock is \$10,000 or less, and if the cavital stock is more than \$10,000, then one-tenth of one per cent, upon the authorized capital stock; (2) for filing a certificate of increase of capital, \$10 if the increase is \$10,000 or less, and if the increase is more than \$10,000, then one-tenth of one per cent, on the proposed amount of increase: (3) for filing the articles of agreement, or a certified copy thereof, in case of consolidations, such articles shall be treated as articles of incorporation, and fees charged as hereinbefore provided, without respect to any such payments originally made by the respective companies for filing their articles of incorporation; (4) for filing a certificate of reduction of capital stock, \$5; (5) for filing a copy of a decree changing the corporate name, \$5; (6) for filing an amendment, twenty cents a hundred words, but in no case less than \$5: (7) for filing, in case of a railroad company, a certificate of change of route, extension of time, change of termini or of location, or intention to build a branch line, twenty cents a hundred words, but in no case less than \$5; (8) for filing a certificate of extension of purpose, or change of domicile, \$5; (9) for filing other certificates (except of election, for which no charge is made), twenty cents a hundred words, but in no case less than \$5.

For taxation of telegraph, telephone, express and sleeping-car companies, see Laws 1893. ch. 171.

§ 947. IOWA: 1 Constitutional provisions.—In calculating the compensation to be paid for private property taken for public use, no account shall be made of any advantages that may result to the owner on account of the proposed improvement. Constitution of 1857, art. I. § 18. No corporation shall be created by special laws; but the legislature shall provide by general laws for the organization of all corporations, except as hereinafter provided. Art. VIII, § 1. The property of all corporations for pecuniary profit shall be taxed the same as that of individuals. Id., § 2. The state shall not become a stockholder in any corporation, nor assume to pay the debt or liability of any corporation, unless incurred in time of war for the benefit of the state. Id., § 3. Stockholders in banks are liable to corporate creditors to the extent of the par value of their stock, in addition to the subscription liability. Art. VIII, § 9. "Subject to the provisions of this article, the general assembly shall have power to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities, by a vote of two-thirds of each branch of the general assembly; and no exclusive privileges, except as in this article provided, shall ever be granted." Id., § 12.

Miscellaneous corporations.— Any number may incorporate for any lawful business. Miller's Code of 1888, § 1058. Articles of incorporation must be adopted, signed and acknowledged, and recorded with the county recorder of deeds. The articles must fix the highest amount of indebtedness or liability to which the corporation is at any time to be subject, which must in no case, except in that of risks of insurance companies, exceed two-thirds of the capital stock; but this shall not apply to debentures and bonds secured by the actual transfer of real estate securities which are a first lien on real estate worth at least twice the amount of the loan. §§ 1060, 1061. A notice must be published for four weeks in a neighboring newspaper, specifying (1) the corporate name and the place of business; (2) the nature of the business; (3) the amount of the capital stock and the terms

 $^{^{\}text{1}}$ The acts of the legislature down to and including the laws of 1892 are included in this synopsis.

and conditions on which it is to be paid in: (4) the time of the commencement and of the termination of the corporate existence: (5) by what officers the corporate business is to be done, and the times when they are to be elected: (6) the highest amount of indebtedness to which the corporation is at any time to subject itself; (7) "whether private property is to be exempt from corporate debts." §\$ 1062, 1063. The corporation may begin business as soon as the articles are filed with the recorder of deeds, and their acts shall be valid if the publication is made, and articles recorded in the office of the secretary of state, within three months from such filing in the recorder's office. \$ 1064. Among the corporate powers are the following: (1) "To render the interests of the stockholders transferable:" (2) "to exempt the private property of its members from liability for corporate debts, except as herein otherwise declared;" (3) "to make contracts, acquire and transfer property, possessing the same powers in such respects as private individuals now enjoy;" (4) to make by-laws, and all rules and regulations deemed expedient. \$ 1059. Changes may be made in the articles at any annual meeting, or special meeting called for the purpose, but such changes must be recorded and published like the original articles. Such changes need only be signed by the officers. \$ 1065. There can be no dissolution before the time fixed in the articles, except by unanimous consent, unless the articles state otherwise, \$ 1066. A failure to substantially comply with the foregoing requirements respecting organization and publicity renders the individual property of the stockholders liable for the corporate debts. "But this section shall not be deemed applicable to railway corporations and corporators, and stockholders in railway companies shall be liable only for the amount of stock held by them in said companies." § 1068. Corporations for the construction of any work of internal improvement, or for the business of life insurance, may be formed to endure fifty years; no others shall be formed for more than twenty years; but in any case renewals may be made for periods not greater than the time at first permissible, if three-fourths of the votes "cast at any regular election for that purpose" be in favor of such renewal, and if those favoring renewal will purchase the stock of those opposed at its fair current value. \$ 1069. Intentional fraud in failing to comply substantially with the articles, or in deceiving the public or individuals, shall subject those guilty thereof to fine or imprisonment or both, and to liability for damages. § 1071. The diversion of the corporate funds to other purposes than those mentioned in the articles and published notices to the injury of any person, and the payment of dividends which leave insufficient funds to meet the liabilities, shall be deemed such frauds, "and such dividends, or their equivalent, in the hands of individual stockholders shall be subject to said liabilities." § 1072. The franchise shall be forfeited for such failure or fraud, and the courts may wind up the corporate affairs. § 1074. The keeping of false books, whereby any one is injured, is a misdemeanor. § 1075. A copy of the by-laws, with the names of all officers, must be posted in the principal place of business, for public inspection, § 1076. Likewise a statement of the capital subscribed and paid in, "and the amount of indebtedness in a general way." § 1077. The transfer of shares is not valid, except as between the parties thereto, until regularly entered on the stock-books. The person making such transfer shall in no way be exempt from "any liability of said corporation created prior thereto." Stock-books, or a correct copy thereof, shall be open to public inspection. § 1078. Non-user for two successive years forfeits the charter, but failure to elect officers at the proper time shall not work a forfeiture; provided the election is held within two years from the appointed time. § 1079. Corporations whose charters expire by limitation, or by voluntary dissolution, may still continue to act to wind up their business (no time limited). § 1080. "For the purpose of repairs, rebuilding or enlarging, or to meet contingencies, or for the purpose of a sinking fund, the corporation may establish a fund which they may loan, and in relation to which they may take the proper securities." § 1081. Stockholders shall not be exempt from "individual liability to the amount of the unpaid instalments on the stock owned by them, or transferred by them for the purpose of defrauding creditors, and execution against the company may, to that extent, be levied upon the private property of any such individual." \$ 1082. But an action must first be brought against such stockholder, after it appears that corporate property cannot be found, in which the said stockholder may prove the existence of corporate property, which must be exhausted before his property can be sold. \$\$ 1083, 1084. Such stockholder may sue the corporation for indemnity, and maintain an action against the other stockholders for contribution. \$ 1085. The franchise may be sold on execution, but the sale does not dissolve the corporation, and no dissolution of the original corporation shall affect the franchise, "and the purchaser becomes vested with all the powers of the corporation therefor. Such franchise shall be sold without appraisement," § 1086. "A single individual may entitle himself to all the advantages of this chapter, provided he complies substantially with all its requirements, omitting those which from the nature of the case are inapplicable." § 1088. In an action between a corporation and another party, neither side can set up the defense of want of legal organization, § 1089. The legislature has full powers to regulate or dissolve corporations as the public good may require. \$ 1090.

As to change of name of a railroad corporation (the name may be changed), see SS 1273, 1302. Any railroad corporation may "join, intersect and unite its railway with the railway of any other corporation at such point on the boundary line of this state as may be agreed upon by such corporators. And with the assent of three-fourths in interest of all the stockholders may, by purchase or sale, or otherwise, merge and consolidate the stock, property, franchises and liabilities of such corporations, making the same one joint-stock corporation upon such terms as may be agreed upon not in conflict with the laws of this state." \$1275. Any corporation, constructing its road so as to meet or connect at the state line with a road in an adjoining state, may make such contracts and agreements with such foreign corporation, for carrying freight and passengers, and for the use of its railway, as the directors think best. § 1276. Any corporation may extend its railway into another state, and may have the same rights respecting such extension as it has respecting the part within the state. § 1277. Lessees have the same duties and liabilities as the corporations described in this chapter. § 1278. The offices of secretary, treasurer and general superintendent of domestic companies shall be kept within the state at the principal place of business, and such officers shall reside within the state (7). The treasurer shall keep a record of the financial condition of the company, open to the inspection of stockholders (8). Transfers in a duplicate book out of the state are only good after entry on the book in the state. § 1279. Full annual reports must be made to the secretary of state, and published in a local newspaper. §§ 1280, 1281, 1282. "Any such corporation shall have power to issue its bonds for the construction and equipment of its railway, in sums not less than \$50, payable to bearer or otherwise, and bearing interest at a rate not exceeding ten per cent. per annum, and make the same convertible into stock, and may sell the same at such rates or prices as is deemed proper; if such bonds are sold below the par value thereof they shall nevertheless be valid and binding, and no plea of wrong shall be allowed such corporation in any action or proceeding brought to enforce the collection of said bonds: such corporation may also receive the payment of said bonds by executing mortgages or deeds of trust of the whole or any part of its property and franchises." § 1283. Such mortgages or deeds of trust may cover any property, real or personal, to be afterwards acquired. § 1284. Such mortgages or deeds of trust shall be executed in the manner provided by the by-laws, and shall be recorded with the recorder of each county through which the road runs, or in which the property may be; and such record shall be notice to the world, as to both real and personal property mortgages. § 1285. Any such corporation, with the consent of two-thirds of the stock, "may issue, in payment of debts, preferred stock, not exceeding \$10,000 for each mile of said railway constructed, which stock shall be entitled to such dividends as the directors of the corporation may determine not exceeding eight per cent. per annum, if the same is earned in any one year after the payment of all interest on the bonds of the corporation, before any dividend is made to the common stock." "Any railway corporation which has no surplus, after paying its running expenses, with which to pay the interest on its bonded indebtedness, with the assent of its bondholders, in addition to the right conferred by section 1286 of the code, may, with the assent of two-thirds of its stockholders, issue its preferred [stock], at par, to an amount equal to and not exceeding its bonded indebtedness, in exchange for its said bonded indebtedness." The dividends on such stock shall be paid as provided in section 1286. Laws 1874, ch. 20 (Code, p. 446). "Such preferred stock [mentioned in section 1286], and any income or mortgage bond," shall, at the ontion of the holder, be convertible into common stock, in such manner and on such terms as the directors may determine. § 1287. Connections shall be made with intersected lines. \$ 1292. Pooling earnings by parallel lines is forbidden, under a penalty of \$5,000 per month. § 1297. A drawback of not more than fifteen per cent, on the gross earnings on business coming from or going to another railway is lawful. § 1298. Corporations whose railroads are partially constructed may, in order to induce the investment of capital in the completion or extension of its line, allow to the parties furnishing such means a drawback of not more than twenty per cent, of the gross earnings on business going to or coming from such extension or portion so aided; or the company may lease of the parties furnishing the means the portion thus aided, subject to the provisions of the next section. § 1299. Any railway company may sell or lease its rallway property and franchises to, or make joint running arrangements with, any connecting railway, and the corporation operating the railway of another company shall, in all respects, be liable in the same manner, and to the same extent, as though such railway belonged to it, subject to the laws of this state. § 1300, "Any contract, lease or benefit desired therefrom, contemplated in either of the three preceding sections, may be mortgaged for the purpose of securing construction bonds in the same manner as other property of the corporation." § 1301. When a railway has been completed, the company shall report, on oath, to the next legislature the total cost of construction and equipment, giving a complete description of the road. § 1303. Any railway running to the state line, or having authority to bridge the Missouri river, shall not transfer its freight or passengers outside the state. § 1311. The maximum passenger rates are fixed at from three to four cents per mile, according to gross earnings. p. 462. An annual statement of the gross receipts of any road must be made to the governor, under penalty of \$100 for each day's delay. p. 462. A board of railroad commissioners have general supervision of the roads of the state. pp. 463, 497. As to change of location, see pp. 472, 473. As to condemnation of real estate, see p. 474. If a right of way has not been used for five years in succession, another corporation may use it; and after non-user for eight years the same reverts to the original owner. §§ 1260, 1261. The lien for materials or labor furnished in the construction, repair or equipment of a railroad extends to all improvements, and includes rolling stock. § 2132. Taxes not to exceed five per centum of the assessed value of any township or municipality may be voted in aid of the construction of railroads. pp. 475-478, Am'd Laws 1892, ch. 18. Land may be condemned for depots, including union depots. pp. 479, 480. Unjust discrimination and pooling of earnings are unlawful. No greater charge shall be made for a short than a long haul, any portion of the shorter haul being included in the longer. p. 486. The commissioners may examine any books, accounts or contracts. p. 489. Annual reports must be made to the commissioners. p. 494. Schedules of rates must be posted, and cannot be increased until ten days' notice is given. Notice of any reduction must be immediately posted. Copies of contracts and agreements with other common carriers must be filed with the commissioners. The posting of the schedules may be compelled by a mandamus, disobedience of which will be punished as a contempt, and make the company liable in a penalty of \$500 for each day's offense. For any violation of this act (beginning with p. 486, supra), the company shall be liable to the injured party for three times the damages suffered. For any wilful violation or omission of the duties prescribed in this act, any director or officer of the corporation who is guilty thereof shall be fined from \$500 to \$5,000. pp. 487-490. The commissioners must make schedules of maximum rates. p. 492. Respecting joint rates on two or more railroads, see Laws 1890, ch. 17, and Laws 1892, ch. 25. The penalty for unjust discrimination or extortion in any railroad business is a fine of from \$1,000 to \$10,000. p. 496.

For telegraphs, see pp. 499, 500. For insurance companies, see pp. 382-411. Local authorities have full control over the construction of street railways. Laws 1890, cb. 11, and ch. 21.

Foreign corporations, excepting those for mercantile or manufacturing business. must file with the secretary of state a dnly verified copy, accompanied by a resolution of the board of directors authorizing the filing thereof, and authorizing process to be served upon any officer or agent in the state, and requesting the issuance of a permit to do business in the state. The said application shall contain a stipulation that the said permit shall be subject to the provisions of this act. The secretary of state shall thereupon issue a permit for the general transaction of business. But this act shall not be so construed as to prevent such foreign corporations from "buying, selling, and otherwise dealing in notes, bonds, mortgages, and other securities, or from enforcing the collection of the same, in federal courts, in the same manner and to the same extent as is now authorized by law." p. 373. No foreign corporation can exercise the right of eminent domain or other corporate privileges, until it has taken out a permit as above required. p. 374. Removal of a cause arising from a contract or act made or done within the state from a state court to a federal court in the state forfeits, the permit, and no new permit, shall be granted for three months. Id. Any corporation transacting business contrary to the provisions of this act shall forfeit \$100 for each day's offense, and any agent or officer so violating any provision of this act shall be fined not more than \$100, or be imprisoned not more than thirty days, and pay all costs. Id.

Any foreign railroad corporation may extend or build its road into the state with the same rights and powers as domestic companies have, and subject to the same liabilities; provided, such corporation shall file with the secretary of state a copy of its articles, or a copy of its charter. p. 482. Foreign corporations may bring suits in the state in their corporate name. § 2554. For foreign insurance companies, see §§ 1144, 1164.

Taxation.—All interest-bearing accounts of any corporation are taxed. § 801. Insurance companies, except domestic joint-stock and mutual companies, shall pay two and one-half per cent. on gross receipts. § 807. Real property of railroads, not used for the corporate business, is taxed like other realty, where it lies, § 808. The real estate taken for a road-bed shall be taxed to the company. § 809. All railroad property not specified in section 808 above shall be taxed, upon the assessment as provided below (§ 1317 et seq.), "at the same rates, by the same officers, and for the same purposes" as individual property. § 810. All the property, real and personal, of telegraph and express companies pays the same taxes as the property of individuals. § 811. All lands already or hereafter "granted to any railroad company or corporation by the general government to the state of Iowa, and by the state granted to such railroad company or corporation, shall be subject to assessment and taxation within the counties wherein situated from and after the year the same may be earned, to the same extent as though patents had been issued to and the title of record was in such railroad companies or corporation." p. 285. The rate of state tax shall not exceed two mills on the dollar. § 835. The stock of corporations shall be assessed at its cash value. § 813. All railroad property, excepting that specified in section 808 above, shall be assessed by the executive council. § 1317. The corporate officers shall furnish a full and complete statement of such property. § 1318. The said property shall be valued at its true cash value, and such assessment shall be made upon the entire railway within the state, and all real and personal property used exclusively in the operation of the road. Consideration shall be taken of the gross earnings per mile during the year. If any part of the railway is without the state, then, in estimating the value of rolling stock and movable property, the council shall take into consideration "the proportion which the business of that part of the railway lying within the state bears to the business of the railway lying without the state; such valuation shall be in the same ratio as that of the property of individuals." § 1319. The valuation is then apportioned to the various counties traversed, and each county apportions its share among the townships and municipalities through which the road runs. §§ 1320, 1321. The provisions of sections 1318 and 1319 shall be extended to include sleeping and dining cars used by the corporation. p. 470.

Domestic manufacturing corporations, having their capital represented by chares of stock, shall list their "real estate, personal property, money and credits" in the same manner as required of individuals, and the machinery used in their establishments shall, for the purpose of this act, be regarded as realty. "The owners of capital stock of manufacturing companies, as herein provided for, having listed their property as above directed, shall be exempt from assessment and taxation."

§ 948. KANSAS: 1 Constitutional provisions.—In all cases where a general law can be made applicable, no special law shall be passed. Constitution of 1859, art. II, § 17. "The state shall never be a party in carrying on any works of internal improvement." Art. XI, § 8. "The legislature shall pass no special act conferring corporate powers. Corporations may be created under general laws; but all such laws may be amended or repealed." Art. XII, § 1. Dues from corporations (excepting railroads) "shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder," and such other means as may be provided by law. Id., § 2. No right of way shall be taken until full payment has been made, or money deposited, irrespective of any proposed improvement by any corporation. Id., § 4.

Miscellaneous corporations.—Five or more may incorporate for various specified purposes, including the purchase and location of town sites and the sale of the same in lots, or otherwise; "the construction and maintenance of a railway and a telegraph in connection therewith;" the construction and maintenance of any species of road and of bridges in connection therewith; the transaction of any manufacturing, mining, mechanical or chemical business; the construction and maintenance of a street railway; the construction and maintenance of a telegraph line; the accumulation and loan of funds, the erection of buildings, "and the purchase and sale of real estate for the benefit of its members." Every stockholder may vote in person or by proxy. General Statutes of 1889, §§ 1155, 1156. The above list shall also include telephone companies and companies for dealing in rolling stock and other equipments for railroads. §§ 1158, 1159. "A charter must be prepared," setting forth (1) the corporate name; (2) the purposes of the incorporation; (3) the place or places of business; (4) the term of existence; (5) the number of directors, and the names and residences of those for the first year; (6) the amount of the capital stock, and the number of shares. § 1161. Amendments may be made upon a two-thirds vote of the stockholders. The charter as amended must be subscribed by the directors and acknowledged by at least three thereof, who shall be citizens of the state; and thereupon filed and recorded as required in case of the original charter. The name must indicate the corporate business. § 1162. A charter must be subscribed by five or more, three

¹ The acts of the legislature down to and including the laws of 1898 are included in this synopsis. (106) 1681

of whom must be citizens of the state, and must be acknowledged by them. 8 1164. Such charter shall then be filed with the secretary of state, and a certified copy be furnished the corporation. § 1165. The corporate existence dates from the time of filing the charter. § 1166. Every corporation has among other nowers, the power to "hold, purchase, mortgage or otherwise convey such real and personal estate as the purposes of the corporation shall require," and also to "take, hold and convey such other property, real, personal or mixed, as shall be requisite for such corporation to acquire in order to obtain or secure the payment of any indebtedness or liability due to or belonging to the corporation;" to appoint and remove such subordinate officers as the business requires, and fix their compensation; to make by-laws; and to increase or diminish, by a vote of the stockholders, cast as the by-laws may direct the number of its directors to not less than three nor more than twenty-four, and in like manner to change the corporate name. \$ 1167. A statement of the change of name or of the number of directors must be filed with the secretary of state. § 1169. Notice of change of name must be published six weeks in a county paper. \$ 1170. The capital stock may be increased by the directors, upon a majority vote of the stockholders in accordance with the by-laws, to not more than three times the authorized capital: or the capital stock may be increased to any amount, by a majority vote of the stockholders, "by an actual bona fide additional paid-up cash subscription thereto, equal to the amount of such increase." A certificate of such increase must be filed with the secretary of state. § 1171. Corporations may borrow money not exceeding the authorized capital stock and may execute bonds or promissory notes therefor, and may pledge the property and income of the corporation. \$ 1172. If the stock is not all subscribed at the time of filing the charter, the directors shall open subscription books within three months, § 1173. The board may fill vacancies in its number, \$1174. The directors choose a president and appoint a secretary and treasurer, and must take an oath. § 1175. The directors may make by-laws, but the same may be changed by a vote of the stockholders. \$ 1176. The corporation shall not be dissolved for a failure to elect directors on the appointed day. § 1178. The directors "may dispose of the residue of the capital stock at any time remaining unsubscribed, in such manner as the by-laws may prescribe." They shall keep all books and accounts open for the inspection of stockholders, and when required by one-third of the stockholders shall make reports. They shall declare such dividends as they think best, or as the by-laws prescribe. § 1180. An annual statement must be made to the secretary of state. under a penalty, for failure, of \$200, and an additional \$200 "for every month that such company shall continue thereafter to transact business." corporation formed under the general law may, by a two-thirds vote of the stockholders, under authority of the directors, extend its duration for periods of any length stated in its certificate therefor. The certificate must be filed with the secretary of state. § 1182. Ultra vires acts are prohibited. § 1183. The stock is personalty, and is transferable only on the books of the corporation in the manner fixed by the hy-laws. Only stock owned for thirty days can be voted. Shares on which assessments are due shall not be transferred. § 1184. In elections for directors, each shareholder may cast as many votes in the aggregate as shall equal the number of shares held by him multiplied by the number of directors to be elected, and may cast all his votes, in person or by proxy, for one candidate, and directors shall not be elected in any other way. § 1185. Subscriptions may be called in in such instalments as the by-laws require. § 1186. If the directors shall knowingly declare and pay a dividend while the corporation is insolvent, or which would make it insolvent, all the directors present and not filing their objections shall be "jointly and severally liable for all the debts of the corporation then existing, and for all that shall be thereafter contracted, as long as they shall respectively continue in office," but such liability shall not exceed the amount of such dividend. § 1189. A general office shall be kept within the state, and at least

three directors shall be citizens and residents of the state. In case of a railway corporation such office shall be near the line of its road. At such general office shall be kept all books and records and the offices of the principal officers. § 1190. Failure to comply with the provisions of the preceding section forfeits the charter. \$ 1191. If execution has been issued against the property of a corporation, except a railway corporation, and returned nulla bona, execution may be issued against any of the stockholders "to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon." § 1192. The office of the person having charge of the corporate funds, earnings and income shall be kept within the state, whether the charter be granted under the general or a special law; and all earnings, income and profits shall be kept within the state until regularly divided and disbursed. § 1196. Corporations created under the general laws which do not begin active business within five years shall become and be dissolved. § 1201. Upon the dissolution of any such corporation. except railway corporations, leaving debts unpaid, "suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit." The defendant or defendants may sue the remaining stockholders for contribution. The corporation shall be deemed dissolved for the purpose of bringing such suits if the corporation has suspended business for more than one year. §\$ 1200, 1204, 1205. No stockholder shall be liable for the corporate debts "beyond the amount due on his stock and an additional amount equal to the stock owned by him." § 1206.

Every railway corporation shall, among other powers, and in addition to those hereinbefore conferred, have power to take voluntary grants of land in aid of railroad accommodation, to be used only for the purposes of the grant; to locate its road upon or along any street, highway or water-course, provided the same is restored to its usefulness by a relocation — but a street in a corporate town or city may not be taken without the consent of the local authorities; "to cross, intersect, join and unite" its railway with any other railway at any point on its route, and upon the grounds of such other railway, with the necessary switches, etc.; "from time to time to borrow such sums of money as may be necessary for completing and finishing or operating their railway, and to issue and dispose of their bonds for any amount so borrowed, and to mortgage their corporate property and franchises to secure the payment of any debt contracted by the corporation for the purpose aforesaid." § 1207. A map and profile of the route must be filed in each county traversed. § 1208. The general route or terminus of the road shall not be changed. § 1210. Certificates of stock shall be valid and binding against the corporation issuing the same, unless an action be brought to annul or cancel the same within two years from the issue thereof. §§ 1219-1222. Counties may subscribe for stock and issue bonds to railroad corporations. §§ 1242-1245. Any railroad company has power from time to time "to purchase and hold the stock and bonds, or either; or to guaranty the payment of the principal and interest, or either, of the bonds of any other railroad company or companies, the line of whose railroad constructed, or being constructed, connects with its own." § 1247. A corporation may enforce a lien the same as an individual. § 1248. A railway company shall take a bond from a contractor conditioned for the payment of laborers and for materials employed by, or furnished to, such contractor. § 1257. Any two or more railroad corporations, existing under general or special laws, owning connecting lines, or lines which when completed will connect, or any domestic and foreign companies whose lines connect at the state line, may consolidate and form one company owning and controlling such connected lines, with all the rights and powers and subject to all the liabilities of the old companies. The companies may enter into a contract, fixing the terms and conditions of the consolidation, which must be ratified by a vote of two-thirds of the stock of the respective companies, or by the approval in writing of such stock, A certified copy of the articles of agreement shall be filed with the secretary of

state. § 1268. Any domestic company may lease or sell the whole or any part of its road, or any interest therein, with all its property and franchises, to any domestic or foreign railroad company in the United States; and any such domestic or foreign company may aid any domestic company in the construction of its road and branches "by purchase of its stock and bonds, or any portion thereof, or by guarantying its bonds, or the interest thereon, or otherwise." The contracts provided for in this section shall be made upon such terms and conditions as the boards of directors determine, approved by two-thirds of the stock of the respective companies. This section applies only to roads which may form a continuous line. No foreign corporation shall lease or purchase a road under this section until it has filed with the secretary of state a true copy of its articles of incorporation, and a certified copy of a resolution of its board authorizing service on any officer or agent, and accepting the provisions of this act. Such foreign corporation shall not remove a cause from the state court to the federal courts. §§ 1269, 1271. No such foreign corporation shall be compelled to have any of its directors residents of the state, nor be required to have its headquarters in the state. § 1270. Any domestic company may extend its line into another state, may purchase or lease any foreign road, or "buy the stock and bonds, or either, or guaranty the bonds and interest, or either, of any such company," provided, in all cases, a continuous line is formed with such foreign company. § 1272. Any domestic company may "issue stocks or bonds or mortgage its property or any part thereof, to such extent as may be necessary to meet the cost of such purchase or extension." § 1274. Branch lines may be built by any company, upon a vote of two-thirds of the stock. § 1275. As to proceedings to foreclose, see §§ 1276-1282. Elaborate provisions are made for county and municipal aid to railroads, by subscriptions for stock or the issue of bonds, upon a vote of the electors. §§ 1283-1315. The railroad company must give a bond to defray electiou expenses. In no case shall the amount of aid exceed \$2,000 per mile, for each mile in the county. §§ 1283-1285. Passenger rates shall not exceed three ceuts per mile on any railroad. § 1324. A railroad commission has the general supervision of railroads, express companies, sleeping-car companies and other common carriers. § 1328. Annual returns must be made by railroads to the commissioners according to a form furnished by the commissioners. § 1330. The commissioners may examine all books and documents, or any officer or employee; and any person wilfully obstructing the commissioners in the performance of their duties shall be fined not more than \$1,000. § 1331. Discriminations shall not be made in respect to connecting companies, and proper connections shall be made. § 1332. Discrimination in favor of or against any person or company, in the way of special rates or drawbacks, or in any other manner, is prohibited, and all charges shall be reasonable. §§ 1333, 1334. Pooling of freight earnings by roads running in the same general direction is prohibited on penalty of \$5,000 for each month for which such earnings are divided. § 1335. Upon complaint that rates are unreasonable, the commissioners may establish reasonable rates. § 1337. Upon the complaint of a municipality, the commissioners may lower freight rates. § 1341. Any corporation which shall violate any of the provisions of this act (section 1324 et seq.) shall forfeit for each offense three times the damages sustained by the aggrieved party, and costs. When not otherwise provided in this act any corporation or individual violating any provision of this act shall be fined from \$100 to \$5,000. §§ 1342, 1343. False swearing before the commissiouers shall be punished by imprisonment not exceeding seven years. § 1345. The commissioners enforce proper connections with other roads. § 1359. For telegraph corporations, see §§ 1383-1389. As to condemnation of lands, see §§ 1390-1397. All the laws for telegraph companies apply to telephone companies. § 1160.

Taxation.—Personal property includes, for purposes of taxation, the capital stock, individual profits and other assets of every corporation, and every share or interest in the stock, profit or assets, "provided, the same is not included in other

nersonal property subject to taxation or listed as the property of individuals." § 6847. No person shall be required to list any portion of the capital stock of corporations which is required to be listed by the corporation, but all corporations, except banks and manufacturing companies, must list in the township or city where the principal office is kept, "the full amount of the stock paid in and remaining as capital stock at its true value in money, and such stock shall be taxed as other personal property;" provided that the amount of such stock invested in realty or personalty in Kansas, which shall, at the time of listing the capital stock, be specified and listed for taxation, shall be deducted from the amount of the capital stock to be taxed. § 6858. Manufacturers pay a tax upon the actual value of all articles entering into their manufactures during the year. § 6866. A state board shall assess railroad property used in the corporate business. Real estate not thus used shall be assessed like other realty where it lies. § 6872. Sworn lists of taxable property must be returned to the state board. The list shall contain a detailed description of every kind of railroad property used in the corporate business, showing also the length and particular location of the track in counties, towns, etc.: the amount of capital authorized, and the amount paid up and the market value of the same. § 6875. The company is liable for the taxes on sleeping and other cars, not owned but used on the road. § 6876. For failure to make the returns the company shall forfeit not less than \$1,000. § 6877. The auditor apportions the value to the counties, and the county clerk makes an apportionment to the tax districts in the county. § 6884. For failure to list personal property, fifty per centum shall be added to the valuation thereof. § 6916. There is no special tax on corporations in the way of fees.

§ 949. KENTUCKY: 1 Constitutional provisions.—In the year 1891 a new constitution went into effect. This constitution seems to go much farther in the regulating of corporations and railroads than the constitution of any other state in the Union. The legislature is prohibited from passing any local or special acts "to grant a charter to any corporation, or to amend the charter of any existing corporation; to license companies or persons to own or operate ferries, bridges, roads or turnpikes;" "to give any person or corporation the right to lay a railroad track or tramway, or to amend existing charters for such purposes." § 59 (17th and 19th). "All laws exempting or commuting property from taxation other than the property above mentioned shall be void. The general assembly may authorize any incorporated city or town to exempt manufacturing establishments from municipal taxation for a period not exceeding five years, as an inducement to their location." § 170. "All property whether owned by natural persons or corporations shall be taxed in proportion to its value unless exempted by this constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this constitution shall be construed to prevent the general assembly from providing for taxation based on income, licenses or franchises," § 174. "The credit of the commonwealth shall not be given. pledged or loaned to any individual, company, corporation or association, municipality or political subdivision of the state; nor shall the commonwealth become an owner or stockholder in, nor make donation to, any company, association or corporation; nor shall the commonwealth construct a railroad or other highway." "The general assembly shall not authorize any county or subdivision thereof, city, town or incorporated district, to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association or individual, except for the purpose of constructing or maintaining bridges, turnpike roads or gravel roads." § 179. "No corporation in existence at the time of the adoption of this constitution shall have the benefit of future legislation without first filing in the office of the secretary of state an acceptance of the provisions of this constitution."

¹ The acts of the legislature down to and including the laws of 1889 are included in this synopsis.

"No corporation shall engage in business other than that expressly authorized by its charter, or the law under which it may have been or hereafter may be organized, nor shall it hold any real estate except such as may be proper and necessary for carrying on its legitimate business for a longer period than five years under penalty of escheat." \$ 192. "No corporation shall issue stock or bonds except for an equivalent in money paid or labor done, or property actually received and applied to the purposes for which such corporation was created, and neither labor nor property shall be received in payment of stock or bonds at a greater value than the market price at the time said labor was done or property delivered, and all fictitious increase of stock or judebtedness shall be void." \$ 193. "All corporations formed under the laws of this state or carrying on business in this state shall at all times have one or more known places of business in this state, and an authorized agent or agents there upon whom process may be executed, and the general assembly shall enact laws to carry into effect the provisions of this section." \$ 194. "No common carrier shall be permitted to contract for relief from its common-law liability." § 196. Free passes to members of the legislature, and state and local officers and judges, are prohibited, and for acceptance of such a pass the office is forfeited. § 197. "It shall be the duty of the general assembly from time to time. as necessity may require, to enact such laws as may be necessary to prevent all trusts, pools, combinations or other organizations from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value." § 198. The construction of telegraph lines is authorized, and telephone companies are required to receive and transmit each other's messages. § 199. The sale of the property of any quasi-public corporation to a foreign corporation shall not affect the jurisdiction of the state courts over such property. § 200. "No railroad, telegraph, telephone, bridge or common-carrier company shall consolidate its capital stock, franchises or property, or pool its earnings, in whole or in part, with any other railroad, telegraph, telephone, bridge or common-carrier company, owning a parallel or competing line or structure, or acquire by purchase, lease or otherwise any parallel or competing line or structure, or operate the same; nor shall any railroad company or other common carrier combine or make any contract with the owners of any vessel that leaves or makes port in this state, or with any common carrier, by which combination or contract the earnings of one doing the carrying are to be shared by the other not doing the carrying." § 201. "No corporation organized outside the limits of this state shall be allowed to transact business within the state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this commonwealth." § 202. "No corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise, or any of its privileges." § 203. An officer of a bank who receives deposits, knowing that the bank is insolvent, "shall be judividually responsible for such deposits so received, and shall be guilty of felony and subject to such punishment as shall be prescribed by law." § 204. "All elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, are declared to be public warehouses, subject to legislative control, and the general assembly shall enact laws for the inspection of grain, tobacco and other produce and for the protection of producers, shippers and receivers of grain, tobacco and other produce." § 206. Cumulative voting is made compulsory. § 207. "The word corporation, as used in this constitution, shall embrace joint-stock companies and associations." § 208. A railroad commission is provided for. § 209. No common carrier 'shall, directly or indirectly, own, manage, operate or engage in any other business thau that of a common carrier, or hold, own, lease or acquire, directly or indirectly, mines, factories or timber, except such as shall be uccessary to carry on its husiness." § 210. Foreign corporations shall not exercise the power of eminent domain. § 211.

Rolling stock and other movable property of railroads are declared to be personal property and subject to execution. The earnings of a corporation in the hands of its officers shall be subject to attachment. § 212. Railroads are required to interchange freight. § 213. No railroad shall make an exclusive or preferential contract with any one in regard to freight. § 214. Discriminations in rates are prohibited (§§ 215 and 218), except that the railroad commission may authorize a larger charge for a short than for a long haul in special cases. § 218.

Miscellaneous corporations. -- Any number may incorporate for any lawful business "except banking and insurance, and for the construction of railroads; but such incorporation shall confer no powers or privileges not possessed by natural persons, except as hereinafter provided." Gen. Stat. 1887, p. 763. Among the corporate powers shall be the following: (1) "To render the shares or interests of stockholders transferable, and to prescribe the mode of making such transfers:" (2) "to exempt the private property of members from liability for corporate debts: "(3) "to make contracts, acquire and transfer property, possessing the same powers in such respects as private individuals now enjoy:" to make by-laws. rules and regulations consistent with the laws of the state. Id. Before commencing any business other than organization the corporators must sign and acknowledge articles, and record the same with the county court clerk of the county where the principal place of business is to be kept. Id. Corporations for any work of internal improvement shall in addition record their articles with the secretary of etate and file a copy in his office. Such articles must specify the highest amount of indebtedness or liability to which the company is at any time to be subject. which must in no case exceed two-thirds of its capital stock, p. 764. A notice shall be published for four weeks in a neighboring paper, specifying (1) the names of the corporators, the corporate name and the principal place of business; (2) the general nature of the proposed business; (3) the amount of capital stock authorized, and the times when and the conditions upon which it is to be paid in; (4) the date of the commencement and the duration of the corporation; (5) what officers shall conduct the corporate affairs and the times when they shall be elected: (6, the highest amount of liability to which the corporation is at any time to subject itself: (7) "whether private property is to be exempt from the corporate debts." Id. The corporation may commence business as soon as the articles are filed for record with the county court clerk, "and their acts shall be valid if the publication in a newspaper is made and the copy filed in the office of the secretary of state, when such filing is necessary, within three months from such filing in the clerk's office." Any change "in the foregoing particulars" must be recorded and published like the original articles. Id. Corporations for any work of internal improvement may be formed to endure for fifty years; those for other purposes shall not endure more than twenty years. Renewals for not longer than the terms at first permissible are allowed upon the approval of three-fourths of the votes at any regular election for the purpose. Id. "The corporation shall not be dissolved prior to the period fixed upon in its articles of incorporation, except by a majority of the stock of its members, unless a different rule is adopted in the articles," and any premature dissolution must be preceded by the publication required at organization. p. 765. Intentional fraud in failing to comply substantially with the articles shall be a misdemeanor, punishable by a fine of from \$100 to \$1,000. or by imprisonment of from three to twelve months, or both; and any injured person may recover damages besides. Id. The keeping of false books to the injury of any person shall be a misdemeanor, punishable by a fine of from \$100 to \$1,000. Id. Transfers shall not be valid, except as between the parties thereto. until regularly entered on the company's books. Transfer books shall be kept open for the inspection of stockholders, and shall show the interests of original subscribers and all transfers. Id. Non-user for five years in succession forfeits, ipso facto, the franchises; but failure to elect officers or to hold meetings at the prescribed time shall not work such forfeiture. Id. Corporations whose charters

expire by limitation may continue to be corporations for the sole purpose of closing up their husiness. p. 766. "Nothing herein shall exempt the stockholders of any corporation from individual liability to the amount of unpaid instalments on the stock owned by them or transferred by them for the purpose of defrauding creditors: and an execution against the company may, to that extent, be levied upon the private property of such individual." Id. "For the purpose of making repairs, rebuilding or enlarging or extending works, or to meet contingencies, or for the purpose of providing a sinking fund for the payment of debts, the corporation may establish a fund and loan the same out from time to time, taking in all cases good and sufficient security for the repayment of the same." Id. In any proceedings to which the corporation is a party the court may, upon motion of either party, compel the production of the corporate books, and either party may use the same in evidence. Id. No franchise shall be declared null or forfeited except in a regular proceeding brought for that purpose. The corporation shall be presumed to be legally organized until the contrary is shown. The want of legal organization cannot be set up in a collateral proceeding. Id. No corporation not expressly authorized by law "shall loan money, discount any cyidence of debt, or deal in the buying or selling of exchange," p. 474. Manufacturing and mining companies may build and operate a railroad, tramway, turnpike or canal from their works to a navigable stream, or to an existing railroad or highway. p. 767. All elections of officers shall be held within the state. Elections held elsewhere are void. This act shall not apply to the Cincinnati Southern Railroad Company. Each stockholder shall vote "only in proportion to the amount that shall have been actually paid up on amount of the stock subscribed or held by him." If any regular election is due and not called, the court may compel the proper officer to issue the call: or, if he resides without the state, the court may order such election upon the application of ten shares of stock. Act of March 3, 1876 (p. 769). Any corporation organized under a general law or special charter may "give to its capital stock already issued a preference in the distribution of the profits and assets of such corporation over any other class of the capital stock of such corporation not then issued or sold, but to be hereafter issued." Such preference shall be given only in the following manner: "Such corporation shall, at a regular meeting of its board of directors and stockholders, adopt a resolution providing for such preference, which resolution shall include in its provisions all of the capital stock of said company then issued, and state the amount thereof, and state the limit of the dividends to be paid on such preferred stock. Such resolution shall also state the amount of the capital stock of such company to be issued as nou-preferred stock." Each share issued in pursuance of such resolution shall have written or printed thereon a true copy of said resolution and attestation (of the president and secretary), and shall show on its face whether it is preferred or non-preferred stock. pp. 773, 774. "Such resolution shall at all times be subject to the inspection of any holder of a share of such stock or of any stockholder in such company." p. 774. "All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes," may be repealed or amended, "unless a contrary intent be therein plainly expressed." p. 861. Purchasers of any railroad at a judicial sale, or their assigns, and their associates, may become a corporation in the place of the original company, with all its rights and obligations. This act shall not be construed to authorize such company to receive subscriptions from municipalities. Such company shall be organized according to the above provisions (p. 763 et seq.). The articles of incorporation "may provide for the issue, at one or several times, and disposition of any amount of negotiable bonds, with or without coupons, bearing a rate of interest, payable semi-annually, not exceeding eight per cent. per annum. and paid-up capital stock; said bonds and stock not to exceed, in the aggregate, the original cost of construction of the railroad and equipment purchased, and such sum as may be necessary in order to complete the same, and for priorities in

the payment of interest or principal of said bonds, or of dividends on different classes of its stock: and may regulate what right the different classes of stockholders and bondholders may have to vote in corporate meetings and elections. and may exempt the latter from responsibility in consequence of the exercise of such right. The corporation thus created may secure the payment of any bonds issued by it, under the authority conferred by this act, by mortgage or deeds of trust, upon all or any part of its property, rights and franchises acquired or to be * acquired." pp. 767, 768 (act of March 1, 1876). The provisions of the above act shall apply to the railroads owned by mining companies. p. 768 (act of April 5, 1878). As to the method of procedure in such a sale, see p. 770. The lien of laborers and material-men on railroads and manufacturing companies are superior to all other liens. pp. 877, 878. For provisions respecting the condemnation of land, see pp. 281-284. Railroad corporations receiving municipal aid must give a bond for the proper application thereof, and annual balance sheets showing the receipts and disbursements of such subscriptions shall be given to the municipal authorities. An action may be brought for any breach of the bonds or covenant. Fraudulent appropriation of corporate property by an officer is a felony, punishable by imprisonment of from two to twenty years. Such officer is also liable upon his bond, if he has given one, and individually liable whether he has given a bond or not. pp. 1215, 1216. Any railroad company doing business in the state shall keep continually posted in all depots a schedule of the maximum freight rates, and schedules of the rates actually charged; also a copy of this act. Any company, and the president and superintendent thereof, failing to post such schedules or copy, shall each be guilty of a misdemeanor and be fined \$100 for each offense. Such failure shall be a separate offense for each depot omitted. The same penalty is imposed for publishing or charging a greater rate than is allowed by law, pp. 1019, 1020. In any written contract of or for the sale of railroad equipment or rolling stock, by the terms of which any part of the purchase-money is to be paid in the future, it may be agreed that the title shall not pass until the purchase-money is fully paid. The term of credit shall not exceed ten years, and the agreement shall not be valid against subsequent purchasers without notice, or against creditors, until the contract is acknowledged in the manner required in case of mortgages, and recorded with the secretary of state, and with the clerk of the county in which the vendee may reside. Leases with the stipulation for a conditional sale at the termination of the lease may be made in the same manner. Each locomotive thus leased or sold must have marked thereon the name of the lessor or owner, followed by the word "owner" or "lessor." pp. 1020, 1021. Unreasonable rates for the transportation of freight, passengers or cars are declared to be extortion. Discrimination in such rates is unlawful. Any corporation guilty of such extortion or discrimination shall be fined, for the first offense, from \$100 to \$1,000; for the second offense, from \$500 to \$2,000; and for the third offense, from \$2,000 to \$5,000. The corporation shall also be liable for three times the damages received by any party, and for costs, A board of railroad commissioners is appointed by the governor, and has general supervision of railroads. The railroads of the state must furnish such commissioners an annual statement, for which thirty-six headings are prescribed. Every corporation, and every officer, that shall wilfully neglect to make any required report, or that shall intentionally hinder the commissioners in the performance of their duty, shall be fined from \$50 to \$100. pp. 1021-1028.

Foreign corporations must, within sixty days from the time of commencing railroad business within the state, procure from the directors a duly authenticated order, authorizing its agents to make contracts in the corporate name, and agreeing that all resident citizens and corporations may prosecute to final judgment, in any county cut by the road, all claims and demands against such corporation, subject to change of venue, as in the case of citizens of the state. Service of process on such agents is a valid service. Failure to comply with the provisions

of this act, or removal of a cause from a state to a federal court, forfeits the right to do business in the state. All parties and persons doing business contrary to the provisions of this act are guilty of a misdemeanor, and shall be fined not less than \$50, and imprisoned not less than one week, for each day's offense, or he both fined and imprisoned. Such corporation shall be subject to the laws of the state respecting rates. pp. 656-658.

Taxation.—The annual rate is fixed at four and seven-tenths mills on the dollar, on all taxable property. p. 1034, ch. 92, art. I, § 1. All corporations required to pay a tax on their capital stock shall be taxed seventy-five cents "on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations or societies: . . . and corporations shall, in addition, pay upon each one hundred dollars of so much of their surplus. undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent, of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, state, county, and municipal." Art. II. § 1. For the purpose of ascertaining such surplus, etc., the auditor may, at his option, investigate the corporate books, and any officer refusing to show the books may be fined from \$500 to \$1,000. Id. The proper officer must report annually on the first of July, to the auditor, the true amount of capital stock, surplus, undivided profits, or undivided accumulations, and how the surplus, etc., is invested, and pay the tax. If the tax is not paid, the cashier and his sureties shall be liable for the same and twenty per cent. upon the amount, and the corporation shall forfeit the privileges of its charter. Id. § 2. If any corporation, on the first of July, has invested in United States bonds or funds, which are exempt from taxation, more of its surplus "than an amount equal to ten per cent of such capital stock, the excess of the amount so invested over the amount equal to ten per cent, of such capital stock shall be exempt from taxation for that year and deducted from the amount of such surplus, undivided profits, or undivided accumulations, upon which tax is to be assessed under this article provided such was done in good faith and not for the purpose of avoiding taxation." Id. § 3. The above provisions shall not exempt the real estate of corporations from taxation for county or municipal purposes where it is situated. § 7. The chief officer of any railroad company owning a line wholly or partly within the state shall, on or before the first of September, annually, report to the auditor the total length of the road, including the portion outside of the state, showing the length of the road within the state, and within each county, city or town, with the average value per mile thereof, together with a description of all improvements and other real estate, giving the value and location thereof. If any such company owns or operates a road without the state the chief officer "shall only be required to return such proportion of the entire value of all its rolling stock as the number of miles of its railroad in this state bears to the whole number of miles operated by said company in and out of the state." Said report shall be made "as of the first day of July," and for failure to make the report the chief officer shall be fined \$1,000. and \$50 for every day's delay after the first of September. Art. III., § 1. The commissioners appointed by the governor shall pass upon such report. Id., § 3. The rate of taxation for state purposes, which is levied on other real estate, shall be the rate levied upon the value thus found of the railroad, rolling stock and real estate of each company; and the rate of municipal or district taxation, levied on other realty, shall be the rate levied on the value of the real estate of said company in such tax district, "and of the number of miles of such road therein reckoned as of the value of the average value of each mile of such railroad, with its rolling stock, as ascertained as aforesaid." Id., § 4. If the tax is not paid by the tenth of October, the chief officer shall be fined \$50 for each day's delay. Id., § 5. All railroads hereafter built shall be exempt from taxation for five years from the time of commencing the construction of such roads. p. 1029 (acts 1883-4, p. 195). Telegraph companies pay, annually, one dollar per mile for the lines of poles and

first wires, and fifty cents per mile for each additional wire. p. 1046. Telegraph companies pay one-fourth of one per cent. on all gross receipts in the state. Id. Express companies pay \$500 per annum where the length of their lines in the state is less than one hundred miles, and \$1,000 where the distance is more than one hundred miles. Also an ad valorem local tax on real and personal property. Id. The property of corporations, except where otherwise provided herein, shall be assessed in the same manner as the property of individuals. p. 1047.

The fee of the county clerk is one dollar for taking acknowledgment of the articles of incorporation, and ten cents a hundred words for recording the same.

The secretary of state receives a like fee for recording. p. 766.

8 950. LOUISIANA: 1 Constitutional provisions.—No local or special law shall be passed authorizing street passenger railroads in any incorporated city or town: creating corporations, or amending, renewing, extending or "explaining" the charter thereof; or "granting to any corporation, association or individual any special or exclusive right, privilege or immunity." Constitution of 1879, art. 46. Neither the state, nor any political division thereof, shall loan its / credit, or anything of value, to any person or corporation, nor subscribe for the capital stock of any corporation, nor assume the liabilities of the same in any way. Art. 56. Cf. art. 242, sub. The power to tax corporations shall never be surrendered or suspended by legislative act. Art. 205. A license tax is authorized. § 206. No municipal tax shall exceed ten mills on the dollar, unless authorized by a vote of the tax-payers. Art. 209. Foreign corporations may be licensed to do business in the state by a mode different from that provided for domestic corporations, provided the same be uniform for all foreign companies. Art. 217. Foreign corporations must keep an office in the state. Art. 236. Corporations shall not engage in ultra vires business, nor hold real estate for more more ten years, unless the same is necessary for its business. Art 237. "No corporation shall issue stock nor bonds except for labor done or money or property actually received: and all fictitious issues of stock shall be void, and any corporation issuing such fictitious stock shall forfeit its charter." Art. 238. The stock shall not be increased, except in pursuance of general laws, nor without the consent of the majority of the stock at a meeting noticed thirty days. Art. 239. The legislature may, by general laws, authorize municipalities to aid public improvements or railroads, upon a majority vote in number and value of the tax-payers. Such tax shall not exceed five mills per annum, nor extend over a longer period than ten years. Art. 242. Any railroad organized for the purpose may construct its road between any two points in the state and connect at the state line with any foreign road. Every railroad company has the right with its road to "intersect. connect with or cross" any other railroad, and railroads shall receive and transport each other's passengers, freight and cars without delay or discrimination. Art. 243. Every corporation doing business in the state shall keep a public office in the state, where transfers of stock shall be made, and where shall be kept for public inspection very complete stock-books. Art, 245. Consolidations with foreign corporations, by sale or otherwise, shall not make a domestic railroad company a foreign company, and no consolidation shall take place except upon public notice of sixty days to all stockholders. Art. 246. General laws shall be enacted providing for the creation of private corporations, "and shall therein provide fully for the adequate protection of the public and of the individual stockholders." Art. 248. "The monopoly features in the charter of any corporation now existing in the state, save such as may be contained in the charters of railroad companies, are hereby abolished." Art. 258.

Miscellaneous corporations.—Six or more may incorporate for railroad or manufacturing purposes, "and generally for all works of public utility and advantage." No such corporation shall engage in mercantile or in commission.

 $^{^{1}}$ The acts of the legislature down to and including the laws of 1892 are included in this synopsis. 1691

brokerage, stock jobbing, exchange or banking business of any kind. Revised Laws of 1882 (2d ed.), \$ 683. Such corporations have among other powers, the power to have succession for ninety-nine years: "to hold, receive, purchase and convey, under their corporate name, property, both real and personal;" to name and appoint such managers, directors and officers as their interest and convenience may require; to make by-laws. § 684. Every charter shall contain (1) the cornorate name and the name of the proposed domicile: (2) a description of the corporate purposes and a designation of the officer on whom citation may be served; (3) the amount of the capital stock, the number and amount of the shares. and the time when and the manner in which subscriptions shall be paid: (4) the manner of electing directors: (5) "the mode of liquidation at the termination of the charter." § 685. The charters of corporations "and the original subscriptions made for the purpose of organizing them" shall be recorded with the recorder of mortgages, at the place selected as the domicile of the corporation, and be published once a week for thirty days in a local paper, but the names of subscribers need not be published. § 686. "It shall be lawful for the stockholders of any corporation, at the general meeting convened for that purpose, to make any modifications, additions or changes in their act of incorporation, or dissolve it with the assent of three-fourths of the stock represented at such meeting." Any such change or dissolution shall be recorded as required by the preceding section. § 687. "They shall forfeit their charter for insolvency, evidenced by a return of no property found on execution;" and in such case the district court shall, at the instance of any creditor, decree such forfeiture. § 688. No street shall be appropriated without the consent of the municipal authorities. § 689. "No stockholder shall ever be held liable or responsible for the contracts or faults of such corporation in any further sum than the unpaid balance due the company on the shares owned by him, nor shall any mere informality in organization have the effect of rendering a charter null or of exposing a stockholder to any liability beyond the amount of his stock." § 690. Any railroad company or corporation for land reclamation and levee building established under any general or special laws of the state "may borrow from time to time such sums of money as may be required for constructions, repair or acquisitions of property or franchises; and for this purpose may issue bonds or other obligations secured by mortgage or pledge, as the case may be, of the franchise and all the property, real and personal; and incomes, revenues, contributions and receipts of said companies, and payable in such terms and such times and places as the board of directors, trustees, managers or commissioners may direct or designate, with power to sell, pledge or otherwise dispose of said bonds on such terms as the companies respectively may direct or deem expedient." § 692, Am'd Laws 1890, No. 80. Such mortgage shall be binding in the several parishes traversed by the road by a record in the parish where the principal office is located; and such mortgage need not be re-inscribed to continue it in force. "The president and directors of any company may confer on the holder of any bond or bonds issued for money for the use of said company the right to convert the principal due thereon into the stock of said company at any time not exceeding ten years from the date of said bond or bonds under such regulations as the president and directors may adopt; provided, that nothing in this act shall be so construed as to authorize an increase in the capital stock of any railroad company." §§ 693, 727. Respecting telegraph companies, see §§ 696, 697. Petition must be made to the district court for permission to appropriate land, if the company cannot agree with the owner of "any land which may be wanted for its purchase or for the acquisition of any necessary right thereon." § 698. "All claims for land or damages to the owner" caused by its expropriation for any public works shall be barred by a two years' prescription which shall begin to run from the date the land was actually occupied for the construction of the works. Id. For the proceedings necessary to condemn land, see §§ 699-714. The state treasurer shall, when authorized by special law, subscribe for the

state for one-fifth of the capital stock of any railroad organized in the state. \$ 715. For the payment of such subscriptions the governor shall issue state coupon bonds payable forty years after date and bearing interest at the rate of six per cent, per annum. § 716. Said bonds may be transferred by the indorsement of the secretary of the company. Id. "The bonds of the state shall be issued from time to time for an amount equal to one-fourth of the amount actually received by and paid to the company . . . from its other stockholders." § 717. The governor shall appoint three directors to serve on the board of directors of such company. § 722. Such company must report annually to the legislature. "Police juries and municipal corporations" may subscribe for stock in internal improvement companies. § 711. No ordinance for such subscription shall be valid until ratified by a majority of the voters at a special election. § 713. "The stock subscribed shall not belong to nor be administered by the parish or mnnicipality by which the subscription shall be made, but shall belong to the taxpavers who shall have paid therefor; and the tax receipt of each tax-payer shall entitle him to a certificate transferable by delivery from the corporation to which subscription has been made for an amount equal to the amount of his tax paid." § 714. The right to receive the whole or any portion of such taxes may be assigned and transferred by such railway company to any person or company; but no such tax shall be paid by the parish or municipality until the road in favor of which the same was levied is completed and in operation to the point specified in the petition for such tax. Laws 1886, No. 35. The obligation of such corporations to parishes and municipalities in regard to the repair or care of streets is enforced. Laws 1888, No. 133. Any railroad company established under the laws of the state may, to secure the payment of any obligation contracted in the construction of its road mortgage its road in whole or in part: and such mortgage, if made of the entire road, shall be as upon the entire road though the same be not completed at the time the mortgage was made; and such mortgage may be made to bind all the appurtenances of the road. The mortgage need only be recorded in the parish where the principal office is located and does not require to be re-inscribed at any time. §\$ 726-7. Directors' and stockholders' meetings shall be held only within the state at the place of domicile of the corporation. § 741. All corporations receiving state aid must report annually to the state auditor. § 746. The passenger rates on railroads are limited to three cents per mile, and the corporation or agent charging a greater rate shall pay a fine of \$100. This act shall not apply to local or branch roads independent of main lines. nor to roads in course of construction or to be constructed until five years after completion within the limits of the state. Laws 1890, No. 54.

For provisions respecting foreign insurance companies, see Laws 1886, No. 76 and No. 82.

Taxation. - All privileges, charters and franchises, and all railroads and railroad appurtenances, are assessed at their cash value. Laws 1890, No. 106, §§ 1, 19. All corporations (except banks) "shall be assessed directly upon all property owned by such corporations which is taxable under section 1 of this act; but unless three months' prior continuous ownership can be shown in any holdings of national, state or municipal bonds, or stock in any other corporation whatsoever. then the market value of such holdings shall be assessed to such corporation as so much 'money in possession.'" § 28. Corporations (other than banks) shall furnish within the first twenty days of January, annually, under penalty of fine or imprisonment, to the assessor, a sworn statement "of the cost of their property, real and personal, and of the value at which the same is carried on the books, and in determining the assessment these valuations shall be considered; and further. to furnish a sworn statement of the earning capacity of the corporation, which said earning capacity shall form a basis of estimating the value of its charter or franchise." Id. The "real estate, road-beds, roads, iron, track, superstructures, excavations and channels of railroads, canals and other transportation or telegraph companies" shall be assessed and taxed in the district where the same are located; and all other property of such corporations, not exempted by article 207 of the constitution, shall be assessed and taxed at the domicile or principal office of such railroad, canal, etc., company. But the rolling-stock or movable property of any such company, whose line is partly without the state, or whose sleepingcars run over a line partly without the state. "shall be assessed in this state in the ratio which the number of miles of the line within the state has to the total number of miles of the entire lines," § 29. All persons or corporations pursuing any business, except those occupations exempted from a license or other tax by the constitution, must pay a license fee. The tax is graded according to gross receipts, and varies, for manufacturing companies, between \$8,000 for \$10,000,000 of gross receipts to \$15 when the gross receipts are less than \$25,000. Transportation companies, excepting railroads running outside of cities and towns, pay from \$400 upon gross receipts of \$500,000 or more to \$30 when the receipts are less than \$25,000. For a passenger street railroad within any city or town, the tax is \$2,500 when the gross receipts are \$500,000 or more, graded to \$250 for gross receipts of \$100,000 or less. But in cities of not more than fifty thousand inhabitants there shall be but two grades, the tax being \$100 when the gross receipts are \$25,000 or more, and \$50 when the gross receipts are less than \$25,000. Telegraph and telephone companies pay from \$3,500 for a gross iucome of \$500,000 or more to \$15 when the gross receipts are less than \$15,000. Laws 1886, No. 101, Am'd Laws 1888, No. 101.

§ 951. MAINE: ¹ Constitutional provisions.—Corporations shall be formed under general laws, and shall not be created by special acts unless the objects of the corporation cannot otherwise be attained. Constitution of 1819, art. IV, § 14. "The credit of the state shall not be directly or indirectly loaned in any case." Art. IX, § 14.

Miscellaneous corporations.—Three or more may associate by written articles of agreement to form a corporation for carrying on any lawful business, "excepting corporations for banking, insurance, the construction and operation of railroads or aiding in the construction thereof, and the business of savings banks, trust companies or corporations intended to derive profit from the loan or use of money and safe-deposit companies, . . . also excepting telegraph and telephone companies." Rev. Stat. 1883, ch. 48, § 16. The first meeting shall be called by one or more of the signers of the articles by a written notice to each signer or by fourteen days' publication in a county paper. At such meeting they may organize, adopt a corporate name, define the purposes of the corporation, fix the amount of the capital stock (which shall not be less than \$1,000 nor more than \$10,000,000), divide it into shares, and elect a president, not less than three directors, a clerk, treasurer and other officers, and may adopt by-laws. § 17, Am'd Laws 1891, ch. 99. Before commencing business, the president, treasurer and a majority of the directors shall make a certificate setting forth (1) the corporate name and purposes; (2) the amount of the capital stock, the amount already paid in and the par value of the shares; (3) the names and residences of the owners; (4) the name of the county where the corporation is located; (5) the number and names of the directors. After the certificate has been examined by the attorneygeneral, it shall be recorded with the county register of deeds, and a copy, certified by such register, shall be filed with the secretary of state. The corporation shall pay the attorney-general and secretary of state \$5 each for their services; and before filing the copy with the secretary of state, there shall be a further payment to the state treasurer of \$10 when the capital is not more than \$10,000, of \$50 when the capital is more than \$10,000 but not more than \$500,000; and when the capital exceeds \$500,000, shall pay \$10 for each \$100,000 of capital. \$ 18, Am'd Laws 1891, ch. 99, and Laws 1893, ch. 212. From the time of filing the copy with the

 $^{^{1}}$ The acts of the legislature down to and including the laws of 1893 are included in this synopsis. 1694

secretary of state the corporation has all the rights and powers and is subject to all the liabilities and duties provided by this chapter and chapter 46. The stockholders may, by a majority vote of all the stock, increase the capital stock to any necessary amount not exceeding \$10,000,000, and also change the number of directors. The vote shall have effect when the corporation files a certificate thereof with the secretary of state, which must be done within ten days. Forty dollars shall be paid to the state treasurer for an increase from \$10,000 or less to \$500,000 or less, and \$10 for each \$100,000 of increase when the capital is increased to more than \$500,000. \$ 20, Am'd Laws 1891, ch. 99, and Laws 1893, ch. 212. "Manufacturing corporations shall exercise the powers and he subject to the duties and liabilities contained in this chapter and in chapter 46, and in their charters." They shall have "a president, directors, clerk, treasurer" and other desirable officers. Such officers shall be chosen annually. There shall be at least three directors, one of whom shall be by them elected president. No one can he a director after he ceases to be a stockholder. The treasurer shall give a bond. L. 1891, ch. 99, §§ 1, 2. The first meeting may be called by a majority of the corporators. By-laws may be made and enforced as provided in section 6. chapter 46. Revised Statutes. The capital shall be fixed within the limits of the charter and divided into shares. The names of owners and the number of shares owned by each shall be recorded at the first meeting. The capital may be subsequently increased to an amount limited in the charter by adding to the number of shares. L. 1891. ch. 99, §§ 3, 4. Stock certificates are transferable. § 12, ch. 46. Assessments, not exceeding the amount originally limited for a share, may be made on all shares to be paid to the treasurer "in such instalments and at such times as are ordered." Id., §§ 5, 6. "Dividends of profit may be made by the directors, but the capital or the debts due shall not thereby be reduced until all debts due from the corporation are paid." Any officer or member voting or aiding to make a dividend in violation hereof shall be fined not more than \$2,000 "and imprisoned less than one year." All sums received on such dividends may be recovered by any corporate creditor. Id., § 8. Any person in charge of corporate property shall, on request, furnish to an officer having an execution against the corporation the names of the directors and clerk, and a schedule of all property, including corporate debts, within his knowledge. Id., §§ 9, 10. Any person violating either of the two preceding sections forfeits not more than four times the amount due on the execution, and may be imprisoned not more than one year. § 11. For refusal to produce books upon a trial for violation of any provision of this chapter, the person having the same in custody is liable to the same fine or imprisonment as the person on trial would be. Id., § 12.

A certificate, identical with that described in section 18 above, is required to be recorded and filed in the manner specified in said section 18, by corporations created by special act. Laws 1891, ch. 140, § 1. Before filing such certificate the secretary of state shall receive from the corporation \$100, if the capital stock exceeds \$10,000, \$50 if the capital is between \$5,000 and \$10,000, and \$25 if the capital does not exceed \$5,000. § 2. Any of the corporations included in the exceptions specified in section 16, supra, also street railway, gas and water companies, and any corporation authorized to exercise the right of eminent domain, shall, before filing their certificate, be required to pay \$100 for a capital stock of more than \$20,000, \$25 if the capital is from \$5,000 to \$20,000, and \$20 if the capital does not exceed \$5,000. § 3. Any change in a charter or certificate must be reported to the secretary of state, with a payment of a fee of \$5. Laws 1885, ch. 361.

The location of a corporation may be changed from one county to another by a majority stock vote. Laws 1893, ch. 182.

For the organization and control of street railroads, see Laws 1893, ch. 268.

Railroads.—Ten or more, a majority of whom shall be citizens of the state, may incorporate for the purpose of contracting, maintaining and operating a railroad for public use. They may make and sign articles of association, which shall

state (1) the corporate name: (2) the gauge of the road; (3) the termini, and the name of each town and county to be traversed; (4) the length of the road, as near as may be: (5) the amount of capital stock (to be not less than \$6,000 per mile, for the gauge of four feet eight and a half inches, and not less than \$3,000 per mile for a narrower gauge); (6) the number of shares; (7) the names and residences of at least five persons, a majority of whom shall be citizens of the state. who shall act as directors until others are chosen. Ch. 51, § 1. The articles shall not be recorded until the capital stock specified in the preceding section has been subscribed in good faith by responsible parties, and five per cent. thereof has been paid in cash, nor until there is annexed thereto an affidavit, made by a majority of the persons named as directors, that the required subscription and payment have been made, and that it is intended in good faith to construct and operate the road. § 2. When it shall appear to the railroad commissioners that the provisions of the two preceding sections have been complied with they shall indorse on the articles a certificate of their approval. Thereupon the secretary of state shall, upon a payment of \$20 to the state, record the same and issue a certificate of incorporation. § 3. The first meeting shall be called by a notice, signed by five or more of the corporators, mailed to each subscriber at least seven days before the time of meeting. § 4. The capital stock may be increased to any necessary amount, upon a vote of two-thirds of the stock. § 5. A petition must be presented to the commissioner for approval of location, with a report and estimate prepared by a skilful engineer from actual survey. The board shall thereupon appoint a day for a public hearing upon the question of the proposed road. If the board decides that public convenience requires the road, the corporation may proceed with the construction thereof; provided, that they first file with the county commissioners of each county to be traversed, and with the railroad commissioner, a plan of the whole location. The said plan, together with any variation thereof, shall be filed within two years from the time of filing the articles. provided, that the commissioners may, in their discretion, extend the time of filing such variations. § 6, Am'd Laws 1893, ch. 164. See, also, as to change of location, Laws 1893, ch. 193. If construction is not begun within three years from filing the articles and three per cent, of the capital expended thereon, the corporate existence and power shall cease. § 7. A map and profile of the part constructed must, in all cases, be filed with the secretary of state and in the various counties within one year after the same is put in operation. § 8. The commissioners may revise and establish rates upon the complaint of interested parties, § 9. A petition for incorporation by the legislature must state (1) the termini and intermediate towns; (2) the length and general course of the road. § 11. The number of directors may be fixed at any annual meeting, provided notice of the intention to do so has been given in the call for the meeting. § 12. Any stockholder, or his representative, may call for a stock vote at any meeting. § 13. A railroad corporation may, for the "location, construction, repair and convenient use" of its road, "purchase, or take and Hold, as for public uses," land and all materials in and upon it; but the land so taken shall not exceed four rods in width, unless necessary for excavation, embankment or materials. § 14; and see Laws 1893, ch. 193. The railroad commissioners shall hear and decide questions respecting variations in the stated location, and any aggrieved party must apply to them. Provisions in charters limiting the time for completing the road shall not affect the portion completed within such time, and the charters are valid as to the portion constructed. § 15. Any railroad company may "purchase or take and hold, as for public uses," land for "borrow and gravel pits," necessary tracks, stations and other buildings. If an agreement cannot be made with the owner, the commissioners shall decide the matter. Dwelling-houses shall not be taken without the consent of the owners. §§ 16, 17. Branches may, under the direction of the commissioners, be constructed to any mills, mines, gravel pits or manufacturing establishments, but not within any city through which the

§ 18. Am'd Laws 1891, ch. 129. For the estimamain line is constructed. tion and payment of damages for land taken, see §§ 19-27. Railroads may cross highways, but cannot pass along them without the consent of the town. § 28, Am'd Laws 1885, ch. 312. Railroad corporations shall receive and transport, at the ordinary rate, the cars of connecting companies, and if they refuse to do so, the connecting company may carry on such transportation with its own engines. \$40. Rates for the transportation of passengers and property may be determined by the directors, provided, that such rates are always subject to revision by the legislature, or its appointees, anything in the charter to the contrary notwithstanding. §§ 42, 43. Any ticket shall be good for six years, and shall not be limited to any train or class of trains: but excursion or special tickets may be sold at less than the regular rate, to be used only as provided on the ticket. \$ 44. If any railroad neglects to run trains regularly for sixty days at a time, the supreme court may, upon petition of ten citizens, appoint a receiver to operate the road. \$\$ 46-53. Am'd Laws 1893. ch. 193. "No corporation can assign its charter or any rights under it; lease or grant the use or control of its road or any part of it, or divest itself thereof, without consent of the legislature." \$ 54. Shares of stock are personal property, and may be transferred by a written conveyance recorded in the books of the treasurer. No transfer is valid, except as to the parties, until so recorded. New certificates shall be issued upon such conveyances of shares. § 55. Any corporation may, to build or furnish its road, or pay debts contracted for that purpose, issue interest-bearing bonds, in sums of not less than \$100, secured in such manner as it deems expedient, "and binding upon it although sold at less than par value:" and no defense of usury shall, for that cause, be allowed. § 56. When interest coupons are, for a valuable consideration. detached and assigned by delivery, the assignee may maintain assumsit upon them in his own name against the corporation. § 57. For failure to make annual returns to the railroad commissioners, the corporation shall forfeit \$1,000. When a corporation has mortgaged its franchise for the payment of its bonds or coupons, and trustees are appointed, the bondholders may, by ballot, elect new trustees to fill vacancies, if no other method has been provided. § 85. The neglect, for ninety days after demand, to pay overdue bonds or coupons secured by such mortgage is a breach of the conditions of the mortgage, and thereupon the trustees shall call a meeting of the bondholders. At such meeting each bondholder shall have one vote for each hundred dollars of bonds, and they shall determine whether the trustees shall take possession of the road and manage it in their behalf. If they so determine, the trustees shall operate the road in the place of the corporation, and shall surrender the same when the overdue bonds and coupons are paid. The trustees shall, annually, and at other times upon the written request of one-fifth in amount of the bondholders, call a bondholders' meeting in the manner prescribed for calling stockholders' meetings. At such meeting they shall make a report. The bondholders may, at such meeting, fix the compensation of the trustees; "instruct them to contract with the directors of the corporation or other competent party, to operate said road while the trustees have the right of possession, if approved by the bondholders at a regular meeting, otherwise not exceeding two years, and to pay them the net earnings thereof;" or may give them any other instruction they deem advisable, and the trustees shall conform thereto, if consistent with the terms of the trust. §§ 86-90. Upon the application of one-third in amount of the bondholders for a foreclosure of the mortgage, the trustees shall publish for three weeks in a county paper of each county traversed the conditions of the mortgage, and the claims of the applicants. and shall record such notice, with the name and date of each newspaper containing it, with the register of deeds of each aforesaid county; and unless, within three years from the first publication, the mortgage is redeemed, or a bill in equity is begun for redemption, founded on payment or a legal tender of the amount of overdue bonds and coupons, or containing an averment that the complainants are ready to redeem, "the right of redemption shall be forever closed." § 91. Each holder of overdue bonds or coupons shall present them to the trustees thirty days before the right of redemption expires: "and such right is not lost by the nonpayment of any claims not so presented; and the parties having the right to redeem shall have free access to the record of such claims." \$ 92. "The foreclosure of the mortgage shall inure to the benefit of all the holders of bonds, coupons and other claims secured thereby; and they, their successors and assigns, are constituted a corporation, as of the date of the foreclosure, for all the purposes, and with all the rights and powers, duties and obligations of the original corporation by its charter: and the trustees shall convey to such new corporation by deeds all the right, title and interest which they had by the mortgage and the foreclosure thereof, and thereupon they shall be discharged." If they neglect to convey, the court may compel them to do so. § 93. The new corporation may call its first meeting in the same manner as the original corporation, and may use therefor the old name, or the meeting may be called by a notice, signed by one or more of the bondholders, published in a county paper seven days before the meeting. At that meeting a new name may be adopted, and the new company may take possession of the mortgaged property, "although a bill in equity to redeem is pending, and it may become a party defendant to such bill." This section applies to all corporations mentioned in section 109. § 94. If any part of "such property or franchise" is subject to a prior mortgage, the new corporation, at a legal meeting called for the purpose, may vote to redeem the same, "and make an assessment therefor on all holders of stock, certificates for fractions of stock, bonds or coupons in such corporation in proportion to their amounts." The "directors" shall immediately assess such sum, and fix the time and place of paying the same. As soon as such prior mortgage is thus redeemed, all the property, rights and interests secured thereby vest in such new corporation. §\$ 95, 97. "When a subsequent mortgage of a railroad, its franchise or any part of its other property, contains no provision for a sale, or contains a conditional provision depending on the application of a majority in amount of the claims secured thereby, and no such application has been made to the trustees, the holder of, such mortgage may redeem a prior mortgage on the same property which is under process of foreclosure, at any time before it becomes absolute: and hold it in trust for those who contributed thereto in proportion to the amount paid by each." § 98. "For such purpose the trustees of such subsequent mortgage, on application of one or more persons interested therein, made six months prior to the absolute foreclosure of such prior mortgage, and on payment of reasonable expenses to be incurred thereby, shall call a meeting of all interested and publish a notice thereof" for three weeks in a state paper, and such other papers as they think proper. If at such meeting, or one called without application, the holders of a majority of the interests represented vote to redeem the prior mortgage, each one may contribute his proportion therefor. The trustees shall give immediate notice of such vote. by publication as above, stating the amount to be paid on each \$100. If any one fails to pay his proportion, any person interested in such subsequent mortgage may pay it and succeed to all his rights, "except as hereinafter provided." § 99. "If no such meeting is called, or it is voted not to redeem, one or more of the persons interested in such subsequent mortgage may pay to the trustees thereof the amount required to redeem the prior mortgage; and such trustees shall redeem it accordingly and then hold it in trust for the persons so paying." § 100. "When a prior mortgage has been redeemed in either mode aforesaid, and all persons interested in the subsequent mortgage have not paid their proportions thereof, the trustees shall publish a notice ten weeks successively in a state paper, the first publication not to be until the right of redeeming the prior mortgage would have expired, that delinquents may pay the same to them or their agents, with twelve per cent interest, within one year from the first publication of said notice; and any person so paying has the same rights as if he had paid originally; and those not so paying are barred. Money so paid shall be divided ratably to those who. advanced the redemption money; and they may become a new corporation, and new certificates of stock or fractions of stock may be issued in the manner and with the rights, powers and obligations hereinhefore provided." § 101. When a prior mortgage is thus redeemed, any number of the stockholders of the old corporation may redeem it within two years by paying to the trustees of the subsequent mortgage the amount paid therefor, with ten per cent, interest, "and also the amount secured by the subsequent mortgage due to those who had contributed to redeem the prior mortgage, after deducting the net earnings of said road or adding the net deficiencies, if operated by the trustees of the subsequent mortgage." Said stockholders may demand from said trustees an accurate accounting. and have the same remedies for failure as provided in case of real-estate mortgages. After such redemption, the redeeming stockholders have the same rights as those from whom they redeemed. § 102. The stockholders thus redeeming shall give notice to the stockholders not contributing; and the latter shall have the same rights as hereinbefore provided in the case of bondholders. § 103. "The persons interested in a prior mortgage on which a foreclosure is commenced, at a meeting called for the purpose, may extend the time of redemption; and thereupon the trustees of such mortgage, by a suitable writing, delivered to the party entitled to redeem, shall extend the time accordingly." § 104. "When the frauchise of a railroad and its road, wholly or partly constructed, or the right of redeeming the same from a mortgage thereof," are sold, the purchasers have all the rights and obligations of the corporation, under its charter, and may form a new corporation in the manner hereinbefore provided. If the original corporation, or those claiming under it, have a right to redeem, they may do so in the manner provided for the redemption of mortgaged real estate; but shall pay the reasonable expenditures of the new corporation in connection with the road, after deducting the net earnings. § 105. "The trustees of bondholders or other parties under contract with them operating a railroad, and all corporations formed in the modes hereinafter provided," have the same rights, powers and obligations as the old corporation had by its charter and the general laws, subject to amendment or repeal, and to all general railroad laws, notwithstanding anything to the contrary in the original charter. § 106. After the foreclosure of the mortgage, the original corporation shall exist for the sole purpose of closing up its business, and a right of action against it or its stockholders is not impaired. But in suits on the honds or coupons secured by the mortgage, the "proportional actual value" of the property taken under the mortgage shall be deducted. \$ 107. In all proceedings relating to trustees or to mortgages, not otherwise provided for herein, the law relating to trusts and mortgages of real estate may be applied. \$ 108. Sections 85 to 108, inclusive, apply to and include mortgages of every kind, whether heretofore given or hereafter to be given, to secure the payment of scrip or bonds. in all cases in which the principal of said scrip or bonds has been due and payable for more than three years, and remains unpaid in whole or in part, or on which no interest has been paid for more than three years, "in the same way and to the same extent as if the mortgage had been legally foreclosed, subject to all the rights of redemption, as provided in section 95; and the holders of said scrip or bonds shall have the benefit of said sections, and all the rights and powers of the corporation under its charter, and may form a new corporation in the manner provided in this chapter, whenever the holders of such scrip or bonds to an amount exceeding one-half of the same so elect, in writing. And any subsequent foreclosure, in any method provided by law, of the mortgage given to secure such bonds or scrip, shall inure at once for the benefit of such corporation, and vest therein the title acquired by such foreclosure." § 109, Am'd Laws 1887, ch. 103. "A corporation formed by the holders of such scrip or bonds, or if no such corporation has been formed, the holders of not less than a majority of such scrip or bonds may commence a suit in equity to foreclose such mortgage, and the court

may decree a foreclosure thereof, unless the arrears are paid within such time as the court orders." § 110. The capital stock of such new corporation shall be equal to the amount of annaid bonds and overdue coupons secured by the mortgage, "taken at their face value at the time of the organization of the new corporation, together with the amount required to redeem any prior mortgage," and shall be divided into shares of \$100 each. All stock issued under the aforesaid provisions shall be taken and considered as paid for in full, and shall not be liable to further assessment; "and no person taking or holding the same shall by reason thereof be liable for the debts of such corporation." § 111. "Any corporation, formed under this chapter by the holders of railroad bonds, may acquire, by purchase, the right of redemption ander the mortgage securing such bouds." § 112.

The provisions of sections 91-112 are so far amended "as to apply to and include all mortgages of franchise, lands or other hereditaments, or of all of them heretofore or hereafter given by any corporation to trustees to secure scrip or bonds of said corporation; so that the holder of said scrip or bonds may have the benefit of all said provisions, whether the said mortgages have been or may be foreclosed in the manner provided by section 91 of said chapter, or in any other legal manner, and to the extent of and with reference to the property covered by the mortgage; the new corporation, when organized, shall have the rights and privileges of the original corporation." Laws 1887, ch. 85.

There is a board of railroad commissioners. § 113, Am'd Laws 1889, cb. 313. The commissioners have general supervision of the road. They settle controversies between connecting roads as to rates and other matters. § 119, Am'd Laws 1891, ch. 44. No railroad corporation shall take the ground occupied by another company and necessary for its use for station purposes without its consent, and the commissioners shall determine whether such land is necessary as aforesaid, and whether any public necessity require it to be taken. §§ 121, 122. The commissioners may compel the building of necessary stations. § 123. Railroads must not discriminate, as to facilities or rates, between freight or passengers destined for other roads and those transported entirely over their own lines. \$ 129. Railroad corporations shall not discriminate between other railroads, by means of drawbacks, or otherwise. §§ 131, 132. Equal facilities shall be afforded to all express companies, or persons doing au express business. § 134. A city or town may, by a two-thirds vote, aid in the construction of railroads, to the extent of five per cent. of its valuation. §§ 135-140, Am'd Laws 1891, ch. 77. Whenever any town or city holds one-fifth or more of the shares in the capital stock of a railroad incorporated by the legislature, any citizen thereof, being a freeholder and resident thereof, is eligible as a director. § 140. Railroad corporations are liable to laborers for services performed under a contractor. \$ 141. Am'd Laws 1889, ch. 267. Railroad corporations, wholly organized under the laws of the state, at any time when it has paid a dividend for the three preceding years, may, by a vote of the directors, authorized by a "two-thirds vote of its stockholders." aid in the construction or equipment of a branch of its road, or of a connecting road, and may own and hold the securities or stock of such branch or connecting road; "and the parties may make such leases or mortgages as they deem necessary to secure their respective interests." Laws 1885, ch. 301. One company has the right to use the tracks of another in approaching a station in any city or town, and the commissioners decide disputes as to the terms of such use. Laws 1887, ch. 120. A road may be extended upon application to the commissioners. The railroad commissioners may revive charters which have lapsed on account of failure to file the location or begin construction within the time limited by the charter, upon application of the directors. Laws 1887, ch. 96.

The conditional sale or lease of rolling stock and equipment is provided for. Laws 1893, ch. 213.

For the regulation of express business on railroads, see Laws 1893, ch. 235.

General provisions -- This chapter applies to all corporations formed by special act or under the general laws, except in so far as inconsistent therewith covering particular classes of corporations. Cl. 46, § 1. Corporations may make hy-laws, "and hold and convey lands and other property." Directors must be stockholders; but a member of another corporation, which owns stock and has a right to vote thereon, may be a director. § 2, Am'd Laws 1893, p. 198. Unless otherwise specified, the first meeting shall be called by a notice signed by some person named in the act of incorporation, a copy of which shall be delivered to each member, or published in a county paper, seven days before the time of meeting. When a meeting cannot be otherwise legally called, a justice of the peace may issue his warrant to one of three members who petition him, directing such member to call a meeting. § 4. Any meeting is legal if all the members are present and sign a written consent. § 5. Corporations may determine by their by-laws the manner of calling and conducting meetings; the number of members necessary for a quorum; the mode of voting by proxy; and of selling delinquent shares. They may enforce the by-laws by penalties not exceeding \$20. The corporate name may be changed at a legal stockholders' meeting, and when the proceedings of the meeting are reported to the secretary of state the name shall be deemed changed. § 6. When, upon due notice, officers are regularly elected on any other day than the day of the annual meeting, they shall hold their offices as if chosen on that day, unless a majority of the members file with the clerk, within six months, written objections thereto, and their acts shall be considered legal until others are chosen in their stead. § 8. When such objections are filed, the clerk must call a meeting. \$9. A clerk's office shall be kept within the state. where the books and records shall be open for the inspection of interested parties. \$ 10. The clerk shall, within twenty days after accepting the office, file a certificate of his election with the county register of deeds, and legal process may be served upon the clerk. § 11. "When the capital of a corporation is divided into shares, and certificates thereof are issued." they may be transferred by indorsement and delivery, but such transfers are not valid, except as between the parties. until recorded on the books. \$ 12, Am'd Laws 1893, ch. 200. Shareholders may be represented by proxies granted not more than thirty days before the meeting which shall be named therein, and are not valid after a final adjournment of the "They may be represented by a general power of attorney, produced at the meeting, until it is revoked. Shares hypothecated to the corporation shall not be represented. No person can give, by right of representation, a greater number of votes than is allowed to any one by the charter or by-laws." Pledgors vote the stock transferred by them. § 14. Whenever the assets are reduced by losses or depreciation of property, so that the capital is impaired, the capital stock may be reduced to the extent of the impairment, with the consent of two-thirds of the outstanding stock, at a meeting legally called. § 15. Any stockholder who has not assented thereto may, within thirty days, file a bill in equity for a revision of the proceedings. The court may then annul such proceedings. or modify them so that the reduction shall not exceed the legal amount. The action of the court, or of the corporation if no bill is filled, shall be conclusive upon all parties, "and such reduction shall not create any personal liability of any stockholder or officer thercof." § 16. The clerk shall file a copy of the proceedings within thirty days, under a penalty for failure of \$1,000, to be recovered by any creditor. § 17. The shares shall be reduced proportionally, and the corporation may, from time to time, issue new shares, of the reduced par value, "until the gross capital equals the gross capital authorized by its charter or articles of association before such reduction was made, although the new shares should increase the whole issue beyond the number authorized by such charter or articles." § 18. Any officer or member who prevents access to and use of books and records shall be liable for all damages arising therefrom. § 19. Corporate property, and the franchises of corporations authorized to take toll, may be attached. § 20.

Corporations are bound by parol contracts of agents authorized by vote or by the by-laws. § 21. Corporations whose charter expire or are otherwise terminated are continued corporations for three years, for the sole purpose of closing up their business. § 24. The court may appoint trustees, in such case, upon the application of a creditor or stockholder. \$ 25. Upon a vote for dissolution, any creditor. officer or stockholder may file a bill against the corporation for the dissolution of the same, unless otherwise provided by statute, § 27. The court may then appoint receivers. § 28. No dividend shall be paid to a stockholder whose residence for the time being is not entered on the books. § 30. The clerk or treasurer shall return annually to the secretary of state the names and residences of stockholders, the amount owned by each, and the amount of stock paid in. § 31. For the failure of such officer to make the return, the corporation forfeits \$500. and costs of the action to recover the same. §§ 32-34. If any officer neglects to publish any statement which his duty requires him to publish, he shall, in addition to the penalties already provided, pay \$500 to the prosecutor. § 35. The stockholders of all corporations, except banks, created by the legislature since February 16, 1836, unless otherwise specified in their charter, or by general law, are liable for the debts of the corporation contracted during their ownership of stock, prior to June 1, 1857, in case of deficiency of attachable corporate property. "to the amount of their stock and no more;" and such liability continues for one year after any subsequent recorded transfer; "but no stockholder whose stock has been fully paid in, and no part of the principal has been withdrawn, is liable for debts contracted after said first day of June; but in the latter case, when an officer certifies on an execution against a corporation that he cannot find corporate property to satisfy it, each stockholder's stock and interest in stock may be seized and sold thereon as on execution against him; and he may recover of the corporation the value of the stock or interest so taken as provided in section The stockholders of corporations, except banks, incorporated since March 17, 1831, "are, as regards debts of the corporation, subject to the liabilities imposed on stockholders by section 37," except for stock owned before April 24, 1839, and for stock held as executor, etc. § 38. At any time within six months after the return of an execution against a corporation, recovered on a debt for which any stockholder is liable under section 37, unsatisfied in whole or in part for want of attachable corporate property, the plaintiff may demand of any stockholder that he disclose attachable corporate property. § 39. After such demand, the execution creditor may have an action against such stockholder, to recover of him individually the amount of the execution and costs, or the deficiency thereof, not exceeding the amount for which said stockholder is liable under section 37. Such action must be commenced within six months after the rendition of judgment against the corporation. § 40. In such action said stockholder may set off against his liability "the amount of corporate debt which he has previously paid;" also any debt due him from the corporation, for which be, at the time, might maintain an action against the corporation; and he may show any other legal cause why judgment should not be pronounced against him. § 41. But such set-off shall not be allowed, unless the treasurer shall keep a record of the claims of stockholders against the corporation, to be exhibited to any creditor; and a stockholder who suffers damages for such failure may have a remedy upon the bond of the treasurer. § 42. The clerk shall furnish the execution officer, on demand, a statement of the liability of the various stockholders. § 43. "No stockholder in any corporation, except in banks, has, after February 24, 1871, been liable for the debts of or claims against such corporation beyond any amounts withdrawn or not paid in, as provided in the two following sections; but neither this section nor the four following affect past or future liabilities of any officer of any corporation; nor any liability of any person or corporation or remedy therefor, existing on said 24th day of February." § 44, Am'd Laws 1885, ch. 359. "The capital stock subscribed for any corporation is declared to be and

stands for the security of all creditors thereof: and no payment upon any subscription to or agreement for the capital stock of any corporation shall be deemed a payment within the purview of this chapter, unless bona fide made in cash, or in some other matter or thing at a bona fide and fair valuation thereof." § 45. No dividend declared from the capital steck, or in violation of law, no withdrawal of stock, directly or indirectly, no cancellation or surrender of stock, and no transfer of any stock, in any form, to the corporation that issued it, shall be valid as against any person who has a bona fide and lawful judgment against the corporation, or as against any receivers, trustees or other persons appointed to close up the affairs of an insolvent corporation. \$ 46. Any judgment creditor, or receiver, etc., may, within two years after the right of action accrues, commence an action on the case, or bill in equity, against the persons who have agreed to take stock and have not paid for it; or who have received dividends in violation of the preceding section; or who have withdrawn any portion of the capital stock, or canceled or surrendered any of their stock, and received any valuable consideration therefor from the corporation, "except its own stock or obligation therefor." or who have transferred any of their stock to the corporation as collate ral security or otherwise, and received any valuable consideration therefor; "and in such action they may recover the amount of the capital stock so remaining unpaid or withdrawn." But no stockholder "is liable for the debts of the corporation not contracted during his ownership of such unpaid stock, nor for any mortgage debt of said cornoratiou; and no action for the recovery of the amounts hereinhefore mentioned shall be maintained against a stockholder unless proceedings to obtain judgment against the corporation are commenced during the ownership of such stock, or within one year after its transfer by such stockholder is recorded on the corporation books," § 47. The defeudant in such suit may prove that the amount of his liability has been paid, or that he has been bona fide sued for it and is likely to be compelled by such suit to pay the same; that the amounts illegally received from the corporation were received more than two years before the claim arose on which judgment was obtained, or more than two years before the commencement of the legal proceeding by virtue of which the corporation passed into the hands of receivers or trustees; or he may prove claims as a set-off; or he may prove that his stock was transferred to the corporation in good faith, "as security or payment for, or of, an anterior liability incurred without any concurrent agreement for the transfer of such stock, and for which the corporation was unable to obtain other sufficient security or payment, or in such case he may prove that whatever sum was received thereon has been in whole or in part repaid to such corporation:" and proof of any such matter is a full or partial defense. § 48. Members of a corporation may recover from the corporation any of its debts which they have paid. § 49. When an officer cannot find personal property of the corporation to satisfy an execution, the creditor may cause the corporate real estate to be sold at auction. § 50. Corporations, except banks. "shall not so divide any of their corporate property as to reduce their stock below its par value, until all debts are paid," and then only to close their concerns. § 51. When a corporation is dissolved, its real and personal estate is vested in the persons who were at the time shareholders, as tenants in common, according to their interests. § 54.

Foreign corporations.—Foreign corporations may sue or be sued in the state. Their property in the state may be attached like that of non-resident individuals. The acts of their agents have the same effect as the acts of agents of foreign individuals, unless prohibited by law. Ch. 46, § 22. Any foreign corporation doing business continuously in the state, and having constantly an officer or agent resident therein on whom process may be served, shall be entitled to all provisions of law relating to limitations of actions the same as domestic corporations. Laws 1889, ch. 166. But see, as to insurance companies, Laws 1893, ch. 150. For building and loan associations, see Laws 1891, ch. 79. Foreign corporations engaged in selling bonds.

etc., must send to the bank examiner a statement of their condition. Laws 1889, ch. 286, Am'd Laws 1891, ch. 131. For foreign surety companies, see Laws 1885, ch. 284; also Laws 1893, ch. 161.

For provisions relating to foreign insurance companies, see Laws 1893, ch. 147. Taxation. - Personal estate for the purpose of taxation includes "all shares in moneyed and other corporations within or without the state, except as otherwise provided by law." Ch. 6, § 5. The buildings of every railroad corporation, within or without the located right of way, "and its lands and fixtures outside of its located right of way," are taxed in the cities and towns where situated as other property is taxed therein, "and shall be regarded as non-resident land." § 4. Machinery employed in manufacturing, goods manufactured or unmanufactured and real estate belonging to "any corporation," except when otherwise specially provided, shall be assessed to such corporation in the town or place where they are situated or employed; and in assessing stockholders for their shares, their proportional part of the value of such machinery, goods and real estate shall be deducted from the value of such shares. § 13. Cashiers of banks and clerks or treasurers of all corporations holding taxable property shall make an annual return, under oath, to the assessors of each town in which any stockholders reside, giving the names of such stockholders, the stock owned by them aud the amount of stock paid into such corporations, and such return shall be the basis of taxation on such property. Ch. 46, § 30. If the clerk fails to make such return, such property, for the purposes of taxation, shall be considered corporate property liable to be taxed to the corporation, "although its stock has been divided into shares and distributed among any number of stockholders." Ch. 6, § 18. Such property, real and personal, is taxable for all purposes, the taxes to be assessed and collected in the same manner and with the same effect as upon similar property of individuals. The right to receive toll may be sold for taxes. \$ 19. When any corporation is required to invest any of its capital stock in any other corporation in the state for the security of the public, such investments shall not be taxable, "except to the stockholders of the company so investing as making a part of the value of their shares in the capital stock of said company." § 21. When the capital stock of a domestic insurance company is taxed at its full value, the securities and pledges held by the company to the amount of said stock are exempt; but if the security consists of real estate in a town other than where "the stockholder resides," it shall be taxed where it lies, and the stock shall be exempt to the amount for which it is assessed, § 22. The building, lands and other property of manufacturing, mining and smelting corporations, "made personal by their charters" and not exempt from taxation, and all stock used in factories shall be taxed to the corporation or to the persons having possession of the same in the town where the corporation is established; "and shares of the capital stock of such corporations shall not be taxed to their owners." § 28. Every railroad company incorporated under the laws of the state or doing business therein shall, annually, return to the secretary of state the amount of its capital stock, the number of shares, a list of shareholders and the number of shares owned by each: also a statement of the whole length of the road, the length of its line within the state and the assessed value in each town of the stations and other property taxed by municipalities. § 40. Every corporation or person operating any railroad in the state, under lease or otherwise, shall pay to the state au annual excise tax, for the privilege of exercising its franchises and the franchises of its leased roads in the state, which with the tax provided for in section 4 is in place of all other taxes. § 41, Am'd Laws 1887, ch. 75, and ch. 104. From this tax there is apportioned among the municipalities, in which is held stock exempt from taxation, an amount equal to one per cent. of the market value of such stock. Id. The tax shall be onefourth of one per cent, of the annual gross transportation receipts, when such receipts do not average more than \$1,500 per mile; when such average receipts per mile are greater than \$1,500 and do not exceed \$2,250, the tax shall be one-half of

one per cent; of the said gross receipts: and so on, the rate increasing one-fourth of one per cent, for each additional \$750 of average gross receipts per mile or fraction thereof; provided, that the rate shall not exceed three and a quarter per cent. If the road transports freight exclusively the rate shall not exceed one and a quarter per cent. If part of the road is outside of the state the gross receipts for the purpose of taxation shall be such proportion of the total gross receipts of the company as the number of miles within the state is of the whole length of the lines operated by such company. In addition to all other taxes the company shall pay such a sum as shall be its pro rata part of the salary and expenses of the railroad commissioners according to its gross transportation receipts. § 42, Am'd Laws 1891, ch. 6: Laws 1889, ch. 313: Am'd Laws 1893, ch. 166. For refusing to make returns, or to allow the commissioners to inspect the corporate books or for false returns, the corporation shall forfeit from \$1,000 to \$10,000. § 46. Horse railroad companies are taxed by the state. § 47. Telegraph and telephone companies pay two and one-half per cent. of the value of any line owned in the state. \$\\$ 48, 52. Express companies must secure a license and must pay three-fourths of one per cent, of their gross receipts, which shall be in lien of all local taxation, except the tax on real estate not used in the express business. §§ 55-58, Am'd Laws 1887, ch. 72. Foreign insurance companies pay two per cent of their premium receipts in the state in excess of actual losses. § 59. Foreign surety companies pay an annual license fee of \$20 and \$1 annually for each agent's certificate; also a tax of two per cent, upon the excess of premiums over losses. Laws 1887, ch. 86. The real estate of domestic life insurance companies is taxed locally like other real estate, and such companies shall pay a tax of two per cent. upon all premiums in excess of dividends received from residents of the state, and a tax of one-half of one per cent, on their surplus. Laws 1885, ch. 329.

Special provisions apply to real-estate corporations. Laws 1893, ch. 289.

§ 952. MARYLAND: 1 Constitutional provisions.—No charter for banking shall be granted except upon the condition that the stockholders shall be liable to the amount of their shares for all debts and liabilities. Books, papers and accounts of all banks shall be open to inspection. Constitution of 1867, art. III, § 39. "Corporations may be formed under general laws; but shall not be created by special act . . . except in cases, where no general law exists, providing for corporations of the same general character as the corporation proposed to be created." All charters are subject to repeal or alteration; "provided, nothing herein contained shall be construed to extend to banks, or the incorporation thereof." Id., § 48. "No county of this state shall contract any debt, or obligation, in the construction of any railroad, canal, or other work of internal improvement. nor give, nor loan its credit to or in aid of any association or corporation, unless authorized by an act of the general assembly," passed in the manner provided in this section. Id., § 54. The legislature is required to provide for state and municipal taxation upon the revenues from the business done in the state by foreign corporations. Id., § 58.

Miscellaneous corporations.— Five or more may incorporate for specified purposes, including manufacturing, mining, insurance, trust companies and guaranty companies, railroads (but no passenger railroad under this act shall exceed twelve miles in length), and telegraph and telephone business. The incorporators must be American citizens, and a majority of them citizens of Maryland. If unnaturalized, they must have "declared their intention" to become citizens of the United States. Gen. Laws of 1888. art. 23, §§ 14-37. Where any two corporations have been formed in whole or in part for the same purpose, and the capital stock of both have been fully paid up, they may consolidate. § 39; and Laws 1892, ch. 666. A certificate must be prepared by the corporators mentioned in articles 14-37 stating (1) the names and residences of the

 $^{^1}$ The acts of the legislature down to and including the laws of 1892 are included in this synopsis, 1705

applicants: (2) the corporate name, which must always include the name of the county or city in which it is formed; (3) the object, the time of existence (not to exceed forty years), "and the articles, conditions and provisions under which the incorporation is formed:" (4) places where operations are to be carried on, and the place of the principal office in the state: (5) the amount of capital stock: (6) the number of shares, and the amount of each: (7) the number of directors or managers and their names for the first year. § 42. "When said certificate is executed, it shall be the duty of the persons executing the same to submit it to one of the judges of the judicial circuit within which the principal or any other officer of said corporation is, under said certificate, to be located if it shall be located in one of the counties of this state, or to one of the judges of the supreme bench of Baltimore city, if the principal office of said corporation shall be located in Baltimore city, in order that the said judge may determine whether the said certificate is in conformity with the law; and such determination, when certified by the said judge as required by the next succeeding section, shall be conclusive evidence that such certificate does conform to the law," § 43. A judge of the judicial circuit in which any place of business is to be located has power to determine whether such certificate conforms to the law, and his determination is conclusive. § 43. The certificate, if approved, is then recorded with the clerk of the circuit court in which is to be located the principal office. § 44. When so recorded the incorporation is complete. § 45. Amendments must be made and recorded as provided in sections 42, 43, and 44. The usual fees for recording papers shall be charged for recording. § 48. Corporations may, unless special provisions are inconsistent with such general power, acquire in any manner, hold, use, mortgage, or dispose of, in any lawful manner, any real or personal property, in or out of the etate, proper for its legitimate business. § 53. The company may make by-laws for the transfer of stock, the forfeiture of stock, calling any meeting of the officers, and fixing the place of meeting. The stockholders may, at any general meeting. make by-laws, and such by-laws shall not be rescinded by the directors, managers or trustees. \$ 55. There shall be at least four, and not more than twelve, directors, who shall be citizens of the United States, or who shall have declared their intention of becoming citizens, and a majority of them must be citizens of Maryland. Stockholders may attend and vote by proxy. § 57. Each stockholder has a vote for each share on which no justalments are due. Provision may be made in the charter or by-laws for minority representation in the elections of the board. Vacancies shall be filled "in such manner as may be provided by the bylaws." § 59. Subscriptions may be made in land or other property, such as it is proper for the corporation to own, at a valuation agreed upon, if authorized by the stockholders at a general meeting specially called to consider the matter. § 61. Stock is personalty. No shares can be transferred until all calls thereon are paid, or until the shares are declared forfeited. § 63. Stockholders are individually liable to creditors only to the amount of their unpaid subscription. capital stock must be paid in in four equal annual payments, the first payment to be made one year from the incorporation of the company, or the corporation may be dissolved, unless the directors bring suit against the delinquent subscribers within the four years. § 64. Within thirty days after the payment of the last instalment of etock, the president and a majority of the directors must make a certificate of the amount limited in the original certificate and the amount paid in, with a statement of the amount of property received for subscriptions, which shall be recorded in the same place and manner with the original certificate. § 65. No person holding stock as executor, etc., is personally liable as stockholder, but the person pledging the stock is liable, and the estate is liable. § 66. If the directors pay any dividend which would render the company insolvent, or while it is insolvent, or which would diminish the capital stock. they shall be jointly and severally liable for all debts thereafter contracted while they are in office, even though the capital is fully paid in. § 67. A director voting against such dividends is not liable, if he file a certificate with the clerk who recorded the original certificate. \$ 68. If a loan shall be made by a corporation to a stockholder, the officer or officers making the loan shall be jointly and severally liable for all debts "contracted before the making of said loan to the extent of double the amount of said loan," \$ 69. The directors may call in the subscriptions at such time and in such payments as they may deem best. § 70. Any person or persons owning five per cent, of the stock may demand from the treasurer or chief financial officer a statement of affairs, which must be made within twenty days and kept for six months to be exhibited to any stockholder. The officer neglecting to furnish such statement shall be fined fifty dollars, and twentyfive dollars for each twenty-four hours until the statement is furnished. § 71. Books must be kept open for the inspection of stockholders or creditors, at the principal office, in which shall be recorded alphabetically the names of those who have been within three years stockholders of the company, showing their residence and the number of shares held by each. The officer or agent refusing to exhibit the same shall be guilty of a misdemeanor, and the corporation shall pay to the party injured a penalty of fifty dollars for every such neglect or refusal, and all damages resulting therefrom. § 72. Reports, containing a statement in minute detail of the condition of the company, must be filed at the principal office on the first of January and July in each year, and must have been verified by the oaths of the president and treasurer. § 73. Any corporation may increase or diminish its capital stock to an amount that may be deemed sufficient for its busi-But all the limitations imposed by the charter, or the general act, shall remain in force, § 74. The capital must not be reduced so that the liabilities shall exceed the capital. § 75. Before any increase or reduction is made, a written notice must be sent to each stockholder and a four weeks' notice given in a county paper. § 76. A vote of two-thirds of the stock is necessary for an increase or reduction. § 77. A certificate of increase or reduction, sworn to by the president, must be recorded with the clerk of the court. § 78. If the par value of stock shall have been reduced by losses, the stockholders may, at a meeting called as provided in section 76, and in the manner provided in sections 77, 78, establish a true value of the stock; and they may call in and cancel any of such stock, and issue other stock in its stead, at such par value as they may determine, "so as to represent the amount of the true value so established of the stock of such corporation." And they may create and dispose of additional stock so as to make the entire value of the stock equal to the amount named in the certificate of corporation. §§ 79, 80. Any manufacturing corporation may change or extend its business to any other manufacturing business, by proceeding according to the provisions contained in sections 76, 77, 78, 79, 80, 81. The certificate to be filed must show the nature of the new business. § 143. No mining company shall hold more than one thousand acres of land, if such company is situated in Alleghany county, "nor more than five hundred acres if in any other county, nor shall its capital stock exceed three million dollars." § 144. The president and directors of any such corporation may construct "a railroad or railroads, with necessary appurtenances, beginning the same at or near the mines . . . or works . . . and running to any convenient point or points that may best suit the convenience and interest of said corporation."

Railroads.— Five or more, three of whom must be citizens of Maryland, may incorporate. § 158. A certificate must be made, which shall specify (1) the name of the company: (2) the termini of the road, and the counties and cities through which it will pass; (3) the amount of capital stock necessary for the construction of the road. The certificate must be acknowledged before a justice of the peace, certified to by the clerk of the circuit court of any county through which the road will run, and presented to a judge of the judicial circuit. If the judge determines the certificate to be in conformity with the law, it shall be forwarded to the secretary of state to be recorded and preserved by him. § 159. The corpora-

tion is then complete. Personal and real property necessary for legitimate business may be bought and sold at pleasure. \$ 160. The capital stock shall be divided into shares of \$50 each, and such shares shall be regarded as personalty. subject to execution at law, and to taxation as other personalty. § 162. "An instalment of five dollars, in actual cash, on each share of stock, shall be payable at the time of making the subscription," and the residue shall be paid "in such instalments, and at such times and places, and to such persons" as the directors may require. § 163. If an increase of capital stock is needed, the directors "shall, if authorized by the holders of three-fourths of all the stock, file with the comptroller of the state a certificate setting forth the amount of such desired increase, and thereafter such company shall be entitled to have such increased capital as is fixed by said certificate." § 165. Any three incorporators may order the books to be opened for subscriptions, at any time and place, after thirty days' notice in a county newspaper, and when ten per cent of the capital stock has been subscribed they may give like notice for the stockholders to meet "for the purpose of choosing seven directors," to hold office until the time fixed for the aunual election. "At the time and place appointed, directors shall be chosen by ballot, by such of the stockholders as shall attend for the purpose, either in person or by lawful proxies; each share shall entitle the owner to one vote, and a plurality of votes shall be necessary for a choice." After the first election, no stock shall be voted on which an instalment is due. The directors may fill vacancies in the board and make by-laws. The directors "shall from time to time make such dividends of the profits of said company as they may think proper." § 166. If it shall be necessary, the company may occupy any road, street, alley or public way, or ground of any kind, or any part thereof, in the location of any part of its railroad, except in the city of Baltimore (where the municipal authorities must consent). The company shall be responsible for injuries to private property by reason of such appropriation, but an action to recover damages in such cases must be brought within two years from the completion of the road. § 169. A railroad chartered under this act shall not charge more than three cents per mile for transportation of passengers, five cents per ton per mile for property "other than coals, ores, or other minerals," for which not more than one and a half cents per ton per mile shall be charged. § 170. "Such company shall have power to borrow money on the credit of the corporation, not exceeding its authorized capital stock, at a rate of interest to be agreed upon by the respective parties, and may execute bonds or promissory notes therefor, in sums of not less than one hundred dollars, and to secure the payment thereof may pledge the property and income of such company." § 171. As soon as convenient after organization, a principal office shall be established on the line of the road, the location of which may be changed at bleasure by giving notice in some newspaper. § 174. An annual report shall be made to the comptroller showing the condition of the company. \$ 176. Consolidation is allowed with any connecting line, within or without the state, provided the agreement of consolidation is approved by the holders of a majority of the stock, at a special meeting, and then filed with the secretary of state. The agreement must not exempt the part of the road within the state from the operation of the laws of the state, and no consolidation with a parallel or competing line is permitted without the special consent of the legislature. § 178, Any d L. 1890, ch. 553. In case of the sale of any railroad, wholly or partly within the state, hy virtue of any mortgage or deed of trust, "the purchaser or purchasers thereof, or his or their survivors, representatives or assigns, may, together with their associates, if any," form a corporation for owning and operating such railroad, or such portions of the road as lie within the state, by filing with the secretary of state "a certificate of the name and style of such corporation, the number of directors of the same, the names of its first directors, the period of their service not exceeding one year," the amount of capital stock, the number of shares, and the par value thereof, which may be all common stock, or partly com-

mon and partly preferred stock. The whole, or any part of the stock may be issued as fully paid up stock "in payment or part payment of the road as purchased, and for the construction and equipment thereof." The amount of stock issued shall not exceed the amount which the old company was entitled to issue. The signing and filing of the certificate complete the incorporation. § 187. The new corporation shall have all the powers, franchises, rights, etc., which the old company enjoyed. § 188, "Such corporation shall also have power to make and issue bonds bearing such rate of interest not exceeding six per cent. per annum, payable at such times and places, and in such amount or amounts, as it may deem expedient, and to sell and dispose of such bonds at such prices and in such manner as it may deem proper, and to secure the payment of such bonds by mortgage or deed of trust of its railroad, or any part thereof;" and all the road or property and franchises embraced in such mortgage or deed of trust shall be subject to the lien and operation thereof, and any sale under the same shall vest in the purchaser the same privileges to form a new corporation as are conferred by section 187. § 189. Any company formed under the three preceding sections may consolidate with a connecting road, provided the agreement be approved at a special meeting by "the holders of two-thirds of the stock represented at such meeting in person or by proxy," and then filed with the secretary of state. § 190. Any corporation formed under the provisions of sections 187, 188 and 189 has power to purchase any connecting line within or without the state. § 191. Any corporation organized under said sections, having purchased an incomplete road, "shall have ten years from the date of its organization to complete and finish the main line of its railroad." § 192. "No corporation shall be established under the provisions of said sections 187, 188 and 189, unless it shall allow and issue to this state the same proportion of its common stock, if any, as the state shall own of the capital stock of the corporation whose railroad shall have been purchased as aforesaid." § 193. Any railroad company may own and operate a line of steamboats when such boats can be used wholly or partly in connection with the business of the company. § 203. "Whenever upon an unfinished railroad a right of way or location on any part thereof remains for ten or more years unused for railroad purposes, the same shall be held to be abandoned, and shall be liable to be used and appropriated by any other railroad company," upon purchase or condemnation. L. 1890, ch. 220.

General provisions.— Every corporation, before transacting any business, shall file in the office of the state tax commissioner a copy of the certificate of in. corporation. For failure herein the president shall be fined \$50. Art. 81, § 136. The officers of every corporation must keep full and fair accounts, to be open at all times to the inspection of stockholders. Art. 23, § 5. General meetings of the stockholders may be called by a majority in interest of the stockholders, after a ten days' notice in a county paper and in a Baltimore paper. § 6. At any such general meeting, the president or any of the directors may be removed by a vote of a majority of all the stock and others appointed to fill the vacancy. § 7. If five or more of the stockholders shall, at least thirty days before an election, give notice in writing to an officer at the usual place of business of an intention "to canvass the votes," the officer shall at once communicate the same by mail to all the stockholders. At the election following, the judges of the election shall. upon proof of such notice, require from each person offering to vote an oath or affirmation that the stock which he proposes to vote is his bona fide property, or belongs to him in some fiduciary relation. § 9. Proxies must take an oath before a proper officer, and present a certificate of such oath at the election. § 11.

Taxation.— All corporate realty of domestic or foreign companies is taxed for state, county and municipal purposes where it is situated. All shares in any corporation, domestic or foreign, "not exempted from taxation by irrepealable contract with the state," other than railroad companies operating by steam power, and all bonds of any corporation, owned by residents, are taxed to the owners

where they reside. Art. 81, § 2. Taxation is regulated by a state commissioner. who shall deduct the assessed value of the realty of any corporation from the aggregate value of all the shares of such corporation and divide the residuum by the number of shares of the capital stock. The quotient shall be the taxable value of the respective shares for state purposes. This value shall be reported to the county commissioners for taxation for county and nunicipal purposes where the owners reside. The tax on such shares shall be collected from the bank, or other corporation, and may be charged by the corporation to the respective stockholders. The realty and personalty of railroads are taxed for county and municipal purposes where such property lies. All domestic railroads are subject to an annual state tax of one-half of one per centum upon their gross receipts within the state. Where companies are subject to the gross receipt tax, neither their shares nor property, real or personal, are taxed for state purposes; and where their real and personal property is taxed for county and municipal purposes, the shares are not subject to county and municipal taxation. § 141. The state tax imposed upon the shares of any corporation shall be paid to the state by the corporation. § 34. "All bonds and certificates of debt bearing interest issued by any railroad or other corporation of this state, secured by mortgage of property wholly within this state," are taxed to the owners thereof in the county where they reside. The same rule applies to such as are secured by mortgage of property lying partly without the state. § 88. When any officer shall have issued any such bonds or certificates, he must before July 1st in each year, make to the comptroller a return of the amount of the same held by residents of the state. and pay out of the interest due thereon the tax thereon; and shall furnish to the county commissioners of any county, annually, before March 1st, a list of the holders of such bonds and certificates residing in said county. For failure to comply with these provisions such officer "shall be fined not less than \$500, and imprisoned not less than one month and until this fine is paid." Such bonds, etc., held by non-residents are not thus taxed. § 87. If any corporation shall own stock in another corporation, and the taxes on such stock for state, county and municipal purposes shall be payable by the corporation issuing the same, the assessed value of such shares of stock "shall be allowed as a credit in the settlement of the taxes of such corporation so owning the same." But this provision does not extend to any stock held as security. § 142. For the purpose of valuing the stock of moneyed corporations held by non-residents, such stock is held to be situate at the place of the principal office. The stock of a railroad company whose principal office is within the state is there valued, but if such office is outside of the state the property is valued where it lies. The stock of miniug and manufacturing companies is assessed to nonresidents at the place where the principal operations of the company are carried on. § 131. The real and personal property of railroads is taxed for county and municipal purposes in the same way as property of individuals. Art. 23, § 201. If any corporation of the state shall fail to pay the state taxes on its shares before the 1st of November of the year in which such taxes are levied, such corporation shall pay to the state an additional amount of five per centum "to be added to the said state taxes so due and unpaid." If, after judgment rendered for such taxes and penalty, the corporation shall remain in arrears for two years from the time when the taxes were first due, the charter of such corporation shall be "ipso facto" annulled. Ch. 244, L. 1890, adding to art. 81 of the Code of General Laws, sections 88 (a), 88 (b), 88 (c), 88 (d) and 88 (e). Every corporation formed after January 1, 1890, except railroads, shall pay to the state a bonus of one-eighth of one per centum upon the capital stock which the company is authorized to have, "in two equal instalments, and a like bonus for any increase thereof." The first instalment must be paid before beginning business, and the second one year thereafter. "Whenever the capital stock of any of said companies, or any company of like character heretofore incorporated, shall be increased, a bonus of one-sixth of one per centum

upon the amount of said increase shall be paid to the state" in two equal instalments, etc. Ch. 536, L. 1890, adding new sections to art. 81 of the Code, section 88 (a). On the first Monday in January annually the proper officer of each bank shall pay to the state twenty-five cents "on every hundred dollars of the issue of notes then in circulation." Art. 11. § 23 (21). Every corporation organized for receiving deposits and paving interest thereou shall pav annually a franchise tax of one-fourth of one per centum on the total deposits. Art. 81. § 86. banks shall be taxed on their real property in the same manner as other corporations. Id. A failure of a chief officer of a bank to furnish to the state tax commissioner a true annual statement of the number of shares of stock in the bank renders such officer liable to pay to the state the sum of \$500, with costs of suit. §§ 133-4. On refusal of the bank to pay the tax on such shares the corporation shall pay, in addition to the taxes, ten per centum as damages, and all costs and a fee of \$50. \$ 135. The proper officer of each bank shall furnish annually to the county commissioners of each county a list of the stockholders resident in their respective counties, with the number of shares held by each. Failure herein subjects the corporation to a fine of \$100 for each day until such statement is furnished. § 138. The county commissioners may require that the stock and other books shall be open for their inspection. § 139. For failure to open the books to such commissioners, or to take an oath when required that the lists furnished are correct, the officer so refusing is fined not less than \$500. § 140. Every foreign telegraph, express, transportation or railroad company doing business in the state, "and not taxed on its shares of capital stock in this state, shall, in addition to the taxes on its real property assessed in this state," pay annually to the state "the sum of one per centum on its total gross receipts or revenues accruing from or received on account of business done in this state." Such corporation shall annually report its gross receipts, and any officer making a false statement in such report shall be guilty of perjury. The tax commissioner may examine any officer under oath touching the business of the company in the state, and any officer refusing to be sworn shall forfeit to the state the sum of \$500. The corporation failing to pay such tax for one month after the same becomes due shall forfeit "an additional amount of five per centum as penalty or damages to be added to the said taxes so due and unpaid." L. 1890, ch. 245. In like manner a foreign telephone, palace or sleeping-car company shall pay a tax of two per centum upon its gross receipts within the state. L. 1890, ch. 60, Am'd Laws 1892, ch. 227.

§ 953. MASSACHUSETTS: 1 Constitutional provisions.—"No man or corporation, or association of men, have any other title to obtain advantages or particular and exclusive privileges distinct from those of the community than what arises from the consideration of services rendered to the public." Constitution of 1780 (with amendments to 1890), part I, art. VI.

Miscellaneous corporations.—Three or more may associate for any mechanical, mining or manufacturing business, except the manufacture or distilling of intoxicating liquors. The capital stock shall be from \$5,000 to \$1,000,000. Pub. Stat. 1882, ch. 106, § 7. For the purpose of transacting the business of a common carrier three or more may incorporate, with a capital of from \$5,000 to \$1,000,000, "with power to undertake for the carriage of persons or property beyond the limits of this commonwealth, but not to purchase or operate railroads, canals or ferries." § 12. There are specifications respecting various minor corporations, namely, ice companies, agricultural, horticultural and quarrying companies, publishing companies, co-operative trade associations, canal construction companies, gas and steam companies, hotel or public hall companies, and corporations for erecting and maintaining buildings for manufacturing or mechanical purposes,—in sections 6 to 14. Am'd Laws 1885, ch. 240; Laws 1891, ch. 189. "For the purpose of carrying on any business not mentioned in the seven preceding sections,

¹ The acts of the legislature down to and including the laws of 1893 are included in this synopsis. 1711

except buying and selling real estate, banking and any other business the formation of corporations for which is otherwise regulated by these statutes," three or mure may incorporate with a capital of from \$1,000 to \$1,000,000. § 14. The creditors of any corporation organized for any purpose specified in this chapter, which corporation has become insolvent or has made an assignment for the benefit of its creditors, may form a corporation to acquire the whole or any part of the property of any such corporation, and to carry on the corporate business. § 15. The articles (in the case of any corporation above specified) shall set forth (1) the fact that the subscribers intend to form a corporation: (2) the corporate name (which shall be changed only by action of the legislature; but see General Provisions, infra): (3) the purpose of incorporation: (4) the town or city where the business will be established (which must be in the state); (5) the amount of the capital stock, and the par value and number of the shares. §§ 16, 17. The first meeting shall be called by a notice signed by one or more of the corporators, stating the time, place and purpose of the meeting, to be mailed to each subscriber seven days before the time of meeting. § 18. "Until the organization is completed, the subscribers to the agreement of association shall hold the franchise; and if it is not otherwise provided in such agreement, each subscriber may take an equal number of shares in the capital stock upon paying the assessments thereon as called for by the corporation, if he elects to take such shares at the first meeting. All shares not so taken shall be disposed of as the corporation determines." § 19. The organization shall be effected at the first meeting. At the first meeting no person shall be eligible as director who is not a corporator. § 20. A certificate, setting forth a true copy of the articles, shall be signed by the president and a majority of the directors and forwarded to the commissioner of corporations, and, if approved by him, such certificate shall be filed with the secretary of state. § 21. No conveyance or mortgage of the corporate realty, or lease thereof for more than one year, shall be made, unless authorized by a vote of the stockholders at a special meeting. S 23. The directors, clerk and treasurer shall be chosen annually by the stockholders, voting by ballot; other officers shall be chosen, and vacancies filled, in the manner directed by the by-laws, § 24. There shall be at least three directors, one of whom shall be chosen president by the board. § 25. Absent stockholders may vote by proxy, authorized by a writing executed and dated, if the maker thereof resides in the United States. within six months previous to the meeting at which it is used. § 27, Am'd Laws 1888, ch. 188. A majority in interest of the stockholders shall constitute a quorum, unless otherwise provided in the by-laws. § 28. Transfers must be recorded by the clerk. § 30. The capital stock and the number of shares may be increased or reduced, within the charter limits, at a special meeting, § 34. Upon any increase of capital, each stockholder may take his proportion of the new shares, and the remainder may be sold as the stockholders by vote direct: but no shares shall be so sold or issued for less than their par value. § 37. Special stock may be issued, upon a vote of three-fourths of the stockholders, at a special meeting. The special stock shall at no time exceed two-fifths of the actual capital. and shall be subject to redemption at par after a fixed time, to be expressed in the certificates. Such special stock shall be entitled to a fixed semi-annual dividend, to be expressed in the certificates, not exceeding four per cent., and the holders of such stock shall "in no event be liable for the debts of the corporation beyond their stock." § 42. At special meetings, assessments may, from time to time, be made. not exceeding in all the par value of the stock, and collected at such times and in such instalments as the corporation directs. § 43. The corporation shall not commence business until the capital is all paid in and a certificate of that fact is filed with the secretary of state. § 46. For a failure to file such certificate the corporation shall ray \$200, and the officers shall be jointly liable in a like sum. § 81. No note or obligation given by any stockholder shall be received in payment of subscriptions. Only cash shall be received, except as provided in sections 48 and

49 below. § 47. Real or personal property may be received at a fair valuation, if a detailed statement respecting such property, together with the approval of the commissioner of corporations as to the valuation, is filed with the secretary of state. and such statement shall be included in the certificate of capital stock required by section 46. § 48. In case of a corporation formed under section 15, any claims or property may be conveyed in payment of the capital stock, at a fair valuation. to be determined by the commissioner of corporations, § 49. Any corporation specified in this chapter may "purchase, hold and convey" real and personal estate necessary for its business, and may "carry on its business, or so much thereof as is convenient," outside the state, and may there purchase and hold necessary real or personal estate. Ultra vires acts are prohibited. § 50. The corporate business may be changed "upon the vote of all its stockholders at a meeting duly called for the purpose." A certificate of such change must be filed with the secretary of state. \$51, Am'd Laws 1885, ch. 310. Corporations organized for the manufacture of cotton or woolen goods may, "upon the consent of four-fifths of the stockholders by a vote at a meeting called for the purpose," manufacture silk, linen, flax or india-rubber goods, \$53. Annual returns, approved by the commissioner of corporations, shall be filed with the secretary of state. Dissolution may be decreed for a two years' failure to file such certificate. The corporation forfeits \$200 for failure to file such certificate and the officers are jointly liable in a like sum. The fee for filing such certificate is \$5. \$\\$54, 55, 59, 81, 84, Am'd Laws 1887, ch. 225. The president and directors are jointly and severally liable (for debts and contracts) for making or consenting to a dividend when the corporation is insolvent, or is thereby rendered insolvent, to the extent of such dividend: "for debts contracted between the time of making or assenting to a loan to a stockholder and the time of its repayment, to the extent of such loan:" also when the corporate debts exceed the capital, "to the extent of such excess existing at the time of the commencement of the suit against the corporation upon the judgment in which the suit in equity to enforce such liability is brought as hereinafter provided." The president, directors and treasurer shall be so liable "for signing any statement filed under section 48, when the property mentioned in such statement is not conveyed and taken at a fair valuation; but only the officer or officers signing the same shall be so liable." The president, directors and other officers shall be so liable for signing any required certificate knowing it to be false. § 60. The stockholders shall be liable for corporate debts and contracts as follows: For such as may be contracted before the original capital is fully paid in, such liability extending only to those stockholders whose shares are not paid in full, and those who have purchased such delinquent shares with knowledge of the facts; for the payment of all debts existing at the time when the capital is reduced to the extent of the sums withdrawn and paid to stockholders; also for all sums of money due to operatives, "for services rendered within six months before demand made upon the corporation, and its neglect or refusal to make payment." "When special stock is created, the general stockholders shall be liable for all debts and contracts until the special stock is fully redeemed." § 61. Stockholders or officers are not liable, as above, until an execution against the corporation is returned unsatisfied. §§ 62-64. "No stockholder shall be liable to pay a larger sum than the amount of stock held by him at that time at its par value." § 65. When it appears to the court that judgment against the corporation is sought with the purpose of enforcing an alleged liability of a stockholder or officer thereof, such stockholder or officer may be allowed to defend the suit, but he must give a bond to secure the plaintiff's costs. §§ 70, 71. The fee required for filing and recording the certificate required by section 21 are onetwentieth of one per cent. of the capital, but in no case less than \$5 nor more than \$200; in case of an increase of stock, one-twentieth of one per cent. of the increase, but never more than \$200, including the amount paid under section 21;

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and in cases of the certificate required by section 51, one-twentieth of one per cent. of the capital; for any other certificate, \$1. § 84. Upon a vote of the general stockholders, special stock may be issued to employees only at a par value of \$10 per share, to an amount equal to two-fifths of the actual capital, payment to be allowed in monthly instalments of \$1. Such stockholders shall receive their proportionate amount of dividends, Laws 1886, ch. 209.

As to street railways, see ch. 113, Am'd Laws 1889, ch. 210; Laws 1887, ch. 366; also Laws 1889, ch. 316; Laws 1890, ch. 326; Laws 1891, ch. 316; Laws 1893, ch. 315

For telegraph and telephone companies, see ch. 109; also Laws 1889, ch. 434; Laws 1886, ch. 270; Laws 1885, ch. 267; Laws 1884, chs. 302, 306; Am'd Pub. Stat., ch. 105, §§ 18, 19.

For mortgage, loan and trust companies, see Laws 1888, ch. 387.

For insurance, see Laws 1887, ch. 214; Laws 1891, ch. 289, and Laws 1893, ch. 54.

A manufacturing or mechanical corporation may "purchase, hold and convey" real and personal estate necessary for its business, in any city to which its business may be removed. Pub. Stat., ch. 105, § 7.

Telegraph and telephone companies shall not begin business until three-fourths of the stock is subscribed, and one-half paid in in cash. Laws 1893, ch. 274.

Railroads.—Twenty-five or more, a majority of whom must be residents of the state, may incorporate. The corporation shall be subject to the provisions of this chapter, and of any general law applicable thereto. Ch. 112, § 34. The articles shall set forth (1) the corporate name; (2) the termini, the length of the road (as near as may be), and the name of each city, town and county along the route: (3) the gauge, which shall be either four feet eight and a half inches, or three feet; (4) the amount of capital stock (not less than \$10,000 per mile of the standard gauge, or \$5,000 for the narrow gauge); (5) the names of at least nine directors to act till others are chosen by the corporation. Subscribers shall not be bound to pay more than ten per cent, of their subscriptions, unless a corporation is duly formed. § 35. The "associates" may from time to time reduce the capital, but not below the limit prescribed in section 35. The directors shall be subscribers to the articles, and a majority of them inhabitants of the state. They shall appoint a temporary clerk and treasurer. They may fill vacancies occurring before the establishment of the corporation. § 36. The directors shall cause a copy of the articles to be published for three weeks in a county paper of each county on the route, and shall post a copy in each city or town on the proposed location, three weeks before fixing the route. Within thirty days after the first publication, the directors shall apply to the railroad commissioners for a certificate that public convenience requires the proposed railroad. If the certificate is granted, proceedings may be continued as now provided by law. If the certificate is refused, no further proceedings shall be had, but the application may be renewed after one year from the date of such refusal. The articles, and all proceedings thereunder, shall be null and void unless the certificate of incorporation is issued within one year from the time the route is fixed, as provided by law. § 37, Am'd Laws 1882, ch. 265. A profile of the surface of the country to be traversed shall be submitted to the local authorities of each city and town. If an agreement cannot be made as to the location, the commissioners decide the question, upon petition to them. the directors paying the cost. §§ 38-41. No branch shall be laid longitudinally within the limits of a public way in a city or town without the consent of the local authorities. § 42. When the amount of capital named in section 35 has been subscribed in good faith by responsible parties, and ten per cent, thereof paid in cash, the treasurer shall affix to the articles a certificate of the facts, and that it is intended in good faith to build and operate a railroad upon the route fixed; also a certificate of the required publication, and the certificates fixing the route, and shall present the same to the commissioners for their approval. He shall also denosit with the board the report of the engineer, and the map. § 43. If the hoard is satisfied that the law has been complied with, and that the money paid to the treasurer will be used for the construction of the road, the said board shall affix to the articles their certificate to that effect. The articles, with all the certificates attached thereto, shall then be filed with the secretary of state, to whom must be paid a fee of \$50. § 44. Thereupon, and after compliance with sections 85 and 86 below, the corporation may construct and operate its road. The first meeting shall be called by a notice signed by a majority of the directors. The cornoration may increase or reduce the capital, within the limits of section 35. A certificate thereof must be filed with the secretary of state. If the construction of the road is not begun, and ten per cent, of the original capital expended thereon, within two years from the date of its "certificate of establishment," and the road is not open for use within four years after said date, the corporate powers and franchises shall cease. No company shall run trains on a narrow gauge road until its paid-up capital equals half the cost of the road, including equipment. 8.45. Towns, and cities of less than thirty thousand inhabitants, may subscribe for stock, to the extent of two per cent of the valuation of such city or town, or of three per cent. if the valuation does not exceed \$3,000,000, upon the approval of two-thirds of the votes cast at a special election. § 46 (also ch. 29. \$ 19). Such city or town may be an original incorporator. \$ 47. At the annual meetings, to be held "at some convenient place established by the bylaws," the corporation shall fix the number of directors for the ensuing year. which number shall not be less than five. §51. The president shall, under penalty for failure of a fine of from \$100 to \$1,000, call a special meeting, upon the request, in writing, of thirty stockholders, or, if there be not thirty stockholders, upon such petition of a majority of the members, § 52. At all meetings, each stockholder has one vote for each share held by him, not exceeding a tenth part of the whole capital stock; but cities and towns, railroad corporations, or the state, may vote all their shares. No vote shall be given upon shares owned by the corporation, "or pledged in any form to or for its benefit." § 53. Proxies are not valid after six months from their execution and date. § 54. Am'd Laws 1888, ch. 188. Transfers must be recorded in the books of the treasurer, but records in transfer books kept at a place appointed by the directors are valid if also entered on the books of the treasurer within ten days. Unrecorded transfers are only valid against the grantor or his representatives, except as provided in Laws 1884, chapter 229, below. § 56. The directors may, from time to time, make such assessments, not exceeding in the aggregate \$100 on a share, as they deem best, Upon the sale of forfeited shares, the stockholder is liable for a deficiency, and is entitled to any surplus. § 57.

When any railroad or street railway company increases its capital stock, the shares shall be offered to the stockholders at their market value at the time of the increase. in proportion to their previous holdings, under the direction of the railroad commissioners. The directors shall notify each stockholder of the number of shares which he is entitled to receive, and the price of the same, fixing a time, not less than fifteen days from the date of the notice, within which he may subscribe for such stock. The stock shall be paid for in cash upon the issue of the certificate therefor. If the increase is not more than four per cent. of the existing stock, or if any shares remain unsold after the expiration of the time limited by the notice, the directors may sell such stock at auction, after a ten days' notice in three daily papers approved by the commissioners. Stock shall not be sold or issued for less than the par value thereof, and shall be paid for in cash. §§ 58, 59, Am'd Laws 1893, ch. 315. A railroad corporation, for the purpose of building a brauch or extension, or of aiding in the construction of another railroad, or of taking stock in an elevator corporation in which it is an original corporator, or for erecting and operating grain elevators in the state, may increase its capital stock, conforming to the two preceding sections. § 60. If a railroad corporation, without authority

of the legislature, increases its capital stock beyond the maximum fixed in its charter, or by this chapter, or declares a stock dividend, or divides the proceeds of the sale of stock among its stockholders, or issues certificates of stock when the par value of the shares so issued is not paid in in cash, the certificates so issued shall be void, and the directors present and not dissenting shall be liable to a penalty of \$1,000 each. If a corporation consolidated with a foreign corporation increases its capital, or that of the consolidated corporation, except as authorized by this chapter, without the consent of the legislature, or without such authority extends its line, or consolidates or makes a stock dividend, its charter shall be "subject to be forfeited and to become null and void." § 61. Any railroad corporation, "by vote at a meeting called for the purpose, may issue coupon or registered bonds to provide means for funding its floating debt, or for the payment of money borrowed for any lawful purpose, and may mortgage or pledge as security for the payment of such bonds" a part or all of its road, franchises or property, real or personal. Such bonds "may be issued" in sums of not less than \$100 each, payable at periods not exceeding fifty years from their date, bearing seven per cent, annual interest, "to an amount which, including that of bonds previously issued," does not exceed in all the paid-in capital stock. No such corporation shall issue bonds, coupon notes, or other evidences of indebtedness payable at periods of more than twelve months from the date thereof, except as provided in this section. § 62. At the request of the "owner or holder" of any coupon bonds lawfully issued, "other than bonds guarantied by the commonwealth," the railroad corporation which issued such bonds may issue "registered bonds in exchange for and in lieu of them, upon such terms and under such regulations as the directors may prescribe, and with the consent and approval of the trustees, if any, to whom a mortgage or pledge has been executed." Such registered bonds shall, with the exception of the coupous, correspond in all respects with the bonds for which they are exchanged, and shall be in conformity with all the laws authorizing coupon bonds. Such exchange shall not affect any previous mortgage or pledge. § 63. "No railroad corporation which has previously issued hands shall subsequently make or execute a mortgage upon its road, equipment and franchises, or any of its property, real or personal, without including in and securing by such mortgage all bonds previously issued and all its pre-existing debts and liabilities." § 64. All railroad bonds or notes are binding and collectible in law, though sold at less than par by the corporation or its agents. § 65. The trustees of mortgagees, when they are entitled to the possession and usufruct of the property, etc., may contract with the corporation to operate the road, if authorized by a majority vote of the creditors and boudholders represented at a special meeting, each bondholder or creditor having one vote for each \$100 held by him. § 66. Trustees in possession shall call annual meetings and report, like directors. § 67. If the trustees fail to call such meeting, five or more creditors or bondholders, whose claims amount to \$10,000, may call the meeting. § 68. At such meeting the bondholders or creditors may elect three trustees for the ensuing year. § 69. Except by special authority of the legislature, or as authorized in the six following sections, no railroad corporation shall, directly or indirectly, "subscribe for, take, or hold shares in the stock or honds of or guaranty the bonds or dividends of any other corporation or company;" and the amount of bonds subscribed for and held, or guarantied by the corporation, together with its own bonds issued in conformity with sections 62 and 63 above, shall not at any time exceed the amount of its capital stock actually paid in-cash. § 74. Stock may be taken in a telegraph company, connecting two or more places on the road, to an amount not exceeding \$200 for each mile between such places. \$75. The corporation may guaranty the bonds of steamhoat companies, or issue its own bonds therefor; or become an associate, under chapter 106, in the formation of elevator companies. §§ 76-78. Either of two connecting roads, wholly constructed, may guaranty the bonds of the other to the extent of the paid-in capital of such

other corporation, § 79. A railroad corporation may aid in the construction of branches, or of connecting roads, within the state. by subscribing for shares. taking notes, or otherwise: but such subscription shall not exceed two per cent. of the paid-up capital of the subscribing company, upless authorized by a majority vote of the stock, "and no corporation shall mortgage its property to secure the loans or subscriptions made by any other corporation under this section," except upon a majority stock vote. § 80. Corporate books shall be open to the inspection of the commissioners or of a legislative committee, and the directors must report annually to the commissioners. § 81. The report shall be accompanied by a payment of \$20. § 82. A lessee must make the required returns. § 83. For failure to make the return or the payment on time the company forfeits \$50 for each day's delay, and for an unreasonable delay in reporting, the sum of \$5,000 or less. \$ 84. As to condemning land, see \$\cong \$5-116. Am'd Laws 1882, ch. 149; Laws 1884, ch. 134. Construction shall not be begun or land entered upon (except for surveys) until a sworn estimate of the cost of construction has been submitted to the board of railroad commissioners, nor until it appears to the board that capital stock equal to half the cost of construction has been bona fide subscribed and twenty per cent. of the par value thereof paid in. § 85. When the preceding section has been complied with and the board has learned that the authority and consent required by section 94 have been obtained said board shall certify the same to the secretary of state, for the filing of which certificate the corporation shall pay \$50. § 86. The location of the road shall be filed with the county commissioners of each county traversed within one year from the defining of the route, and no land shall be used (except for making survevs) until such location is filed. § 89, Am'd Laws, 1882, ch. 149. The time for completing the road shall not be extended on account of variations in the route. \$ 90. Land outside the route may be condemned for station purposes, or materials taken for any purpose of construction, upon application to the county commissioners. § 91. No corporation shall take by purchase or otherwise, or enter upon or use (except for surveys), any land or other property for construction purposes until the county commissioners have determined in what manner the railroad shall cross highways and have given their consent to such crossings. §§ 94, 119, 123. Materials necessary for construction purposes may be taken. § 95. Branches or extensions may be built without additional capital stock if the corporate indebtedness is not thereby increased. A certificate shall be filed according to the provisions of sections 85 and 86, and a fee of \$50 paid, \$ 139. Such branch or extension, whether or not an increase of capital is required, shall be begun within two years from the filing of the certificate and be completed in four years, or the power to construct shall cease. § 140. Within one year after such branch or extension is open for use, a map and profile thereof shall be filed with the secretary of state. § 142. Rates may always be revised by a committee of the legislature, anything in the charter to the contrary notwithstanding. § 180. Railroads shall not cross on the same level without the consent of the commissioners, but when they are authorized so to cross, either corporation may "enter its road upon, unite the same with and use the road of the other." §§ 118, 216. Such connecting roads shall transport each other's passengers, merchandise and cars at reasonable times and for reasonable compensation, and shall receive and deliver the same as it receives and delivers its own passengers and freight. § 217. Connecting roads chartered by other states shall have the same privileges regarding connections as domestic roads. § 219. Such connecting domestic lines may lease each other's roads on such terms as the directors may decide upon, and as may be approved by a majority of the stock of both corporations. This section shall not apply to two roads each having a terminus in Boston. § 220. Connecting roads within the meaning of the preceding section includes roads connected by means of a leased road or another connecting road. § 221. Leases shall not be made for more than ninety-nine years. § 222. Corporations may be formed to construct

and operate a railroad in a foreign country subject to the laws of that country. 88 225-229 A purchaser at a valid foreclosure sale shall, in all respects, take the rights of the original corporation. Laws 1886, ch. 142. All discriminations regarding freight transportation against any person or corporation are forbidden. Laws 1884, ch. 225. A route may be changed to improve the alignment of the road. Laws 1887, ch. 430. Notice of intended petitions to the legislature affecting municipalities must be published for three weeks in a paper designated by the secretary of state. Laws 1885, ch. 24. A quarterly statement of the business and the financial condition of the corporation shall be furnished to the railroad commissioners within fifty days from the expiration of each quarter and be open to public inspection. The penalty for failure to report is \$50 for each day's delay. Laws 1893, ch. 131. Annual returns must be made according to a form furnished by the board. Laws 1889, ch. 328. The issue of mortgage bonds by street railway companies must be approved by the railroad commissioners. Laws 1889, ch. 316. A resolution of the legislature directs the railroad commissioners to report upon the question of securing uniform railroad laws for the New England States. Laws 1891, p. 1107.

General provisions.—The provisions of this chapter, unless specially limited, shall apply to all domestic corporations, except so far as they may be inconsistent with statutes concerning particular corporations. Ch. 105, § 1. The legislature may annul or amend any act of incorporation passed since 1831. When no provision is specially made, the by-laws may determine the number of shares entitled to one vote, the number of members which shall constitute a quorum, and the mode of voting by proxy. The by-laws may fix penalties, not exceeding \$20 for one of-"Every corporation may convey lands to which it has a legal title." A corporation created by charter, if no time is limited therein, shall be organized within two years from the passage of the act of incorporation. § 8. The first meeting of such a corporation shall be called by a notice signed by a majority of the persons named in the act, unless otherwise provided in the said act. The persons so named, and their associate subscribers before the date of the act, shall hold the franchises until the corporation is organized. § 9. When a meeting of any corporation cannot be otherwise legally called, a justice of the peace may issue a warrant to one of three applicants (members) to call a meeting. § 11. Unless otherwise provided by law, the par value of shares in any corporation hereafter organized shall be \$100. § 16 (Statute of 1873). No corporation, unless specially authorized, "shall issue any share for a less amount to be actually paid in thereon than the par value of the shares first issued." § 17. When stock is increased, if no other provision is made by law, the directors shall give notice to each stockholder, stating the time, not less than thirty days, within which the stockholders shall have the right to take such stock. If any shares remain untaken they shall be sold at auction, but not below par. § 20. The treasurer shall keep an accurate list of stockholders, open to the inspection of any stockholder upon written application. Such officer shall forfeit \$50 for failure so to do. § 21. All records of transfers of stock in any purely domestic corporation shall be made and kept within the state; and the officer whose duty it is to record such transfers shall be a resident of the state. § 23. A certificate issued to a pledgee shall express on its face the fact of the pledge. The name of the "pledgor" shall be stated therein. and he alone is responsible as a stockholder. § 25. A creditor of a general owner of pledged stock may demand the records to be shown him, and for refusal to exhibit the same the corporation shall be liable for all damages resulting therefrom. § 25. Once in five years every corporation shall publish a list of all dividends and balances which have remained unclaimed for two years or more, with the names of those in whose names the same may stand. § 27. The franchise of a corporation authorized to receive toll may be attached on mesne process. § 30. And when judgment is recovered against such corporation the franchises and all other property may be sold on execution. § 31. The purchasers of the franchise shall be entitled to all the privileges of the corporation respecting toll. § 35. The corporation whose franchise is purchased retains its powers in all other respects, and is subject to the same liabilities as before the sale. § 37. The corporation may, at any time within three months, redeem the franchise. § 38. A corporation may be dissolved upon petition to the supreme court. § 40. When the corporate existence is terminated in any manner the corporation exists for three years for the sole purpose of closing up its affairs. § 41. The court may appoint receivers for a cornoration whose existence is terminated upon the request of a creditor or stockholder. § 42. Shares of stock in a domestic or foreign corporation may be attached and sold on execution. Ch. 161, §§ 71-73. Sales of stock which the vendor does not own or control at the time are void. Ch. 78. 8 6. Stock cannot be issued below par. Ch. 105, § 20. A complete written transfer of stock, for value, though unrecorded on the corporate books, is valid against all parties excent the corporation. Laws 1884, cb. 229. The penalty for false entries is imprisonment not exceeding ten years. Ch. 203, § 56, Am'd Laws 1885, ch. 223. Every domestic company, if requested in writing by a stockholder from thirty to sixty days before the annual meeting, shall, within fifteen days, file with the secretary of state a complete list of stockholders, with their residences and the number of shares of each. The form is to be prescribed by the commissioner of corporations. The penalty for failure herein is a forfeiture of \$1,000 by the corporation and a liability to the extent of a like sum on the part of the officer whose duty it was to make the certificate respecting such list. Laws 1889, ch. 222. A corporation cannot change its name or adopt the name of another corporation without the consent of the commissioner of corporations. With his consent the same may be changed at a meeting called for the purpose by a vote of two-thirds of the stockholders present and voting. Laws 1891, ch. 257, and ch. 360, Am'd Laws 1892, p. 177. All corporations, domestic and foreign, "are prohibited from issuing, negotiating or selling any bonds, certificates or obligations of any kind, which are by the terms thereof to be redeemed in numerical order or in any arbitrary order of precedence. without reference to the amount previously paid thereon by the holder thereof, whether the same are sold on the instalment plan or otherwise." Any corporation or person violating the provisions of this act shall forfeit \$50 for each offense. Such offense shall work a forfeiture of the franchise in case of a domestic corporation, and a forfeiture of the right to do business in the state in the case of a foreign corporation. Laws 1891, ch. 382.

Foreign corporations.—Property in the state belonging to foreign corporations may be attached like the property of a non-resident individual. Ch. 105, § 28. Foreign corporations, except insurance companies, "hereafter having a usual place of business in this commonwealth," shall, before doing business in the state, file with the commissioner of corporations a copy of their charter and a statement of the amount of their capital stock, the amount paid in, and whether paid in cash or otherwise, and shall appoint said commissioner their attorney to accept service of legal process. Failure herein subjects every officer or agent doing business in the state to a penalty of \$500. The fee for filing the charter is \$10; for filing the statement, \$5. Laws 1884, cl. 330; Laws 1890, ch. 199. Foreign manufacturing corporations, which have complied with the above provision, may purchase and hold such realty in the state as their business requires. Laws 1888, ch. 321. As to proceedings for making an assignment on the part of domestic and foreign corporations, except in the case of railroads and banks, see ch. 157, §§ 127-30, and Laws 1890, ch. 321. There is a "commissioner of foreign mortgage corporations," whose duty it is to examine and regulate foreign mortgage corporations, and an annual license fee of \$50 must be paid to provide for the salary of the commissioner, Laws 1889, ch. 427; Laws 1891, ch. 275; Laws 1893, ch. 303. All foreign corporations "having a usual place of business in this commonwealth" shall annually file with the secretary of state a certificate, stating the fixed amount of capital, the amount then paid up, and the assets and liabilities, in a form prescribed by the commissioner or corporations. This act does not apply to railroads, nor to mining or manufacturing corporations conducting their mining or manufacturing operations wholly within the state; nor to those foreign corporations required to report to other state officers than the commissioner of corporations. For failure to report the corporation shall forfeit \$200, and the president, treasurer and directors shall be jointly liable in a like sum. A certificate shall be filed upon every increase or reduction of capital stock. All certificates herein required shall be approved by the commissioner of corporations before being filed. The fee for filing the annual certificate is \$5; for each of the others required by this act, \$1. Laws 1891, ch. 341.

Taxation. - Stock in any corporation within or without the state is taxed. No taxes shall be assessed for state, county or town purposes upon the shares of any domestic corporation paying a tax on its franchises under the provisions of chapter 13, for any year in which it pays such tax, but such shares shall be taxable to the owners thereof for school district and parish purposes, and this provision shall apply to corporations mentioned in section 46 of said chapter 13. Ch. 11, § 4, Am'd Laws 1887, ch. 228. All machinery used in manufacturing is taxed where employed; and in assessing the stockholders for their shares, there shall be first deducted from the value thereof the value of all machinery and real estate belonging to the corporation. § 20. Fraudulent transfers or certificates, made or issued to avoid taxation, or evasions for such purpose, work a forfeiture of one-half the par value of the shares in question. § 28. The shares or interest of any stockholder in any domestic corporation may be sold on execution for taxes. Ch. 12. § 8. Every domestic corporation which, on May 1st in any year, holds, as collateral, bonds of any kind, or shares in corporations other than those subject to taxation on their franchises or stock under the provisions of this chapter, shall return to the tax commissioner (who is also commissioner of corporations) the whole number of shares and bonds so held, the names of the pledgors, and the number, denomination, and par and cash value, if known, of the shares and bonds pledged by each. Ch. 13, § 4. For neglect to report or for falsity therein. the corporation forfeits from \$50 to \$1,000. § 5. Domestic insurance companies pay one-fourth of one per cent. on the "net value" of all policies in force, § 25. Other domestic insurance companies pay one per cent, on all premiums received and not taxed in another state. § 29. Foreign life insurance companies pay the highest rate imposed by their state upon Massachusetts companies. § 31. Other insurance companies incorporated in other states pay two per cent. on their premium receipts, but always pay the highest rate imposed by their state upon Massachusetts companies; if incorporated in a foreign country, they pay four per cent. \$\$ 30, 32. Home corporations, except banks, and except those corporations mentioned in sections 43 and 46, shall annually return to the tax commissioner a list of their stockholders, giving the number of shares held by each, the par and market value thereof, and the amount of the capital stock. The name of any pledgor whose stock is held shall be given. The returns shall contain a statement of the personal and real property subject to local taxation within the state, and, except in the case of railroad and telegraph corporations, of the property subject to local taxation without the state. Railroad and telegraph corporations shall return the whole length of their lines, and the length of the part without the state. § 38. The fair cash value of all the shares constituting the capital stock shall be considered the value of the franchise for purposes of taxation. § 39. Every corporation embraced in the provisions of section 38 shall pay an annual tax upon the valuation of its franchise, after making the deductions provided for in this section, at a rate determined by an apportionment of the whole amount of taxes to be raised upon all the taxable property in the state. There shall be deducted, in case of railroad and telegraph companies whose lines extend beyond the state, such portion of the valuation of their whole capital stock as is proportionate to the length of the lines beyond the state; and also the value of their real estate and machinery sub-

ject to local taxation in the state; in the case of other corporations mentioned in section 38, the value of the real estate, machinery, etc., locally taxed within or without the state. But if the charter of a corporation provides a different method of finding the value of the franchise, the provisions of the charter shall be followed. \$40. Foreign telegraph companies shall make the returns prescribed by section 38, excepting the list of shareholders, and pay the tax required by section 40. § 42. Corporations chartered by the state, or under the laws of the state, to engage, without the state, in mining, quarrying or extracting carbonaceous oils from the earth, or to purchase, sell or hold mines or lands without the state, shall nay a semi-annual tax of one-twentieth of one per cent, upon the par value of their capital stock; also an annual tax of four per cent, upon their net profits. 88 43-45. Such corporations, formed without the state, and having established for more than ten days, a subscription, treasury or transfer office within the state, shall file with the secretary of state a certificate, setting forth the facts and particulars respecting their organization and capital stock. A certificate shall be likewise filed upou an increase or reduction of capital stock. The fee for filing each certificate is \$5. The tax to be levied on such corporations is one-fourth of one per cent, semi-annually, upon the par value of the capital stock, provided such tax does not exceed \$300 for any corporation. The corporations mentioned in this act, upon filing the copy and statement required by chanter 330 of the laws of 1884 (see above under "Foreign corporations"), shall be relieved from making the returns and certificates required by this act. Laws 1882, ch. 106, Am'd Laws 1883, ch. 74: Laws 1886, ch. 230. Every corporation formed in the state to construct railroads, or railroads and telegraphs, in foreign countries, shall, for purposes of taxation, be subject to section 43, chapter 13. § 46. Mutual insurance companies, organized under the general laws, pay a tax upon their guarantied capital and permanent fund, like the tax upon the frauchises of other corporations. § 50. For failure to make returns, corporations forfeit two per cent upon their capital stock, § 54. Both lessee and lessor are liable for the tax. § 56. No tax will be assessed for state, county or town purposes upon the shares of stock taxable under sections 40, 42, 43 and 45, for any year in which the franchises or property tax is paid, but the tax collected under section 40 shall be apportioned to the municipalities in proportion to the number of resident stockholders. § 57. Corporate books shall be open for the inspection of the tax commissioner. § 59. The tax on the corporate franchise of any corporation shall not prevent or affect the imposition of any tax authorized to be collected upon any special privilege. § 60. For filing the certificate required by section 21 of chapter 106, a fee of one-twentieth of one per cent., but not exceeding \$200, is charged. Ch. 106, § 84. Foreign accident insurance companies pay a tax of two per cent on premium receipts within the state. Laws 1890, ch. 197. The cost of caring for the deposits required to be made with the state treasurer shall be taxed to the corporations in proportion to the amount of their respective deposits. Laws 1891, ch. 233. Land without the limits of the route of a railroad, taken for station purposes, under section 91 of chapter 112, shall not be exempt from taxation. Ch. 112, § 92.

§ 954. MICHIGAN: 1 Constitutional provisions.— The credit of the state shall not be granted to or in aid of any person or corporation. Constitution of 1850, art. XIV, § 6. The state shall not subscribe to or be interested in the stock of any corporation. Id., § 8. The state shall not be a party to or interested in any work of internal improvement, nor engaged in carrying on any such work, "except in the expenditure of grants to the state of land or other property." Id., § 9. The legislature may provide for specific taxes on "banking, railroad, plank-road and other corporations hereafter created." Id., § 10. Corporations may be formed under general laws but shall not be created by special act. All such general laws may be amended or repealed. Art. XV, § 1. "The stockholders of all

¹ The acts of the legislature down to and including the laws of 1893 are included in this synopsis.

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corporations and joint-stock associations shall be individually liable for all labor performed for such corporation or association." Id., § 7. Private property shall not be taken by any corporation for public use without compensation being first received. Id., § 9. No corporation, except for the construction of railroads, plank-roads and canals shall be created for more than thirty years: "but the legislature may provide by general laws applicable to any corporation for one or more extensions of the term of such corporation while such term is running, not exceeding thirty years for each extension, on consent of not less than a twothirds majority of the capital of the corporation; and by like general laws for the corporate reorganization for a further period not exceeding thirty years of such corporations whose terms have expired by limitation, on the consent of not less than four-fifths of the capital." Id., § 10, Am'd Supplement 1890, p. 2802. "No corporation shall hold any real estate hereafter acquired" for more than ten years except that actually "occupied" in the exercise of the corporate franchise. Id. The legislature may establish maximum rates on railroads, "and shall prohibit running contracts between such railroad companies whereby discrimination is made in favor of either of such companies as against other companies owning connecting or intersecting lines of railroad." Art. XIX, A., § 1. Competing or parallel lines shall not consolidate their "stock, property or franchises." In no case shall consolidation take place without a public notice of sixty days to all stockholders. Id., § 2.

Miscellaneous corporations.— Three or more may incorporate to carry on "any manufacturing or mercantile business or any union of the two." Gen. Stat. Sup. of 1890, § 4161 (a). Blanks for the articles of association are furnished by the secretary of the state. The articles shall state (1) the corporate name and purposes; (2) the place of husiness; (3) the amount of capital stock (to be from \$5,000 to \$5,000,000) and the number of shares (to be of the par value of \$25 each); (4) the amount paid in "at the date of the articles" (which shall be not less than ten per cent of the capital and shall not be reduced below such per cent.): (5) the term of existence (not to exceed thirty years); (6) the names and residences of the stockholders and the number of shares taken by each. § 4161 (a 1). Any two members may call the first meeting by a two weeks' notice in a county paper. The notice may be waived by a writing signed by all the stockholders, specifying the time and place of holding the meeting. § 4161 (a 2). There shall be not less than three directors, who shall be stockholders. § 4161 (a 3), Am'd Laws 1893, No. 76. If the directors neglect to call a meeting, three of the stockholders may call the meeting. § 4161 (a 4). The secretary and treasurer shall reside, have their place of business and keep the corporate books within the state. The same person may hold both offices. § 4161 (a 5). The corporate business may be conducted in whole or in part in any state. §4161 (a 7). If the corporation is organized to operate in the state, it shall before doing business record the articles with the secretary of state and with the county clerk at its own expense; if to operate without the state, with the secretary of state and the county clerk of the county in this state where the office is kept. § 4161 (a 8). The directors may call in subscriptions by instalments in such proportion and at such times and places as they think best. § 4161 (b). Annual reports shall be made on blanks to be furnished by the secretary of state. § 4161 (b 1). The corporation may elect "in such manner as they shall determine all necessary officers." § 4161 (b 2). The corporation may "acquire and hold such lands, tenements and hereditaments, and such other property of every kind" as are necessary for its corporate business; and such other "lands, tenements and hereditaments" as shall be taken in payment of or security for debts due the corporation, and may manage and dispose of the same at pleasure. "It may also purchase and hold any grant of lands made by the general government to aid in any work of internal improvement in this state." § 4161 (b 3). The corporate books and accounts shall be kept for the inspection of stockholders at the principal office in the state, and annual statements must be made to the stockholders. § 4161 (b 4). The stock is personalty, transferable only on the corporate books in the manner described by the by-laws. The corporation shall at all times have a lien upon "all the stock or property of its members invested therein, for all debts due from them to such corporation." § 4161 (b 5). The place of business may be removed from one place in the state to another place in the state upon a two-thirds stock vote. § 4161 (b 7). An office or place of husiness may be established anywhere in the Union, and stockholders' or directors' meetings be held at such office; provided, that there shall always be one office in the state where notices may be served. § 4161 (b 9). If the capital stock is refunded to the stockholders before all the corporate debts are paid for which such stock would have been liable, the stockholders shall be jointly and severally liable to creditors for the amount refunded to them respectively. \$4161 (c). All the directors assenting to a dividend where the corporation is insolvent, or which would make it so, shall be jointly and severally liable "for all the debts due from such corporation at the time of paving or declaring such dividend." The directors ordering, or assenting to, any violation of this law shall be jointly and severally liable for all debts contracted after such violation, "to the extent of three times the amount paid in on the stock standing in the name of such director in any such corporation." § 4161 (c 2). The stockholders are individually liable for all debts for labor performed for the corporation, which liability may be enforced after execution against the corporation is returned unsatisfied. \$ 4161 (c.8). When the corporate existence is about to terminate by limitation. the same may be continued for not more than thirty years, by a two-thirds stock vote at the annual meeting next preceding the termination of the corporation, or at a special meeting held less than a year before such termination. § 4161 (d 2). Provision is made for the issue of preferred stock. Laws 1893, No. 187. The "general provisions" given below (§§ 4860-4904) govern corporations formed under this act, where no provision of this act is applicable. § 4161 (d 3).

For the winding up of mining and manufacturing corporations, see § 4161 (d 7), and Laws 1891, p. 168. Also Laws 1893, No. 40.

For telegraph, telephone and express companies, see Gen. Stat., § 3718 et seq., and Supp., § 3718 (a) et seq.,

For insurance companies, see Gen. Stat. and Supp., § 4207 et seq., and Laws 1891, p. 16.

For mining and smelting companies, see Gen. Stat. and Supp., § 4076 et seq.

Respecting land-purchasing and improvement companies, see Id., § 3801 et seq. For oil and petroleum companies, see Id., § 3751 et seq.

For street railroads, see Id., \S 3536 *et seq.*, and Laws 1891, pp. 22 and 277, and Laws 1893, No. 12.

Three or more may form a partnership association for the purpose of conducting any lawful business in any state or country, but having a principal office within the state, by subscribing and contributing capital, which capital shall alone be liable for the debts of the association. They must sign and acknowledge a statement setting forth (1) the names of the corporators and the amount subscribed by each; (2) the total amount of the capital, and how and when to be paid; (3) the character of the proposed business, and the location of the same; (4) the name of the association, with the word "limited" added as a part of the same; (5) the contemplated corporate duration (not to exceed twenty years); (6) the names of the officers. The capital stock may be paid for in real or personal estate, at a valuation to be approved by all the "members subscribing to the capital." The names of those thus contributing, with a description and valuation of the property, shall be inserted in the statement. Such statement shall be recorded with the recorder of the county where the principal office is to be located. Gen. Stat., § 2365. The liability of members for corporate debts is as follows: If execution against the company is returned unsatisfied, an execution may be issued against any of the members ' to the extent of the portions of their subscriptions respectively in the capital of the association not then paid up." This provision does not relieve the members from individual liability for labor performed for the association. \$ 2366. The omission of the word "limited" renders all the members liable for debts or liabilities. § 2367. An interest in such an association shall be personal estate, and may be transferred "under such rules and regulations as the association may prescribe and in force at the time of such transfer." The transferee, whether by gift, purchase, descent or bequest, shall become a member, on compliance with such rules and regulations. \$ 2368. Am'd Sup., \$ 2368. There shall be at least one meeting annually of the members, "at one of which" there shall be elected from three to five managers, one of whom shall be chairman, one treasurer and one secretary. No debts shall be contracted or liability incurred except by one or more of said managers, and no liability for more than \$500, "except against the person incurring it, shall bind the said association," unless reduced to writing and signed by at least two managers, "except in case of associations for the purpose of buying and selling merchandise, a majority of the interest in such association may select one of the managers each year" to make purchases. The by-laws originally adopted can only be changed by the consent in writing of three-fourths in number and interest. § 2369. The credit, name or capital cannot be loaned to members; nor to any other person or association without the consent in writing of a majority in number and interest, and then only to benefit the association. § 2371. Real estate shall be held, owned and conveyed only in the name of the association. § 2374.

Railroads. - Seven or more may incorporate to construct, operate and maintain a railroad, railroad bridge or railroad tunnel. They shall subscribe articles setting forth (1) the corporate name and the period of duration; (2) the amount of capital stock (which shall be not less than \$4,000 per mile for a narrow gauge, and not less than \$8,000 per mile for a standard gauge, or not less than half the estimated cost of such tunnel or bridge); (3) the number of shares (to be of the amount of \$100 each); (4) the names of from five to fifteen directors; (5) the termini, the names of the counties traversed and the length of the road. Each subscriber shall state his residence and the number of shares he will take. When \$500 per mile is subscribed (or one-half the cost of the bridge or tunnel), and five per cent, thereof paid bona fide in cash to the directors, and an affidavit of two directors is attached affirming such payment, the articles shall be filed with the secretary of state, which completes the incorporation. Real estate necessary for railroad purposes may be held. Any railroad company existing in whole or in part under the laws of the state may increase or reduce the number of its directors, by a twothirds stock vote, within the limits stated above. Gen. Stat., § 3313. The purchasers of a railroad at a foreclosure sale, and their associates, may incorporate and have the rights and powers of the old corporation. The organization may be formed by virtue of a declaration or certificate of the purchasers, setting forth a description of the property sold and the date of the deed under which it was sold, or of the decree of the court; a description of the parties to the deed or suit; the time of sale and the name of the officer who sold the property; the purchasers. the amount paid, the stockholders to whom stock is to be issued, and the amount of the capital stock; the name of the new corporation, and any other facts requisite to be stated. The certificate shall be filed and recorded with the secretary of The stock shall be issued in shares of \$100 each. § 3314. Directors shall state. be stockholders. No stockholders in arrears in the payment of assessments can vote. The directors must provide by-laws for the "disposition of its unsubscribed capital stock." Each share held for ten days previous to an election has one vote in person or by proxy. Vacancies in the board are filled by the directors. § 3315. Amendments may be made, upon a two-thirds stock vote, so as to change the route, extend the line from either or both termini, build branches, change the gauge, etc. The amendments must be filed like the original articles. § 3316. At any annual election the stockholders may classify the directors in three equal

classes, as near as may be, to hold office for one, two and three years respectively. If the directors fail to call the annual meeting it may be called by a majority of the stockholders, and a special meeting may be called by one-fourth of the stock. A majority of the stock may remove any director or other officer and elect others in their stead. All the officers shall be governed by the rules and regulations adopted by the stockholders at any meeting. § 3317. The directors may prescribe the amounts of instalments and the manuer of paying the same. § 3319. Stock is personalty, transferable according to the by-laws, but no share shall be trausferred until paid in full "without the consent of the board of directors." Each certificate of stock shall show the amount paid thereon. \$ 3320. A profile map of the route shall be submitted to a state board for their approval. Sup., § 3321. A relocation may be made for the improvement of the line. Gen. Stat., § 3322. The corporation has the usual powers respecting surveys, and has power to "receive, hold and take" voluntary "grants and donations" of any property made in aid of the road, but real estate thus taken shall be held for the purpose of the grant only. The corporation has further power "to purchase, and, by voluntary grants and donations, receive, take, and by its officers, engineers, surveyors and agents enter upon and take possession of, hold and use all such lands and real estate, franchises and other property, as may be necessary for the construction, maintenance and accommodation of its railroad or railroad tunnels, stations, depots and other accommodations." But the same shall not be appropriated until compensation is made. Neighboring lands may be taken (by condemnation) to procure construction materials. The railroad may be constructed "upon or across" any private road, street or highway, and across or under any railroad or canal, but any such road, etc., shall be restored to its former condition of usefulness. The company may "cross, join and unite its railroads with" any other railroad "now or hereafter constructed," and may make "all such business arrangements as said companies may agree upon," Every company whose road is thus crossed must form connections. The maximum passenger rates are fixed at from two to three cents per mile, according to the earnings of the road. § 3313, Am'd Laws 1891, p. 100. Such railroad company cannot limit its common-law liability as a common carrier. except by a written agreement signed by both parties thereto. §§ 3328, 3418. As to proceedings for condemnation, see Gen. Stat. Am'd Sup., §§ 3329-3341. The corporation has the same powers respecting the building of branch roads as are conferred for the construction of the main line. Branches may be built when the directors think best. The corporation may subscribe to the capital stock of any other corporation formed under this act; and any railroad company chartered or organized under any other law of the state may subscribe to the capital stock of any company formed under this act, not having the same terminal points, and not being a competing line, with the consent of the company to whose stock such subscription is made. Any company organized under this act may arrange with any other railroad company for running its cars over the road of such other company, "or for the working and operating of such other roads as said companies shall mutually agree upon;" and any railroad companies may enter into any arrangements for their common benefit, calculated to promote the objects of their creation. Rates on branch roads, or on connecting roads with which such arrangements are made, shall be the same as on the main line. No discrimination shall be made respecting connecting roads. § 3342. Any railroad company in the state, forming a continuous or connecting line with any other company, "may consolidate with such other company, either in or out of this state, into a single corporation." But competing lines cannot thus consolidate. The directors may enter into an agreement, which must be submitted to a meeting of the stockholders of the respective companies, and approved by a majority of the stock. The number of directors named in the agreement shall be from five to fifteeu. first election of directors shall take place within six months from the consolidation. The agreement shall state the number of shares in the new corporation, and

the value of each share, and the manner of converting the shares of the two or more old corporations into the shares of the new corporation. Any "power, right, franchise, privilege or immunity" possessed by either of the consolidating companies, which would not be possessed by a company originally incorporating under this act, as now existing or hereafter amended, "shall be utterly lost annulled and abrogated:" but the new corporation shall be subject to all the restrictions and perform all the duties imposed by this act. A copy of the contract shall be filed with the secretary of state. Subject to the above provisions, the rights, franchises and property of all the consolidating companies shall vest in the new corporation, and it shall be subject to all the liabilities and duties which were imposed upon the old companies. Debts of the old companies shall be paid by the new corporation. The articles of agreement shall be submitted to a state board for approval, before they shall have any effect, and before the duplicate is filed with the secretary of state, \$\\$ 3343, 3344, Am'd Laws 1891, p. 141. The trustees, in any deed of trust or mortgage of and upon any railroad, in case of default in payment, may, in pursuance of any power of sale in the mortgage, etc., convey the title to the purchaser or purchasers, and authorize them to possess and enjoy the franchise, "as fully as may be provided in said mortgage or deed of trust;" and it shall be lawful for all corporations formed under this act "for the purpose of securing their bonds, authorized to be issued in accordance with its provisions, to execute such mortgage or deed, with such power contained therein for the sale of the property mortgaged or deeded as shall, in its judgment, or the judgment of the board, be found expedient, and such power and sale in accordance therewith shall be lawful and valid." Gen. Stat., § 3321. "All companies organized under this act shall have power from time to time to borrrow such sums of money as may be necessary for completing, finishing, equipping or operating their road, or any part thereof, or for paying any indebtedness necessarily incurred" for such purposes; "and to issue and dispose of their lands or obligations for any amount necessarily borrowed for such purpose, for such sums and for such rate of interest, not exceeding ten per cent, as they may deem advisable. and to mortgage their corporate property and franchises and the income thereof, or any part thereof, to secure the payment of any debt contracted or to defray any expenditure by the company for the purpose aforesaid." The directors may give bondholders the right to convert their bonds into stock at any time within ten years from the date of the bonds, on such terms as the company may think best: "and said company may sell their bonds or obligations, either within or without this state, and at such rates and prices as they may deem proper." Any such company may at any time, "with the concurrence of the stockholders representing a majority of the stock, a majority in value of its stockholders," at the annual or a special meeting, increase its capital stock, "or provide for the issue of preferred or secured stock, for the purpose aforesaid, upon such terms and conditions as to them may seem meet." If the capital stock is found insufficient for the purposes of the road, the corporation may, with the consent of twothirds of the stock, increase the capital to any necessary amount. "Any railroad company who owns, has possession of and is operating a railroad constructed and equipped, and whose railroad and railroad property and franchises are not mortgaged, shall have the right to issue bouds and to mortgage its corporate property and franchises to recover the payment of the said bonds, and may issue such bonds and dispose of the same in such manner as shall be determined upon by a vote of the owners of the entire capital stock of the said company, at a meeting duly called for that purpose." The owners of all the stock, at a meeting called for the purpose, are authorized to determine the form of such bonds, the length of time they shall run, and the rate of interest they shall bear, not exceeding ten per cent; also the form and provisions of the mortgage or trust deed, the trustee or trustees to whom the same shall be made, and their rights, powers and duties, "and to make such provisions therein for the sale and transfer of the corporate property and franchises therein described as they shall deem best: and the sale and transfer of the said corporate property and franchises in accordance therewith shall be lawful and valid." Laws 1891, p. 94. Railroads shall furnish accommodations for connecting roads at junctions and termini. \$ 3354. No discrimination shall be made in favor of any individual or company, in facilities or rates. Sun. \$ 3355. Any necessary land for station accommodations for itself, or for any connecting road, may be condemned by the corporation. Gen. Stat.. 8 3356. When any of the land of a railroad corporation in pr adjacent to its stations is not in actual use, and is not needed by such company for depot or terminal purposes, any other company may condemn such land for such purposes. \$ 3357. Any railroad company which has a terminus on any navigable water may own a line of steamers to convect its road with another road, or may aid such steamboat company by loans of money. Sup., § 3357 (a). "Every railroad and railway company operating a railroad in whole or in part in this state which company may have been by means of a consolidation nuder any general or special law of this state, or by means of a mortgage foreclosure and sale and reorganization, under any general law of this state, is hereby declared to be in all respects subject to the general laws of the state respecting railroads as now existing or as hereafter amended:" and any right, power, or exemption which would not belong to a company organized under the general railroad laws, "as now existing or as hereafter amended," is hereby "annulled and abrogated;" and every such company shall be subject to all the restrictions and perform all the duties now imposed by the general laws, or which may hereafter be imposed upon railroad companies. Laws 1891, p. 144. All the stockholders shall be individually liable for all labor performed, after execution against the company has been returned upsatisfied. Gen. Stat., § 3385. If the directors declare and pay a dividend when its corporation is inselvent, or which would make it inselvent, "they shall be severally liable to a penalty of five hundred dollars." § 3387. The same penalty is imposed upon an efficer who signs a false certificate or report. § 3388. If the construction of the road is not begun within three years after organization, and ten per cent. of the subscribed capital expended thereon, and the road is not finished and put in operation within ten years from the organization of the company, the corporation "may be adjudged to have forfeited its corporate rights and privileges," on the petition of one-fourth of the stock, except as to the part completed at the time of filing such petition. § 3390. Any officer who shall, with fraudulent intent, make, sign, issue or offer to sell any false or fraudulent stock, or other evidence of corperate debt, shall be imprisoned for not more than ten years. § 3393. Accounts shall be open to the inspection of the railroad commissioner. § 3399. A general office shall be kept within the state, where general and detailed accounts shall be kept. § 3399. Any railroad company in the state which shall bona fide have begun the construction of their road, and have been unable to complete the same, may, with the assent of two-thirds of the stock, sell the whole or any part of the uncompleted road, with all the rights and franchises connected therewith, to any non-competing company of the state, not having the same termini. The corporation so purchasing shall be subject to the general railroad law of the state, and shall complete the road within five years from the time of the sale, or the sale shall be void. §§ 3403-5. Any domestic company may, with the assent of a majority of the stock, sell its road and franchises to any other non-competing domestic company. The sale may be made by transfer of the stock or otherwise. The parties to the transaction shall not be companies having the same terminals. The purchasing company shall be subject to the general railroad laws. The purchasing company may issue its bonds "secured by trust deed or mortgage upon their property and rights thus acquired to make payment therefor; and such trust deed or mortgage shall have the effect of a purchase-money security." Sup., §§ 3405 (a), 3405 (b). Upon the foreclosure of any mortgage or pledge of the property and franchises of "any railroad company," if the stock and the appurtenances are sold, and if the purchaser or purchasers shall, by purchase from said company or otherwise, provided suitable equipments for running the road, "and shall transfer to said corporation again its railway track and appurtenances, and all and singular the equipments necessary to run the same," and shall "under their hands and seals, and verified by their oaths, declare that he or they," having become such purchaser or purchasers, are desirous to continue the corporate existence, and that they have provided the means therefor, stating the new name of the corporation. and shall file such declaration with the secretary of state, together with a copy of the order confirming the sale, "then such purchaser or purchasers shall be at liberty to issue and themselves hold new stock in said corporation to such an amount and of such denomination as they shall deem proper." But if "additional stock shall not be in good faith subscribed by persons able fully to pay up the same, new stock to a greater amount shall not be issued than sufficient at par to represent the fair value of all the property and rights then owned by said corporation." After said new stock is issued the holders of the same may elect officers to supersede the old officers. The old stock shall be deemed forfeited "and may be canceled." on the books, and the new stockholders and officers may continue the corporate business of the old company. "The said corporation shall not be liable for any debts or obligatious except those by it thereafter contracted." But no prior lien shall be affected, and only the property thus sold shall be relieved from liability for the old corporate debts. Gen. Stat., § 3406. When it shall be necessary to make loans to meet just liabilities, or to carry out lawful objects and duties, or if any of the creditors holding bonds of the corporation desire to exchange the same for preferred or secured stock, the corporation may, upon the vote of a majority of the stockholders, issue such stock and secure the dividends thereon; provided, that no dividend greater than eight per cent, shall be secured without the consent of all the stockholders, and in no case greater than the legal rate of interest. "Such preference may be full or partial" and subject to such terms and conditions as the corporation deems proper. Such stock shall be redeemable and payable upon such terms and at such times as shall be provided in the resolution authorizing the issue thereof, but shall not be sold at less than its par value. § 3407. The issue of fictitiously paid-up stock or bonds is prohibited. No company or officer thereof shall sell, dispose of or pledge any shares nor "issue certificates of shares in the capital stock of such company until the shares so sold, disposed of or pledged, and the shares for which such certificates are to be issued, shall have been fully paid." Any officer violating any provision of this section shall be guilty of a misdemeanor. § 3409. Annual reports must be made to the secretary of state. § 3410. Any "existing" railroad corporation in the state may aid, by subscription. by guarantying bonds, or making running and business arrangements or in any other form, in the construction of the road of any company formed under the general laws; and when any company formed under general laws is unable to finish, or equip and operate its road or any part thereof, it may make arrangements with "any other railroad company" to "equip, operate, manage and work such road or section thereof," upon such terms and for such length of time as may be agreed upon by the boards of directors. § 3413. For union station and depot companies, see § 3458 et seq., and Sup., § 3490. All railroad companies must report annually to the commissioner of railroads. § 3291. The commiseioner may examine the books of the company, and he has general supervision of the railroads of the state, but does not regulate rates. § 3295 et seq. The conditional sale of rolling-stock and equipment is provided for. Laws 1893, No. 81. It shall be lawful for any domestic railroad company to "sell, lease and convey its road together with the rights and franchises connected therewith, or any part or portion thereof, to any other railroad company, whether organized within or without this state; and for the railroad company so purchasing or leasing to acquire and use such road, rights and franchises by purchase of the stock or otherwise as may be agreed between the parties interested; said railroads not to have the same terminal points and not being competing lines; provided, the stockholders owning a majority of the stock of said companies shall consent thereto; "and provided, that the purchaser or lessee shall operate the road under the general laws of the state. The purchasing or leasing company "may issue its bonds secured by trust deed or mortgage upon the property and rights thus acquired to make payment therefrom; and such trust deed or mortgage shall have the effect of a purchase-money security;" but the rights of creditors of the corporation from whom the purchase or lease is made shall not be prejudiced. Laws 1893, No. 102

General provisions. — Unless otherwise provided, the first meeting shall be called by one or more of the incorporators. Gen. Stat., \$ 4862. A justice of the neace may issue a warrant for a meeting when there is no one capable of calling it. § 4863. Every corporation may hold land "to an amount authorized by law." and may receive subscriptions in lands situate in the state, or may take donations of such lands, to assist such corporation to perform any work of public improvement, and may sell and convey the same. The shares of such company may be transferred by indorsement and delivery of the certificates, but such transfer shall only be valid between the parties until entered on the books. The articles may be amended by filing the amended articles, executed by the corporation and by a majority of the stock, with the secretary of state. § 4866. Corporations whose charters expire, for any cause, shall continue corporations for three years for the sole purpose of closing up their business. § 4867. The franchise of any corporation authorized to receive toll may be sold on execution, and the purchasertakes the place of the corporation, so far as relates to receiving toll. The franchise may be redeemed within three months. §\$ 4868-75. The purchaser at: a foreclosure sale of the property and franchises of a corporation, with their associates, take the place of the original corporators, and shall file articles of association with the secretary of state, with a copy of the order confirming The new corporation may issue new stock, to an amount equal to that prescribed in the original articles or charter. § 4885. The individual liability of stockholders is not enforced until the return of an execution unsatisfied against the corporation. \$\$ 4886-4899. Corporations formed under the laws of the state, whose principal office is without the state, are required, where they have an office in the state, to keep a list of the stockholders, with a statement of the number of shares held by each, and a transfer book, at the office in the state. But mining companies of the upper peninsula shall not be required to keep a transfer book at such office in the state. Any violation of this law shall work a forfeiture of the charter. Any domestic company may, at a general or special meeting properly noticed, with the consent of three-fourths of the capital, sell and convey all its property and franchises, or any part of its real property or franchises, to any other domestic corporation formed under the same or a similar law for similar purposes. This provision shall not authorize the consolidation of parallel or competing lines of railroads, and shall not apply to corporations formed under the act for the incorporation of companies for mining, smelting and manufacturing iron, copper, etc. The purchasers may organize and take the place of the old corporation. Sup., §§ 4904 (e), 4904 (f), Am'd Laws 1893, No. 197. corporation shall forfeit its charter if it enters into a trust combination to enhance prices or limit free competition. § 9354 (m). Shares of stock may be sold on execution. Gen. Stat., § 7697, Am'd Laws 1893, No. 109. Circuit courts have extensive powers over the directors and other officers of any corporation. Such courts may compel them to account, suspend or remove them, order new elections, etc., and such jurisdiction may be exercised upon the petition of any creditor, director, officer or stockholder. §§ 8150, 8152.

Foreign corporations.—Foreign corporations for mining, smelting, etc., may do business in the state, but shall not hold more than six thousand acres of land at one time. Gen. Stat., § 4061. For further provisions respecting such companies, see

Sup., § 4064 (a) et seq. Foreign corporations formed, in whole or in part, for any of the purposes specified in sections 4161 (a) et seq. above, may after filing with the secretary of state copies of their charter, or articles, and a detailed statement of the condition of the corporation, and after appointing an agent, do business in the state, with all the privileges, and subject to all the liabilities, provided in case of said domestic companies. § 4161 (d 6).

For proceedings against foreign corporation, see Laws 1893, No. 89.

Taxation.—"All shares in corporations organized under the laws of this state, where the property of such corporation is not exempt or is not taxable to itself. or when the personal property is not taxed; . . . all shares in foreign corporations, except national banks, owned by inhabitants of this state," are taxed as personalty. Laws 1893, No. 206, § 8. The real property of a corporation is assessed to the corporation in the town where situated. § 5. The personal property of all corporations not required to pay a specific tax to the state in lieu of all other taxes shall be assessed where the principal office is situated. The track, road or bridge of road, street railroad, bridge, etc., companies shall be taxed as personalty. The railroad tracks, right of way, depot grounds, buildings, rolling-stock and all other property necessarily used in operating a railroad in the state are exempt from taxation, except for local improvements; but all realty not adjoining the track shall be taxed. § 7. Any railroad company owning or operating a road wholly or partly in the state shall, annually, pay a specific tax as follows: Upon a gross income not exceeding \$2,000 per mile of road actually operated in the state. two per cent, of such income; upon such gross income above \$2,000 per mile, and not exceeding \$4,000, two and a half per cent.; upon all gross incomes of from \$4,000 to \$6,000 per mile, three per cent; upon such gross income ranging from \$6,000 to \$8,000 per mile, three and one-half per cent.; and upon all such gross incomes in excess of \$8,000 per mile, four per cent. Where the road is partly without the state, the gross income subject to the above tax shall be computed by adding to the income from business done entirely within the state such proportion of the income from interstate business as the length of the road on which the interstate business is done within the state bears to the entire length over which interstate business is done. The tax so paid is in lieu of all other taxes upon the properties of the company, "except such real estate as is owned and can be conveyed by such corporations under the laws of this state, and not actually occupied in the exercise of its franchises, and not necessary or in use in the proper operation of its road; but such real estate so excepted shall be liable to taxation in the same manner, and for the same purposes and to the same extent," as other real estate. The tax above specified shall not be imposed upon any company hereafter building and operating a railroad in the state north of the forty-fourth parallel until the same has been operated for the full period of ten years, unless the gross earnings shall equal \$4,000 per mile, except as to the portion south of said parallel. But this exception shall not extend to such road when owned or operated by existing companies until the report of earnings to the railroad commissioner has been made by such company. Gen. Stat., § 3360, Am'd Laws 1891, p. 217; Am'd Laws 1893, No. 129. When one railroad company, which has been paying a different tax than that imposed by the general laws, consolidates with another company, it may continue to pay such tax until July 1, 1892, and thereafter shall be taxed under the general law. Laws 1891, p. 144. All railroad companies existing under any special charter, or general act, or special or general act of consolidation, or which has heretofore been taxed under any special act, shall be subject to the general act respecting taxation. Laws 1891, p. 161. "Mining and manufacturing" corporations pay an ad valorem tax on realty and personalty, but this provision does not authorize the taxing of their capital stock. § 4020, Am'd Sup., § 4161 (d). All the property of corporations engaged in mining, smelting or refining ores in the state shall be taxed under the general laws relating to the assessment and taxation of property. Laws 1891, p. 173. Corporations shall report to supervisors of towns or assessors of tax districts the names of shareholders residing therein, the number of shares held by each and their par value. The penalty for fraudulently transferring shares to avoid taxation is a forfeiture of half the par value of such shares. Gen. Stat., §§ 4880-3. Every corporation hereafter incorporated, or formed by consolidation or otherwise, under any general or special law of the state, which is required to file its articles with the secretary of state, and every foreign corporation, shall pay the secretary of state a franchise fee of one-half a mill upon each dollar of its authorized capital stock, "and a proportionate fee upon any and each subsequent increase thereof." Corporations already formed must pay a like fee upon any increase of stock. Contracts made in the state after the 1st of January, 1894, by companies which have not complied with the provisions of this act, shall be wholly void. Laws 1893, No. 79.

8 955. MINNESOTA: 1 Constitutional provisions. - Any law providing for the repeal or amendment of any law or laws, so as to allow railroad corporations to pay a percentage of their gross earnings to the state in lieu of all other taxes, must be submitted to the people. Constitution of 1858, art. IV, § 32. (Such an amendment to the constitution was proposed, to be voted upon in 1892. Laws 1891, ch. 2.) Corporate powers or privileges are not to be granted by special legislation. No law shall be passed creating corporations, or amending, renewing, extending or explaining the charters thereof; or granting to any individual or corporation any special or exclusive privilege, immunity or franchise whatever. Id., \$33. Am'd 1892. The legislature shall provide by general law for the transaction of corporate business. Id., § 34. Investments in bonds, stocks or joint-stock companies shall be taxed. Art. IX, § 3. The state shall never contract any debts for works of internal improvement, or be a party in carrying on such works, except when grants to the state have been specially dedicated by the grant to specific purposes. Id., § 5. The credit of the state shall never be given or loaned in aid of any individual or corporation. Id., § 10. Stockholders in banks shall be liable to double the amount of their stock and for a year after any transfer thereof. Id., § 14. The legislature shall not authorize any county or municipality to issue bonds, or become indebted in any manner, to aid any railroad to a greater amount than five per centum of the value of the taxable property. Id., § 15. No corporation (except banks) shall be formed under special acts. Art. X, § 2. In all corporations (except manufacturing and mechanical), each stockholder "shall be liable to the amount of stock held or owned by him." Id., § 3. Common carriers, enjoying a right of way, "shall be bound to carry the mineral, agricultural and other productions or manufactures on equal and reasonable terms." Id., § 4.

Miscellaneous and railroad corporations.—Corporations empowered to take private property for public use may be formed by five or more. This includes corporations formed for building, improving and operating railways, and other works of internal improvement. Gen. Stat. 1891, § 2448. "Any citizens of the United States, not less than nine in number, being the owner or owners of any railroad within this state now or hereafter actually constructed for public use in the conveyance of persons and property, or organized for the purpose of maintaining and operating, under lease or contract, a railroad constructed for like public uses, may, by making and filing articles of association as authorized by this act, acquire and enjoy the rights, privileges and franchises granted by this act, and may, by filing in the office of the secretary of state a resolution of such corporation of its intent to construct or operate any branch line, become empowered to so construct and operate the same in connection with such main line, subject to the provisions of this act and the general laws of this state." Any railroad corporation to be organized under this act may erect and maintain lines of telegraph along its railroad, and charge a reasonable rate for transmitting messages.

 $^{^{\}rm I}$ The acts of the legislature down to and including the laws of 1893 are included in this synopsis.

Id. The corporators mentioned in the preceding section "shall organize by adopting and signing articles of association," which shall be recorded with the register of deeds of the county in which the principal place of business is to be, and with the secretary of state. § 2450. The articles shall specify (1) the corporate name, the nature of the business, and the principal place, "if any," of transacting same: (2) the time of the commencement and the period or duration of the corporation: (3) the amount of the capital stock, and how it is to be paid in: (4) the highest amount of indebtedness or liability to which the corporation shall at any time subject itself; (5) the names and residences of the corporators; (6) the names of the first board, in what officers the management of the corporate affairs is to be vested, and when the same shall be elected: (7) the number and amount of the shares in the capital stock. \$2451. The articles shall be published for four weeks in a county paper, or for one week only if the articles have been recorded as above required, and thereupon the incorporation is complete. Id. No such corporations shall be formed for more than fifty years, but may from time to time be renewed for that period, upon a vote of three-fourths of the stock, if those desiring renewal purchase the stock of those opposed thereto, at its value: provided, that railroad corporations formed under this chapter may continue and be formed for any time the corporators may designate or provide in the articles of association. \$ 2452. The corporators may at their first annual meeting, or before, open subscription books, under such regulations as they may prescribe, and when "sufficient stock is subscribed to justify the incorporators or directors to commence such canal line, railroad or [internal] improvement, and the first instalments upon such stock are paid in, said corporation may commence work thereon, and they shall thereby become invested with all the rights, privileges and franchises conferred by this title," § 2453. Transfers are not valid, except as between the parties thereto, until regularly entered on the stock books, which books shall be kept open for the inspection of any person. Transfers shall not in any way exempt the party making the same from any liability of the corporation created before such transfers are made. § 2454. "The private property of each stockholder in any corporation formed as herein provided is liable for corporate debts in the following cases: First. For all unpaid instalments on stock owned by him, or transferred for the purpose of defrauding creditors. Second. For a failure by the corporation to comply substantially with the provisions aforesaid as to organization and publicity. Third, When he personally violates any of the provisions of this title in the transaction of any business of the corporation," or is guilty of any fraud, unfaithfulness or dishonesty in the discharge of any official duty. § 2455. Such private property shall never be levied on while sufficient corporate property can be found to satisfy the execution or any part thereof. §§ 2456, 2457. When the articles are filed, recorded and published, as aforesaid, the incorporation is completed, and the corporation then has the usual corporate powers. The corporation "may render the interest of its stockholders transferable." The articles may, by a resolution of the board of directors, be altered in relation to the corporate name; the general nature of the business; the place of business; the amount of capital, and manner of paying in the same; the highest amount of indebtedness; the number and amount of shares; the number of directors, their terms and the manner of their election. New or amended articles are not valid until filed, recorded and published, as required in the case of the original articles. § 2458. The capital stock of any railroad corporation may be increased, or the articles of association modified, upon the authority of a majority of the stock. § 2459. "Such corporation has power to borrow money on credit of the corporation, and may execute bonds or promissory notes therefor, and, to secure the payment thereof, may pledge the property and income of such company: provided, that the amount of the indebtedness or liability of such company, exclusive of its indebtedness secured by mortgage of its property, shall not, at any one time, exceed two-thirds of the amount of its capi-

tal stock, nor the amount to be specified in the certificate hereinbefore provided for. That such corporation is authorized to issue bonds in lieu and in payment of any bonds of such company, or bonds issued and disposed of for the construction of its line of road, outstanding, bearing such rate of interest as may be agreed upen." If the articles of association so provide, the corporation may admit one or more persons chosen by the bondholders to be members of the board of directors. § 2460. (The preceding section appears to apply to all corporations empowered to take private property.) Any corporation formed under this title may acquire by purchase, gift or contract any right of way, and hold all property, real and personal, necessary and convenient for its business. Railroads may take and hold the real estate necessary for railroad purposes, in the same manner and by the same titles as individuals. § 2461. Only reasonable rates shall be charged by railroad, or other, corporations formed hereunder. § 2462. A copy of the bylaws, with the names of all the officers, must be posted in the principal place of business, for public inspection. § 2463. A statement of the financial condition of the company shall be kept posted in like manner. § 2464. The diversion of corporate property to ultra vires objects to the injury of any person; the declaring of dividends where the profits are insufficient to meet the same, or when the funds remaining will not meet the corporate liabilities: any wilful failure to comply with the articles of incorporation; or intentional deception, are criminal offenses punishable by a fine of not more than \$5,000, or imprisonment for not more than three years, or by both. § 2465.

Respecting the condemnation of private property, see §§ 2467-2507.

The following provisions apply to corporations for pecuniary profit other than those named above, and other than banks, but including corporations for dealing in lands and tenements. § 2638. The provisions of sections 2450, 2451, 2454, 2455, 2456, 2457, 2458, 2459, 2464, 2465, ante, shall apply to and be observed by corporations organized under this title. § 2639. Such corporations shall not endure for more than thirty years. § 2640. The amount of capital stock shall iu no case be less than \$10,000, to be divided into shares of not less than \$2 nor more than \$100 each, excepting that the capital stock of building and loan associations may be divided into shares of \$200 each. § 2642. The stock is personal property, transferable in the manner prescribed by the directors, and the corporation has a lien thereon, and upon the property of members invested therein, for all debts due the corporation from the member. § 2643. The directors must keep stock-books open for the inspection of stockholders, and, when required, must present to the stockholders reports in writing, and must make dividends of the profits, "not reducing the capital stock while they have outstanding liabilities." § 2644. Real and personal property necessary for the corporate business may be acquired and transferred. § 2645. The directors may establish one or more offices without the state and transact business thereat, provided an office be always kept within the state where legal process may be served on the person in charge thereof." § 2646. The articles may be amended by a majority vote "in number and amount of such shareholders and shares." Amendments must be filed, etc., like the original arti-§\$ 2647, 2648, cles.

The following provisions apply only to "corporations for manufacturing or mechanical business:" Three or more may incorporate. § 2650. The articles must distinctly state the purpose of the incorporation. The articles may be amended by a majority vote of the shares. The new or amended articles must be published at length in two county papers. §§ 2651, 2652. Before the corporation shall commence business, the president and directors shall cause the articles to be published in full in two county papers, and shall make a certificate of (1) the purpose of the incorporation; (2) the amount of the capital stock and the amount actually paid in; (3) the names of the stockholders and the number of shares owned by each; which certificate, signed by the president and a majority of the directors, shall be recorded with the secretary of state and the county recorder of

deeds. \$ 2652. Such corporation shall be formed for not more than thirty years. but may be renewed, from time to time, for that period, if three-fourths of the votes cast at a regular meeting held for the purpose are in favor thereof, and if those in favor of renewal buy the stock of those opposed, at its current value, § 2653. The amount of capital stock shall be fixed in the articles, and shall be divided into shares of not less than \$50 nor more than \$100 each, but the capital stock may be increased by the stockholders. § 2654. The directors shall call in subscriptions by instalments, in such proportions and at such times and places as they think proper, upon the notice prescribed by the by-laws. \$ 2655. A certificate of any increase of capital stock must be recorded as required in section 2652. \$ 2656. Stock is personalty, to be transferred only on the books in the manner prescribed by the directors, and the corporation has a lien on the stock or property invested therein for dues from the members. § 2657. If the capital stock shall be refunded to the stockholders before the payment of all debts for which the stock would have been liable, the stockholders shall be liable to creditors to the amount refunded to them respectively. § 2659. There shall be at least three directors, and all the directors shall be stockholders. § 2659. The directors fill vacancies in the board. § 2661. The directors must choose a president from their number, and a secretary and treasurer, both of whom shall reside and have their place of business and keep the corporate books within the state. If any corporation violates any of the provisions of this act, and thereby becomes insolvent, or if the directors declare any dividend while the company is insolvent, or which would make it insolvent, the directors assenting to such violation or such dividend shall be jointly and severally liable for all debts contracted after such violation, or due at the time of such dividend. §§ 2663, 2664. Any two corporators may call the first meeting, and notice of such meeting may be waived by a writing signed by all the subscribers, specifying the time and place of meeting. § 2665. The corporation has the usual corporate powers. § 2667. It may hold any kind of property necessary for its business, or taken for debts, and may dispose of the same at pleasure. § 2668. All corporate books and accounts shall be open for the inspection of stockholders, and annual statements must be made to the stockholders. § 2669. At all meetings, each share has one vote, in person or by proxy. § 2666. The president, directors or secretary are jointly and severally liable for all corporate debts contracted during the period of any neglect of duty on their part. § 2671. For mining and metal or mineral manufacturing companies, and manufacturers of stone or brick, companies for "dealing in mineral or other lands," or for all such purposes combined, see §§ 2672-2682. The corporators must be three or more. § 2672. The capital stock shall be not less than \$10,000, and be divided into shares of not less than \$100 each. Each share has one vote, in person or by proxy. § 2676. Stock is personalty, and may be "issued, sold or transferred" in the manner prescribed by the by-laws or by the directors. Stock issued as fullpaid shall not be subject to any assessment without the consent of the lawful holder. A majority in amount of the stockholders may always call a meeting. upon a thirty days' published notice, irrespective of the by-laws. § 2677. "Until otherwise provided," the persons executing the articles of incorporation shall constitute the board of directors. § 2678. The corporation may mortgage, lease or sell any of its real estate, if authorized by a majority of the stock. § 2679. Stock in any other corporation may be held, if a majority in amount of the stockholders so decide. § 2680. Directors and stockholders may hold meetings and do business without the state, and establish offices outside of the state, provided an office be kept within the state where legal process may be served upon the person in charge of the same. § 2681. The issue of fraudulent stock, or evidence of debt. is felony, punishable by imprisonment of from one to ten years. § 2682.

For insurance companies, see §§ 2906-3097, and Laws 1893, ch. 132.

For telegraph companies, see §§ 2625-2632.

Railroad corporations are subject to the following provisions, in addition to

those noted above in reference to "corporations empowered to take private property:" Railroad companies may condemn and use a street or highway in the same manner and upon the same terms as are provided for the appropriation of private property. § 2509. Any such corporation may "cross, intersect, join or unite" its road with any road before constructed at any point. \$ 2509. The local authorities of any municipality may grant, sell, loan or convey any public grounds or place to any railroad company. § 2510. The right of way is granted over any swamp or public lands of the state. §§ 2511-2515. The corporation has power to "create, issue and dispose of special stock, preferred stock and income certificates to such amounts, in such form, and for such purposes as may be determined upon by the hoard of directors of such corporation, with the assent thereto of the holders of at least two-thirds in amount of the common capital stock then outstanding of such corporation:" provided, that no increase thereof shall be made without the assent of two-thirds in amount of the holders who will be affected by such issue, \$ 2517. The directors may, with the assent of two-thirds of the common stock, confer upon the holders of the stock certificates authorized by the preceding section, or upon the holders of bonds or other obligations, the right to vote for directors, or to choose from their number one or more members of the board. \$ 2518. The capital stock shall not be increased until application has been made to the railroad and warehouse commission. §§ 2519, 2520. Certificates of shares shall not be issued, nor shares sold, disposed of or pledged until such shares are fully paid, nor stock or bonds be issued except for money, labor or property actually received and applied to the corporate business. All fictitious stock, dividends or increase of stock or indebtedness shall be void, and officers violating any provision of this section are guilty of a misdemeanor. § 2523. A special stock report shall be made annually to the secretary of state. \$ 2524. Any officer violating the provisions of section 2523, or falsifying the report required by the preceding section, or guilty of any neglect to comply with the requirement of said section, shall be punished by a fine of not more than \$5,000, or imprisonment for not more than three years, or both. § 2526. The route of a road shall not be changed to avoid any municipality which has granted aid to such road. § 2527. Any company shall have power to "mortgage or execute deeds of trust of the whole or any part of their property and franchises, to secure money borrowed by them for the construction and equipment of their roads, and may issue their corporate bonds, in sums not less than five hundred dollars, secured by said mortgages or deeds of trust, payable to bearer or otherwise; and, if payable to bearer. negotiable by delivery, bearing interest at the rate not to exceed ten per cent, per annum, and convertible into stock or not, as may be deemed expedient, and may sell them at such rates or prices as they deem proper;" and if sold below par, they shall be valid and binding on the company, and no plea of usury will be allowed the company. § 2529. Such mortgages or deeds of trust may be drawn to include after-acquired property, real or personal. § 2530. They shall be recorded in each county through which the road runs, and in the office of the secretary of state. §§ 2531, 2532. Any railroad company may make an agreement with the holders of its bonds or other obligations, or of any of its stock or income certificates, "in relation to the sale, lease or control of the property and franchises of such corporation," which shall receive the assent of two-thirds of each class of stock and certificates outstanding, at a meeting called for the purpose. A certificate of such assent and a copy of such agreement shall be filed with the secretary of state within thirty days, and a copy of the agreement shall be attached to each. class of bonds, stock, certificates, etc., and also to the common-stock certificates. § 2533. Purchasers at a judicial sale take the place of the original company in all respects; and whether or not the mortgage included the corporate franchises, the purchasers may organize and secure all the powers of the old company. § 2534. The purchasers may proceed, after a ten days' notice in a St. Paul paper, to elect a board of not less than nine directors, adopt a corporate name and a corporate seal. The organization is then complete. Within thirty days after organization, a certificate must be filed with the secretary of state, showing the date of organization, the corporate name, the amount of capital, issued and unissued, common and preferred, and the names of its officers. Id. Any railroad corporation may by subscription to the capital stock of another company, or otherwise, aid such corporation in the construction of its railroad, for the purpose of forming connections: or may lease or purchase any connecting live upon such terms and conditions as may be agreed upon; or any two connecting lines may enter into any agreement, for their common benefit calculated to promote the legitimate objects of both corporations. But no such aid shall be furnished, or purchase leave or agreement perfected, without the approval of two-thirds of the stock. \$ 2535. Any domestic or foreign company may lease or purchase, "or in any way become the owner of, or control or hold the stock of," any connecting line, with or without branches. \$ 2536. Corporations, domestic or foreign, may consolidate so as to form a continuous line, upon such terms as may be agreed upon. Articles stating the terms must be approved by a majority of the stock of the respective companies. A copy of the articles and of the record of approval, accompanied by lists of the stockholders of the consolidated company, and the number of shares held by each, shall be filed with the secretaries of the respective states, before such consolidation shall be valid. The new corporation has all the rights and liabilities of the domestic company or companies, parties to the consolidation. Any corporation empowered to consolidate with, or purchase, another railway may effect such consolidation or purchase by acquiring "the stock, bonds or other securities of such other railway company;" and, for the special purpose of acquiring the same, "may create, issue or dispose of" its own stock, bonds or securities, "in addition to the amounts of the same it is otherwise empowered to issue, to an amount not exceeding the actual value of the stock or bonds of such other company acquired by it." Any railway company in this state may also, "for any other purpose authorized by its acts or articles of incorporation, create, issue and dispose of such amounts of stock as the board of directors may find necessary for such purpose." Prior to the issuance of any stock under the provisions of this section, there must be filed with the secretary of state a resolution of the hoard, stating the number and par value of the shares so to be issued, and the particular purpose for which the same are to be issued. This section shall not be construed to allow any railway company to sell its capital stock for less than par value, in money, property, work or services; nor to authorize the issuance or sale of any stock or bonds, or the performance of any act prohibited by sections 2523-2526, supra, or by any other law of the state respecting the issue or sale of stocks or bonds of railway companies therein. \$ 2537. No railroad company shall control any parallel or competing line, or have any interest therein. § 2528. Any company may build branches and receive municipal aid therefor — street railroads excepted. § 2539. Any domestic company may exercise its franchises in another state. § 2540. A contractor shall be required to give a bond for the payment of wages, and the company shall be liable to laborers for such wages, provided a thirty days' notice he given to the company, and provided such debt has accrued within sixty days prior to such notice. \$\$ 2541, 2542. Ample facilities for transferring cars, freight and passengers shall be given by connecting roads. §§ 2544-2547, 509. Conditional sales of rolling stock may be made by written contract, and rentals may be paid as purchase-money. §\$ 2552-2554. Proxies shall only be valid for one year from their date. § 2561. Every company shall report to the state auditor annually. § 2563. A general office shall be kept upon the line of the road within the state, and an agent upon whom process may be served. § 2563. At such office shall be kept a list of stockholders and the original minutes of the board. § 2564. A penalty of \$500 per month is prescribed for failure to keep such office; also as against laud-grant companies for failure to maintain an office in the state where books and papers relating to conveyances must be kept. §§ 2565, 2566. Any municipality may aid in the construction of any railroad in the state which will benefit the tax-payers of such municipality. §§ 2611-2624. A majority of the electors must consent thereto. § 2614. No bonds shall be delivered to the company until the road is completed through or to the municipality, or to the point for which aid was granted. § 2615. Municipal bonds may, for the purpose of such aid, be exchanged for railroad stock or bonds. §§ 2616, 2617. Or the municipality may become a subscriber. § 2618.

A railroad and warehouse commission, with extensive powers, is created by statute. § 498, and Laws 1893, ch. 108. All common carriers must make annual reports to the commission. § 501. The commission has the general supervision of railroads. §§ 502-506. Unequal and unreasonable charges are prohibited, and discriminations are made unlawful. § 508. Pooling is prohibited; also any special rates, rebates or drawbacks. §§ 510, 511. The long and short haul abuse is prohibited. §§ 512, 513. Rate schedules are to be posted in every depot, and copies furnished the commission. Upon complaint that the rates are unreasonable the commission may change the rates. § 514, Am'd Laws 1891, ch. 106. Any officer or agent who shall violate any of the provisions of this act, or neglect to perform any of the duties herein imposed, shall be fined from \$2,500 to \$5,000 for the first offense, and from \$5,000 to \$10,000 for each subsequent offense. § 515.

Municipalities may aid in the construction of canals. Laws 1893, ch. 205. Stock certificates are defined and their renewal provided for. Laws 1893, ch. 45. A railroad which has received public aid or local subscription given as a bonus for construction cannot stop the operation of its road without an order from the court. Laws 1893, ch. 59. Any person or corporation may, in the manner provided, secure the privilege of erecting a grain elevator or warehouse upon the right of way of a railroad corporation. Laws 1893, ch. 64. The owners of a warehouse or mill near a station may compel the railroad company to construct a side track to their buildings. Laws 1893, ch. 65.

General provisions.—The members of any corporation, or the directors thereof, may meet and transact business without the state the same as within the state. § 3127. Any corporation may, by resolution of its board, form three classes of directors, each class to comprise, as near as may be, one-third of the board, the term of the first class to expire at the next annual election, the second class at the succeeding election, etc.; and at each annual election a number of directors shall be elected, for three years, equal to the number whose term then expires, All other vacancies shall be filled as the by-laws direct. Directors hold office until their successors are elected. Id. Where no other provision is specially made, the by-laws may determine the number of shares entitled to one vote. § 3129. Shares shall not be issued "for a less amount to be actually paid in on each share than the par value of the shares first issued;" provided, that railroad, navigation, manufacturing and real-estate corporations "shall have the power to create, issue and dispose of such an amount of special, preferred or full-paid stock of the capital stock of such corporation as may be deemed advisable by the board of directors;" provided, also, that any corporation may, by its articles, or an amended article, provide for "special, preferred and common stock, or special or preferred and common stock, of the capital stock of such corporation;" and may issue its capital stock "as a part special and a part preferred and a part common, or a part common and a part either special or preferred," by direction of the board, when so authorized by a majority of the stockholders at an annual or called meeting. The board "may give such preferences as it may deem best to such special or preferred stock, or such special and preferred stock." § 3130, Am'd Laws 1891, ch. 71. Persons holding stock as executors, etc., are not personally liable as stockholders. § 3133. When there is no one legally authorized to call a meeting, a justice of the peace may, upon a petition of three or more members, authorize one of them to call a meeting, and may authorize such person to preside, in the absence of the proper officer. § 3135. When a majority "in number or interest"

desire to close the corporate business, they may petition the district court. § 3142. Corporations whose charters expire or are annulled continue bodies corporate for three years for the sole purpose of closing up their affairs. § 3143. The attorney-general, at the request of the governor or the legislature, may always examine the corporate affairs. § 3144. Any corporation may amend its articles upon a two-thirds stock vote, and in like manner renew its term of existence. § 3145. "Any corporation may convey its real estate by an agent appointed by resolution of its directors or governing board." Laws 1891, ch. 75. If any corporation, domestic or foreign, shall enter into any trust or combination to regulate the price, or limit the amount, of any commodity or article made, produced or sold in the state, such corporation shall be guilty of conspiracy to defraud. Severe punishment is prescribed. Laws 1891, ch. 10, Am'd Laws 1993, ch. 125.

Foreign corporations.—Foreign corporations formed in whole or in part. to deal in land in this state, or to promote immigration into the state, shall not hold at one time more than one hundred thousand acres of land in the state, and all of such lands shall be sold within twenty-one years after their acquisition, except lands acquired under mortgage, foreclosure or forfeiture of contracts, which lands must be sold within fifteen years. Such corporations must have a resident agent upon whom process may be served. \$ 2649. Any foreign railroad may, upon becoming incorporated in Minnesota, extend its road into or through the state. A true copy of its articles shall be filed with the secretary of state, and be recorded with the county recorder where the principal place of business is kept. An office shall be kept within the state and an agent upon whom legal process may be served. Such corporation is then considered a domestic company. §§ 2557-2560. Any removal of a case from a state court to a federal court subjects the corporation to a penalty of from \$100 to \$10,000, and to the forfeiture of all rights to do business within the state, under a penalty of from \$1,000 to \$10,000 per day for doing business after such forfeiture. But such companies shall have the same rights respecting removals as domestic companies enjoy. No foreign corporation shall enjoy any greater rights than a domestic company. §§ 3152-3160. Service of summons or other process may be made on such companies the same as on domestic companies, unless an agent is appointed. Laws 1891, ch. 79.

Taxation.—Personal estate includes all stock in corporations out of the state owned by inhabitants of the state, and all improvements upon lands the title to which is vested in any railroad, or other corporation "whose property is not subject to the same mode and rule of taxation as other property." § 1384. In 1873 a special law allowed a certain railroad to pay, in lieu of all other taxes, one per cent of its gross earnings for the three years beginning with January 1, 1872, two per cent, for the next seven years, and three per cent, thereafter. The same act allows any railroad company, existing or to be created, to accept the provisions respecting the railroad specially named, and concludes as follows: "And in such case the payment of such percentage in lieu of taxes in accordance therewith shall commence from and after the first day of March next after the completion of thirty miles of such line hereafter built, or of the entire line, if the same shall be less than thirty miles in length." An act of 1887 declares that any railroad which has not accepted the provisions of the act of 1873, or become subject to some special act, shall pay the percentage above specified. A resolution to repeal the law of 1887 was submitted to the people by the acts of 1889, chapter 191, the vote to be taken at the next election. §§ 1387-1389. The gross earnings shall be certified to the railroad commission. The report shall include a list of lands §§ 1390-1392. Mining corporations pay, in lieu of all other taxes on their stock or property, fifty cents for each ton of copper; one cent for each ton of coal or iron. Returns must be made to the state auditor. §§ 1404, 1405. Telephone companies, not especially taxed, pay two per cent. of their gross receipts, after deducting the amount paid as royalties. § 1407. Insurance companies pay two per cent, on their premium receipts, and pay taxes on other property owned in the state. § 1420. Telegraph companies report to the state auditor and are taxed by the state board of equalization. Laws 1891, ch. 8. The capital stock and franchises, unless otherwise provided, are listed and taxed in the county or tax district where the principal place of business is located. \$ 1432. Bona fide indebtedness may be deducted from all values listed for taxation, but not dues on subscriptions for stock. §§ 1440, 1441. Manufacturers shall list the value of materials, and of all machinery and tools. § 1443. All corporations, except railroad insurance and telegraph companies, whose taxation is not specially provided for shall make a sworn return of their capital stock. The value of the real and personal property and the amount of indebtedness, except for current expenses. shall be deducted from the market value of the stock, and the remainder listed as "bonds or stocks." The real and personal property of corporations is taxed like that of individuals. § 1444. The penalty imposed upon railroads for failure to make returns is an addition of twenty-five per cent. to the tax. § 1495. Foreign railroad corporations are subject to the same law as domestic companies. § 2557. Before filing articles of association all corporations must pay to the state \$50 for a capital stock of \$50,000 or less, and \$5 for each additional \$10,000 or fraction thereof; and \$5 must be likewise paid for each subsequent increase of \$10,000 or less. §§ 3149, 3150.

8 956. MISSISSIPPI: 1 Constitutional provisions.—The question whether the contemplated use of private property is a public use shall be a judicial question, beyond the control of the legislature. Constitution of 1890, art. III, § 17. The legislature may limit or restrict the acquiring or holding of lands by corporations. Art. IV, § 84. No special or local law shall be enacted for the benefit of individuals or corporations, in cases which can be provided for by general law: nor shall the operation of any general law be suspended for the benefit of any private corporation or individual. Id., § 87. The legislature shall pass general incorporation laws. § 88. No special law shall be passed changing the names of corporations; granting to any person or corporation the right to have any ferry, bridge or road; exempting property from taxation; opening, changing or vacating any highway; conferring the power to exercise the right of eminent domain; granting the right to lay railroad tracks; or granting any state lands to persons or corporations. Such matters shall be provided for by general laws only. Id., § 90. Lands under the control of the state shall never be donated, directly or indirectly, to private corporations or individuals, nor sold to corporations for a less price than to individuals. But this shall not prevent the legislature from granting a right of way across state lands, not exceeding one hundred feet wide, to railroads. Id., § 95. No obligation of a corporation to the state shall ever be diminished by the legislature. Id., § 100. "Taxation shall be uniform and equal throughout the state. Property shall be taxed in proportion to its value." Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value; but the legislature may provide for a special mode of valuation and assessment for "railroads, and railroad and other corporate property," or particular kinds of corporate property not situated wholly in one county. But no county shall be denied the right to levy county and special taxes "upon such assessment as in other cases of property situated and assessed in the county." Id., § 115. Corporations shall be formed under general laws only. The legislature may alter, amend or repeal any charter, where such action appears to be for the public interest; provided, that no injustice shall be done to the stockholders. Charters shall not be given for a louger period than ninety-nine years. Art. VII, § 178. Every charter or grant of corporate franchise shall become void in two years, unless the corporation shall have organized and commenced business within that time. Id., § 180. Corporate property shall be taxed "in the same way and to the same extent" as the property of individuals. But special regulations may be made in the case of

¹ The acts of the legislature down to and including the laws of 1892 are included in this synopsis.

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banks: also respecting building and loan associations, which may be required to pay a privilege tax in lieu of all other taxes, except upon real estate. Domestic insurance companies shall not be required to pay a greater aggregate tax than is imposed upon foreign companies. Id., § 181. The power to tax corporations and their property shall never be abridged by any contract to which the state or any subdivision thereof may be a party; except that the legislature may by general law. grant exemptions to encourage manufactures, "and other new enterprises of public utility," for not more than five years, dating from the date of the charter. Id. § 182. No county or municipal corporation shall subscribe to the capital stock of any corporation, or make appropriation to or loan its credit in aid of any corporation. Id., § 183. Any company organized for the purpose under the laws of the state may construct and operate a railroad between any two points in the state, and may connect at the state line with the roads of other states. Every company may with its road intersect, connect with or cross any other railroad; and all companies shall receive and transport each other's passengers, tonnage and cars, without delay or discrimination. Id., § 184. Rolling stock shall be personalty, and liable to execution and sale as such. Id., \$ 185. The legislature shall pass laws to prevent abuses, unjust discrimination and extortion in all charges of express, telephone, sleeping-car, telegraph and railroad companies, and for the supervision of such companies, and other common carriers of the state, by commission or otherwise, and shall provide adequate penalties, to the extent, if necessary, of forseiture of their franchises. Id., § 186. Passes shall not be granted to state or municipal officers, except the railroad commissioners. Id., § 188. The legislature may take corporate property and franchises for public use. Id., § 189. Municipalities shall, by general law, be authorized to encourage the establishment of manufactories, and "other enterprises of public utility." by exempting all property used for such purposes from municipal taxation for not more than ten years. Id., § 192. The legislature shall provide that in all elections for directors each share shall have one vote, in the person of the stockholder or by proxy; and that each stockholder may cumulate his votes. No person who is interested in any competing business, "either individually or as an employee or stockholder," shall serve as a director in any corporation without the consent of a majority in interest of the stockholders. Id., § 194. Express, telegraph, telephone and sleeping-car companies are declared common carriers, and subject to liabilities as such. Id., § 195. "No transportation corporation shall issue stocks or bonds except for money, labor done (or in good faith agreed to be done), or money or property actually received; and all fictitious increase of stock or indebtedness shall be void." Id., § 196. "The legislature shall not grant to any foreign corporation or association a license to build, operate or lease any railroad in this state; but in all cases where a railroad is to be built or operated, and the same shall be partly in this state and partly in another state or in other states, the owners or projectors thereof shall first become incorporated under the laws of this state; nor shall any foreign corporation or association lease or operate any railroad in this state, or purchase the same or any interest therein. Consolidation of any railroad lines and corporations in this state with others shall be allowed only when the consolidated company shall become a domestic corporation of this state. No general or special law shall ever be passed for the benefit of any foreign corporation operating a railroad under an existing license from this state, or under an existing lease: and no grant of any right or privilege, and no exemption from any burden, shall be made to any such foreign corporation except upon the condition that the owners or stockholders thereof shall first organize a corporation in this state under the laws thereof, and shall thereafter operate and manage the same, and the business thereof, under said domestic charter." Id., § 197. "The legislature shall enact laws to prevent all trusts, combinations, contracts and agreements inimical to the public welfare." Id., § 198. The credit of the state shall not be pledged or loaned in aid of any person, association or corporation. Art. XIV, § 258.

Miscellaneous corporations,—"Corporations for every lawful purpose and of every kind, except for the construction and operation of a railroad other than street railroads, and the carrying on of an insurance business, may be created under the provisions of this chapter." (There is no restriction as to the number of incorporators.) Code of 1892, ch. 25, § 832. "Persons desiring to be incorporated may prepare a charter . . . which shall be headed 'the charter of incorporation of ----," which shall contain (1) a clear statement of the purposes of the corporation: (2) the names of the persons incorporated: (3) the corporate name: (4) the powers to be exercised; (5) the period for which the corporation is to exist (never more than fifty years), and anything else proper to be stated. Charters for telegraph and telephone companies shall also describe the proposed line. The proposed charter shall be published for three consecutive weeks in a newspaper at the domicile of the proposed corporation, and must then be submitted to the governor, who may sign his approval, or require amendments, or disapprove. "And the powers therein specified shall, by the approval of the charter, be vested in such corporation, and it shall go into operation at the time and on the terms and conditions specified." § 833. The charter may be renewed or amended, after publication as above, setting forth the nature and extent of the amendments, if the governor shall give his approval, "and in case of renewal merely, it shall be sufficient for the governor to give a certificate that the original charter is renewed." \$ 834. Every charter and amendment, and every certificate of renewal, must be filed with the secretary of state. § 835. The corporate existence shall never exceed fifty years. Every corporation created under this chapter may determine the manner of calling and conducting meetings, the number of shares that shall entitle a member to a vote, and the mode of voting by proxy; may elect all necessary officers, and prescribe their duties, salaries and tenure of office; may borrow money and secure the payment of the same by mortgage or otherwise; and may issue bonds and secure them in the same way, and may hypothecate its franchises. The first meeting, unless otherwise provided for, may be called by a published notice signed by one or more of the corporators, \$ 836. The rights of stockholders at an election are re-enacted in the language of the constitution (vide § 194, under "Constitutional provisions"). § 837. The corporation may hold necessary real and personal estate, not exceeding in value \$250,000, excepting manufacturing companies, which may purchase and hold property to the amount of \$1.000.000. Corporations shall not, by means of a trust, use or benefit in property, hold for their use, in the name of another, a greater amount than they may lawfully hold. They are forbidden to employ their capital in any other way than in the pursuit of their legitimate business. A corporation offending against any of these provisions shall forfeit its charter, and forfeit to the state all property above the lawful amount. But this section shall not apply to a lien for a debt, or to the taking of property for debt to a greater amount than the corporation can lawfully hold, provided the excess is disposed of within five years. § 838. "A mortgage or deed of trust conveying the franchise or income or future earnings of any corporation, no matter when or how such corporation was created, shall not be valid against debts contracted in carrying on the business of the corporation." § 839. (See "Railroads," § 3567.) It shall not be a defense to any suit against a corporation that there was a defect in its organization. § 841. "In all corporations, each stockholder shall be individually liable for the debts of the corporation contracted during his ownership of stock for the amount or balance that may remain due or unpaid for the stock subscribed for by him, and may be sued by any creditor of the corporation; and such liability shall continue for one year after the sale or transfer of the stock. The stock in all corporations shall be transferable by the indorsement and delivery of the stock certificate and the registry of such transfer in the books of the corporation; but the legal title to the stock and the beneficial interest therein shall remain in the person appearing to be the owner by the books of the corporation,

as to creditors, until after a bona fide transfer has been made on the books." § 844. All the property and franchises of any corporation may be sold on execution, "and the sale shall vest the title to the franchise in the purchaser, with all privileges and immunities; and the officer making the sale shall immediately put him in possession." The purchaser shall discharge all the duties imposed by the charter, "and be liable in like populties as the original stockholders which may accrue after his purchase of the franchise." § 845. The franchise thus sold may be redeemed at any time within six months. § 846. On the dissolution of any corporation, by judgment or otherwise, all its real and personal estate, which the corporation could lawfully hold, shall be vested in the stockholders, in their respective proportions, who shall hold the same as tenants in common. due to and from the corporation shall not be extinguished by its dissolution, but shall be a charge upon its property." § 847. All corporations, after dissolution, may be continued bodies corporate for three years, for the purposes of suing and being sued, and closing up their business, excepting when trustees are necessarily appointed. § 848. "A note obligation or security of any kind given or transferred by any subscriber for stock in any corporation shall not be considered, taken or held as payment of any part of the capital stock of the company." § 850. A company, other than building and loan associations, shall not loan money to any stockholder therein: and if such a loan be made, "the officers who make it or assent thereto shall be jointly and severally liable . . . to creditors whose debts were contracted before the repayment of the money by the borrower," \$ 851. "No part of the capital stock in any corporation shall be withdrawn or diverted from its purpose, nor a dividend declared, when the company is insolvent, or would be rendered insolvent by such withdrawal or the payment of such dividend;" and the directors who assented to such withdrawal or dividend, as well as the stockholders who received it, "shall be jointly and severally liable to creditors whose debts then existed, to the extent of such withdrawal or dividend, and interest." § 852. The debts of manufacturing and trading corporations shall not exceed the amount of their capital stock; and in case of such excess, the directors contracting the debts shall be individually liable for the excess, "and may be sued therefor by any creditor, whether the debt be due at the time of suit brought or not, if such creditor were without notice or knowledge of the excess at the time his debt was made." § 853. Corporations organized for the purpose shall have the right to construct telegraph lines along any highway, street, railroad, etc., and may exercise the right of eminent domain. §\$ 854-858. provisions of this chapter, when not limited by their terms, shall apply to all corporations whatever, where the subject-matter is not elsewhere prescribed." § 860.

Railroads.—Persons desiring to organize a railroad corporation may prepare an application to the governor, which shall state (1) the names and residences of the applicants; (2) the termini, "and, if either or both be without this state, the point at or near which the state line is proposed to be crossed;" (3) the line of the road in the state; (4) the corporate name; (5) "the time within which it is hoped the railroad will be completed." If the applicants be the purchasers at a judicial sale, they shall present a certified copy of the conveyance, and shall declare (1) the facts regarding the purchase; (2) the name of the former company and the location of the road; (3) the amount paid for the property, the real value of the same, and the sum at which it is proposed to capitalize it. Code, § 3572. The attorneygeneral must pass upon the legality of the application, and if the governor believes that it is made in good faith, "and there be no valid objection thereto," he shall issue a proclamation authorizing the company to organize. § 3573. The application and proclamation shall be recorded together in the office of the secretary of state, and in each county to be traversed. § 3574. The projectors shall then meet and organize. They shall fix the amount of capital stock, and divide it into shares of \$100 each, and elect as many directors as they think best. The directors may select a president and other officers and agents, fix their duties and compensation and adopt by-laws. \$ 3575. The directors shall then file with the secretary of state a detailed statement of the date of organization, the amount of the entire capital stock, and the number of shares. The company is then a body corparate: but before doing business in any county, a certificate of the secretary of state, with the application and governor's proclamation, shall be filed with the recorder of deeds therein. § 3576. The corporation shall have power (1) "to have, hold, purchase, receive and enjoy real and personal estate, either in this or other states, or both, whether acquired by way of security or in satisfaction of debts, or by donation, purchase, devise or otherwise, and the same, or any part thereof, to sell, rent, lease, mortgage or otherwise dispose of or incumber; and to hold and enjoy real estate necessary for its purposes, in fee-simple or otherwise:" (2) to construct, and "use, operate, own, sell and enjoy" the railroad described in the application, with one or more tracks, and to construct and operate such branches as may he "necessary and proper to develop the country through which its main line may extend." But upon the location of brauches a statement of the line thereof shall be filed with the secretary of state; (3) to collect reasonable transportation charges; (4) "to increase, from time to time, its capital stock, but never to exceed the amounts actually expended by the company in constructions completions, equipments and additions to its railroad and property. And a stockholder shall not be liable for the debts of the corporation beyond the sum due for unpaid subscriptions:" (5) "to issue any part of its stock as preferred stock, and to fix the relative rights of common and preferred stock, and to issue such bonds and obligations as it may from time to time determine; "(6) to fix the number of directors, officers and agents, prescribe their duties and compensation, and their terms of office: (7) "to authorize the directors to appoint an executive committee, with full power to act in their stead and place at all times when they are not in session;" (8) to open subscription books and call meetings; (9) "to mortgage or convey in trust, from time to time, any or all of its property, real, personal and mixed, then owned or thereafter to be acquired, and also all or any of its rights, powers, privileges, liberties, immunities or franchises, whether then owned, possessed and enjoyed or thereafter to be acquired, including its right to be a corporation; and under such deed or deed in trust or mortgage, to secure, execute and dispose of the mortgage-bonds of the company to such amounts, and maturing at such times and bearing such lawful interest as it may deem best; and to secure in like manner or in any other way the bonds and obligations of any other railroad company;" (10) "to consolidate with any other railroad company, in or out of this state, with the consent of the railroad commission, upon such terms as the consolidating companies may agree upon," but not with a parallel or competing line; (11) "to lease its railroad and all of its property and franchises, rights, powers, privileges, and immunities then owned or thereafter to be acquired, or to lease other railroads, in or out of this state, not in either case parallel or competing lines, for a term of years;" (12) to do an express or a telegraph business over and along its own lines; (13) to condemn lands for a right of way not to exceed one hundred feet in width; also for materials and necessary buildings; (14) "to cross, intersect, join or unite" its railroad with any other railroad at any point, and to exercise the right of eminent domain for that purpose; (15) to own and operate ferries and other water-craft in connection with its road; (16) to exercise other usual powers of corporations, necessary for the accomplishment of its purposes. §§ 3577-3597. Each share shall have one vote, in person or by proxy. § 3598. (See Constitution, § 194.) The route may be changed, with the consent of the commissioners. § 3599. Fictitious stock is prohibited in the language of the constitution. § 3600. (See Constitution, § 196.) Parallel or competing lines shall not consolidate, or in any manner control each other's affairs, under penalty of forfeiture of the charter and franchises, and a fine of \$10,000. § 3560. When a railroad is sold to enforce a lien, the purchasers shall be invested with all franchises and property belonging to the corporation, and may form a new corporation in the manner specified above. They shall fix the entire capital stock of the new corporation, "as represented by the property and franchise bought." But no exemption from taxation contained in any charter shall pass to the purchasers. \$\$ 3565, 3566. "A mortgage or deed of trust conveying the income or future earnings or the rolling stock of a railroad company shall not be valid against liabilities incurred by such company as a carrier of freight and passengers, or for damages sustained by persons or property." \$ 3567. (See \$ 839, supra.) The railroad commissioners shall fix reasonable rates for all common carriers, in all cases not subject to the exclusive regulation of congress, and shall prevent all discrimination and rebates. The penalty for a rebate, or for discrimination, shall be a fine of not less than \$100, and the party injured may recover twice the amount of the damages sustained. The commission has general supervision of the operation of railroads. \$\$ 4273 et seq. Annual reports must be made to the commission. which report must contain, among other matters, the name of every person transported free of charge. No passes shall be granted without the consent of the commission. \$3 4292, 4321. Other common carriers shall also report to the commission, and for failure to comply with the reasonable requirements of the commission shall forfeit their right to do business in the state. All common carriers are fined \$50 per day for delinquency in reporting. \$\$ 4323, 4324. An appeal is allowed from the decision of the commission as to rates. § 4329.

Foreign corporations.—Foreign corporations may sue in the state, or be proceeded against, like individual non-residents. The acts of their agents shall have the same effect as the acts of the agents of private persons. § 849. (See Constitution, § 197.) For insurance companies, see § 2322 et sea.

Taxation .-- All corporations shall be assessed in the county in which the principal office or place of business is situated. Code, \$\$ 3750, 3757. Corporations. other than banks and railroads, whose capital stock is taxable, must deliver to the county assessor a statement of the capital stock paid in and its market value. stating to whom each share belongs; and on failure to furnish such statement the tax shall be assessed on the whole capital authorized by the charter. \$ 3758. Railroads must annually file with the railroad commission a complete schedule of all their property taxable and non-taxable, giving the total leugth of the road, the number of miles in the state, and in each political subdivision thereof, with the value of the whole line and of each subdivision; the total capital, its par value and actual value, and the value of the franchise; the gross receipts for the year: and the proportion thereof earned in and from the state; a description and the value of all rolling stock; the number of depots and other buildings, where situated, and the value of each, including the land on which it is built; the value of all tools in such buildings; all property, real or personal, owned in the state, and not otherwise enumerated, and its value; the number of bridges and ferries in the state, and the value of each, specifying whether or not they were included. in the estimate of the road-bed. § 3875. For failure to make such report the corporation shall be fined \$5,000. § 3876. The commission is a state board of assessors, and shall, upon the receipt of said report, assess all railroad, telegraph, sleeping-car and express company property liable to taxation in the state affixing its true value, "so that such property shall bear its just proportion of taxation, taking into consideration the value of the franchise, the capital stock engaged in business in this state." The board may take measures to correct the report of the corporation. §§ 3877, 3878. The state board shall apportion the taxes to the counties and municipalities for collection, in proportion to the amount of property of such common carrier situated therein. § 3880. Telegraph, express, sleepingcar, palace-car and dining-car companies shall, as far as applicable, prepare schedules like those required of railroads, and be subject to the same penalties for failure to do so. They shall be assessed "for ad valorem taxation in the same manner as railroads." §§ 3885. 3886. The fee of the secretary of state for recording a charter is ten cents per hundred words, but never less than \$3. \$ 2037.

\$ 957. MISSOURI: 1 Constitutional provisions.—The state shall not aid. nor authorize any municipality to aid, any person or corporation, by subscription to stock or otherwise. Constitution of 1875, art, IV, 88 45, 46, 47, 49. There shall be no special law creating corporations, or amending, renewing or explaining their charters; nor granting the right to lay down railroad tracks. Id. 8 53. Municipalities shall not aid corporations, by subscriptions or otherwise. Art. IX. 8 6. The power to tax corporations shall not be surrendered or suspended by the legislature. Art. X. § 2. All railroad corporations shall be subject to taxation on their realty and personalty, "and on their gross earnings, their net earnings, their franchises and their capital stock." Id., § 5. Before filing their certificate of incorporation, all corporations shall pay a fee of \$50 for the first \$50,000 or less of capital, and \$5 for each additional \$10,000, or each \$10,000 of any subsequent increase of capital. Id., § 21. No corporation shall be created by special law. Art. XII, § 2. The property of corporations may be taken under the right of eminent domain, like the property of individuals. Id., § 4. In voting for directors cumulative voting must always be allowed. Id., § 6. Ultra vires acts are prohibited. Real estate, except that necessary for the corporate business, shall not be held for more than six years. Id., § 7. "No corporation shall issue stock or bonds, except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void." Neither stock or bonded indebtedness shall be increased, excent according to general law, nor without the consent of a majority of the stock. Id., § 8. In no ease shall any stockholder be individually liable "in any amount over or above the amount of stock owned by him or her." Id., § 9. No corporation shall issue preferred stock without the consent of all the stockholders. Id., § 10. It shall be unlawful for railroad companies to charge more for a shorter than a longer distance. Id., § 12. Any corporation, organized for the purpose, may construct a line of railroad anywhere in the state, and connect at the state line with other railroads. Any railroad may cross or connect with any other railroad in the state, and connecting roads shall carry each other's freight and passengers without delay or discrimination. Id., § 13. The legislature shall pass laws to prevent discrimination and extortion, and shall fix maximum rates on railroads. Id., § 14. Every railroad corporation doing business in the state shall keep a public office in the state where transfers of stock shall be made, and where shall be kept, for public inspection, books containing detailed record of stock and stockholders, liabilities, etc. The directors shall hold one meeting annually in the state, and shall report annually to the state auditor. Id., § 15. Rolling stock and other movable property are personalty, and subject to execution and sale. Id., § 16. Parallel or competing lines shall not consolidate. No railroad corporation shall purchase or control a parallel or competing line. Nor shall an officer of one line hold office in a competing line. Id., § 17. A consolidation with a foreign corporation, by sale or otherwise, shall not make the domestic company foreign, but it shall remain subject to all the laws of the state. Id., § 18. No law shall grant the right to construct a street railroad without the consent of the local authorities. Id., § 20. No officer or employee of a railroad company shall be interested in furnishing material or supplies to such company, or in the business of transportation as a common carrier over the works controlled by the company. Id., § 22, No discrimination in charges or facilities shall be made "between transportation companies and individuals, or in favor of either." Id., § 23. Free passes, or tickets at a discount, shall not be given to any state or municipal officer. or member of the legislature. Id., § 24.

Miscellaneous corporations.—Three or more may incorporate for any mining, manufacturing, coal oil or petroleum business; to build warehouses, docks, grain elevators, etc.; "to convey and transport persons and freights on land or water by any mode of conveyance whatever;" to build and operate horse rail-

 $^{^{\}rm I}$ The acts of the legislature down to and including the laws of 1893 are included in this synopsis.

roads; to establish ferries; and for any other lawful business not otherwise provided for: provided, that this section shall not authorize the incorporation of any bond investment company, or any trust, bank, building and loan or fiduciary company. Rev. Stat. 1889, §\$ 2768, 2771; Am'd Laws 1893, p. 125. They shall adopt written articles of agreement, specifying (1) the corporate name; (2) the name of the city or town and county in which the corporation is to be located; (3) the amount of the capital stock, the number and par value of the shares, that the capital has been bona fide subscribed, one-half paid up in lawful money, and in the hands of the directors: (4) the names and residences of the shareholders. and the number of shares taken by each; (5) the number of directors and the names of those constituting the first board: (6) the period of existence (not to exceed fifty years); (7) the purposes of the corporation; (8) if it is desired that any part of the capital stock shall be preferred, the amount of such preferred stock, the number of shares thereof, the names of the subscribers therefor, and the number of shares taken by each subscriber. \$ 2768. Am'd Laws 1891, p. 79. The articles shall be recorded with the county recorder of deeds, and a certified copy of the recorded instrument filed with the secretary of state. § 2769, Am'd Laws 1891, p. 77. The secretary of state shall thereupon give the corporators a certificate of organization which completes the incorporation, § 2770. The capital stock may be from \$2,000 to \$10,000,000. There shall be from three to thirteen directors who shall be stockholders, and one of them a bona fide citizen of the state. The directors may be elected for from one to three years, the time of service and mode of classification to be provided for by the by-laws. There shall be an annual election "for such number or proportion of directors as may be found upon dividing the entire number of directors by the number of years composing a term." The time and place of holding the election shall be stated in the by-laws, but a published notice of two weeks shall be given. Each share shall have one vote, in person or by proxy, and cumulative voting is provided for. Failure to elect on the appointed day does not dissolve the corporation. In case of death or resignation of any director, the survivors fill the vacancy. § 2772. Dividends may be declared every six months or oftener, as the directors may decide. If any dividend is declared while the corporation is insolvent or which would render it insolvent, or which would impair the capital stock, all the directors who did not file their objections thereto shall be "jointly and severally" liable for all the corporate debts then existing, or that may be contracted while they respectively remain in office, § 2773. The directors shall send to each stockholder ten days before an election a statement of the condition of the corporation, the list of stockholders and the number of shares owned by each. Each stockholder may examine the corporate books. § 2774. No note or obligation, however secured, shall be received in payment for stock, and no loan of corporate funds shall be made to a stockholder. The officers assenting to such loan shall be jointly and severally liable to the corporation for the amount of such loan and interest. § 2775. Persons holding stock as administrators, etc., are not liable as stockholders. § 2776. Books and records must be kept open for the inspection of interested parties. § 2778. Such corporations may increase or diminish their capital, within the limits of section 2772, and may extend their business to any other purposes specified in section The capital shall not be reduced to a less amount than the amount of corporate debts and liabilities. § 2779. The directors shall give a personal notice to all stockholders of a meeting for the purposes specified in the preceding section and publish the same. A majority vote of all the stock is necessary. A certificate of the proceedings of the meeting, and of the increased or diminished stock, or extension of business, shall be recorded and filed as provided in section 2769. §§ 2780, 2781. No stockholders shall be personally liable for any debt contracted by such corporation which is not to be paid within one year from the time the debt is contracted, nor unless suit is brought against the corporation within one year after the debt was due; and no suit shall be brought

against any person who ceases to be a stockholder for any corporate debt, unless the same is begun within two years from the time when he ceases to be a stockholder nor until an execution against the corporation has been returned unsatisfied, in whole or in part. § 2782. Any such corporation may carry on business in any part of the state. \$ 2783. Upon an increase of stock, the said "increased stock" may be made preferred stock if all the stock is voted in favor thereof at a special meeting, and if the stockholders, by a like vote, shall determine the amount. the number of shares, and the price per share of "said increase," and what rate of dividend, not exceeding seven per cent. per annum, shall be paid on said preferred stock, out of the net yearly income "earned in any one current year." before any dividend is paid on the common stock. § 2784, Am'd Laws 1891, p. 78. A certificate stating the facts of such increase shall be filed with the secretary of state, § 2785. Any two manufacturing corporations whose business is in general of the same nature may "amalgamate, unite and consolidate," and form one corporation, "bolding and enjoying all the rights, privileges, power, franchises and property" belonging to each, and under such corporate name as they may agree upon. The consolidation shall be made by an agreement in writing, under the authority of the respective boards, and with the assent of three-fifths of the stock of each company, and a certificate of the act of consolidation shall be filed and recorded as required in case of the original articles. The consolidated corporation shall be subject to the provisions of this title (Miscellaneous Corporations). The number of directors shall not exceed thirteen. §§ 2786, 2788. Any corporation specified in this title may, by a two-thirds stock vote, at a special meeting, authorize the holders of the bonds of the corporation to exchange them for and convert the principal thereof into stock of the corporation, at such rates and upon such terms as may be agreed upon "as aforesaid," provided such shares of stock shall not be valued at less than their market or actual value; and such stock shall, for all purposes, be entitled to all the benefits and privileges of "any other" stock of the corporation. \$ 2789. The circuit court has exclusive jurisdiction over the directors of all such corporations, to compel them to account for their official conduct; to compel them to pay to the corporation, and to its creditors, all money and the value of all property which they may have misappropriated or wasted; to suspend or remove any director or other officer for abuse of his trust, and to direct new elections to fill vacancies caused by such removal; and to prevent a fraudulent alienation of the corporate property. \$ 2790. The court may appoint receivers. § 2791. Such jurisdiction may be exercised upon the petition of an officer, or a creditor or stockholder of the corporation. § 2792. "Pools, trusts and conspiracies to control prices" are forbidden and declared null and void. Heavy fines are imposed for violation of this law; the charter may be forfeited and the corporation may be criminally prosecuted. Laws 1891, p. 186. It shall be unlawful for any corporation to move, abandon, or discontinue, in any way, to any material extent, "any factory, workshop, office, agency, or other establishment, or the work or business carried on therein, from or in any city, town or other place within this state," without first repaying and restoring all money or other valuable thing granted, or hereafter to be granted, as a consideration for locating or maintaining such business, etc., within such place. Fines, forfeitures and imprisonment may be imposed to enforce this law. Laws 1891, p. 85.

For gas, water and electric companies, see § 2793 et seq.

Any street railway authorized to use horse power may change to any other motive power which the municipality may authorize. § 2807. For provisions respecting mutual loan and building associations, see § 2808 et seq. Respecting trust companies, see § 2836 et seq., and Laws 1893, p. 130. For telegraph and telephone companies, see §§ 2716–2742.

As to insurance companies, see § 5793 et seq., and Laws 1891, pp. 165-68. The railroad and warehouse commission may fix maximum rates for express

companies doing a business over the railroads of the state, and such companies shall make no discrimination in their charges. Laws 1893, p. 122.

Railroads. - Five or more may incorporate. They must sign articles of association, stating (1) the corporate name: (2) the period of duration: (3) the termini: (4) the approximate length of the road: (5) the name of each county to be traversed; (6) the amount of capital stock (to be not less than \$10,000 per mile for a standard gauge, or \$5,000 per mile for a narrow gauge road), and the number of shares: (7) the names and residences of from five to thirteen persons, who shall constitute the first board of directors. Each subscriber shall state the number of sbares he will take. § 2542. Voluntary grants of real estate may be taken to aid in the "construction maintenance and accommodation" of the road the same to be used for the purposes of the grant only. The railroad shall not be constructed upon or across any street in a city, or road in a county, if the city authority, or the county court, respectively, are opposed thereto. The new corporation may "cross, intersect, join and unite" its road with any other railroad already constructed, at any point, with the necessary switches, etc. The corporation shall have power to borrow, from time to time, such sums of money as may be necessary "for the completion, equipment or repair" of its railroad, or "for the funding of any floating debt, or for the making of any addition or extension thereto authorized by their charter, or for the making connections with any bridge by tunnel or otherwise, and for any or all of the purposes above named. may issue and dispose of their bonds for any amount so borrowed, and may mortgage their corporate property and franchise, or any part thereof, to secure the payment of any debt contracted by the company for the purpose aforesaid, or any one of them:" provided, that the entire bounded indebtedness shall never exceed the authorized capital, and that the bonded indebtedness shall not be increased except for the purpose and in the manner provided in section 2499. § 2543. The articles shall not be filed with the secretary of state until \$1,000 per mile for a standard gauge, or \$500 per mile for a narrow gauge, road is subscribed, and five per cent, thereof paid in bona fide, in cash: nor until there is affixed thereto an affidavit by three directors that such subscription has been made and the required amount paid, and that it is intended in good faith to construct the road: nor until the corporation shall pay to the state \$50 for the first \$50,000 or less of its capital, and \$5 for every additional \$10,000 of stock. \$2544. If the capital stock is insufficient, the corporation may, with the concurrence of a majority of the stock, increase its capital or bonded indebtedness, in the manner prescribed by law. § 2548. Persons holding stock in a fiduciary capacity are not liable as stockholders. \$ 2549. Any corporation may receive subscriptions to its capital stock to aid in the construction or equipment of its road to be known as "transportation subscriptions," and the certificates of stock to be issued thereon shall be known as "transportation certificates," each of which shall be for an amount equal to one share of stock, to be issued to one or more persons, and entitling the holder or holders thereof, or their assigns or representatives, to all the privileges of a stockholder, but not subjecting the holder to any liability for the corporate debts or liabilities; and it shall be "an irrevocable and indefeasible first lien and charge upon and against such railroad, and the road-bed, rolling stock and depots, engine houses and machine shops" of such company, then in possession of, or thereafter to be acquired by, the company or its successors or assigns, "whether in the hands of such company or of any other person, company or corporation whatsoever into whose bands or possession the same may at any time come, until taken up, paid or discharged by such company as hereinafter provided," except the liens provided by law in favor of employees, and in favor of persons performing labor, or furnishing materials, and except as to mortgages recorded before the date of such subscription, in the county or counties through which the road runs, or is expected to run; which mortgages shall have the

preference only as to such portion of the road as lies in the county in which the mortgage is recorded; and such mortgage shall not have any preference as a lien upon property acquired after the time of such subscription. § 2550. Subscriptions of this character may be accepted by the corporation upon a majority vote of the stockholders present at any regular meeting. The corporation shall then prepare a statement of the terms and conditions upon which such subscriptions will be recsived, "together with the rates at which they propose to transport passengers and freight in exchange for such certificates," which statement shall be acknowledged and recorded like conveyances of real estate, before taking such subscriptions. The cornoration shall then open a subscription book with said statement as a heading. The book shall be in duplicate, stating the time and manner of payment, whether in "money, property, material or work," and both books shall be signed by all the subscribers before their subscriptions shall be binding. One copy shall be deposited with the clerk of the county court in which the subscribers reside. Any company refusing to issue the required certificates to any subscriber who has performed his part of the contract, "or refusing to take or accept the proportional part thereof in payment of freight charges or passenger fare," shall in addition to all other liabilities for the breach of such contract be liable to be enjoined at the suit of any subscriber aggrieved from operating its road until it complies with the terms of the contract. § 3552. Any two or more persons may unite in their subscriptions so as to make the same joint as well as several, and have the certificates issued to them jointly; but in the absence of express agreement all subscriptions shall be several. § 2552. Every "transportation certificate" shall state on its face that it is such: shall draw interest from date at six per cent, per annum, unless otherwise agreed in the articles of subscription; shall be assignable by indorsement, and shall entitle the holder or his assignee "to an amount of transportation, either freight or passenger, in his own right or at his request, over any and all parts of the road of such company, its successors, assigns, lessees, or any company operating the same at the time, to an amount equal to the face value thereof and accrued interest, if any, at rates not exceeding those set forth in the recorded instrument hereinbefore provided for;" provided, that the company may require one-half of each freight bill, or of the fare for each trip, to be paid in cash, and the remainder only shall be credited until the amount due shall be less than oneeighth, "after which such holder shall be entitled to freight or passage to an amount equal to the balance due thereon until the same is all paid," when the certificate shall be delivered up to the company; provided, further, that no assignment of the certificate "shall create any other or greater liability in the assignor than is expressly created by such assignment." § 2553. A record of such certificates shall be kept for inspection at the principal office in the state. § 2554. No person shall hold an office of profit or trust in a domestic railroad company who is a stockholder or owner in any dispatch or transportation company, whether incorporated or not, which makes shipments over the said railroad or any railroad in direct connection therewith, or who is in any way pecuniarily interested in any such company. § 2555. The penalty for holding office in violation of the preceding section is a fine of \$100 for each day's offense. § 2556. The capital stock of any domestic company may be reduced upon a three-fifths vote of the stock, but such reduction must affect all the stockholders alike. § 2557. Any such company may issue a preferred stock for such amount, and upon such terms and conditions, as the directors may prescribe, upon the approval of all the stockholders. "When a dividend of ten per cent. per annum shall have been declared upon the preferred stock of any company issued in pursuance of this section, then all other dividends shall be declared and distributed pro rata until the dividends on the common stock shall equal the dividends on the preferred stock, among all the stockholders of such corporation," and nothing in this section shall be construed to give to said preferred stockholders any other or greater powers in relation to corporate management or elections than are exercised by the common stockholders. Said preferred stock shall be offered to the common stockholders pro rata, but if not taken within thirty days it may be sold to any person, § 2558. The directors may, by a two-thirds vote, change the road-bed or line, or, when the payments required by section 2544 have been made, may, by a like vote, extend the road from either terminus. The gauge may be changed by the same vote. \$ 2559. The right of way is granted through unimproved state lands. \$ 2560. Land may be condemned for depots and side-tracks. § 2563. Profile maps of the route in each county shall be filed with the clerk of such county before building the road in that county. § 2564. The company is liable to subcontractors and laborers, and for construction materials, upon proper notice, \$ 2565. Materials in the neighborhood of the road, necessary for the construction or operation of the road, may be condemned, upon application to the justice of the peace. § 2566. Any two or more companies, formed under special or general laws, whose roads, wholly or partly constructed, will, in the main, form one continuous line, are authorized to consolidate in whole or in the main, with all the powers, etc., and subject to all the liabilities, "which belonged to and rested upon either" of the consolidating companies. The terms must be approved by a majority of the stock of each company. A certificate of the articles of agreement must be filed with the secretary of state, whereupon the "board of directors of the several companies" may proceed to carry out the agreement, calling in the certificates and issuing new ones. The consolidated company shall make connections with intersecting lines, and transport their freight cars on fair terms. Before any consolidation takes place, the respective companies shall file with the secretary of state a resolution, passed by a majority stock vote, accepting the provisions of this law. § 2567. Any railroad company may aid another, by stock subscriptions or otherwise, in the construction of its road, within or without the state, to form a connection with the company furnishing aid. Any company which has built its road to the state line may extend it into an adjoining state, and for that purpose may build, buy, lease or consolidate, "in the manner provided in the preceding section." with any railroads in such state, and operate the same, and may own in such state necessary real estate and other property. Any domestic company or foreign company of the United States "may lease or purchase all or any part of a railroad, with all of its privileges, rights, franchises, real estate and other property, the whole or part of which is in this state, and constructed, owned or leased by any other company, if the lines of the road or roads of such companies are continuous or connected at a point either within or without this state, upon such terms as may be agreed upon between said companies respectively," or any company incorporated in any state may "extend, construct, maintain and operate its railroad into and through this state," and, for that purpose, shall have all the powers, etc., and be subject to all the liabilities of domestic companies and be subject to all the laws of the state, the same as domestic companies. But no such aid shall be furpished, nor any such purchase, lease or arrangements perfected, "until a meeting of the stockholders of said company or companies of this state, party or parties to such agreement, whereby a railroad in this state may be aided; purchased, leased, sublet, consolidated or affected by such arrangements," shall have been called by the directors, at such time and place as they shall designate, by a sixty days' public notice, and the majority of the stock has given its assent at such meeting, or until a majority of the stock has assented in writing, and a certificate of such assent has been filed with the secretary of state. A foreign company exercising the privileges conferred by this section shall, as to the part of its road in the state, be subject to taxation like a domestic company, and a domestic company leasing its road or the use of its tracks to such foreign corporation shall remain liable as if operating the road itself. A foreign lessee of a domestic road shall be held liable for any violation of the laws of the state, and may sue and be sued like a domestic corporation. Such foreign lessee or company extending its road into the state shall keep an office in the state where legal process

may be served. § 2568. Competing companies shall not consolidate or control each other, but each railroad shall depend on its own earnings, under fair and onen competition. '\$ 2569. No officer in a company shall hold any office in a competing line. \$ 2570. Any corporation or person violating the provisions of section 2569 shall, for the first offense, be fined from \$1,000 to \$5,000; for the second offense, from \$5,000 to \$10,000; and for the third offense, a domestic company forfeits its charter, ipso facto, and a foreign company forfeits the right to do business in the state. Any officer or person who violates the provisions of section 2570 shall be guilty of a misdemeanor, and be fined from \$500 to \$5,000 for each offense, and each day's service as such officer after the first conviction shall be a separate offense. § 2573. The directors shall annually, in March, hold a meeting at their office in the state, after a thirty days' public notice; and, on or before the first of September, the chief officer of such corporation, or of any foreign corporation owning or controlling any railroad in the state, shall return to the railroad commissioners a statement in detail of the affairs and business operations of the company. § 2577, Am'd Laws 1893, p. 126. For failure so do the officers shall be guilty of a misdemeanor, and be fined from \$200 to \$1,000. \$ 2578. Interest accounts may be kept with stockholders from the date of payment on their subscriptions, and interest from the date of such payment may be made payable in stock. § 2580. "All railroad corporations may contract with each other, and with other corporations, in any manner not inconsistent with the scope, object and purpose of their creation and management." § 2588. Any corporation, organized for the purpose, may construct its road between any points in the state and connect at the state line with foreign roads; intersecting roads shall receive and transport each others' passengers, freight or cars without delay or discrimination. § 2626. There shall be no greater charge for a short than a long haul over the same line, in the same direction, and discriminations for equal distances are forbidden. §§ 2629, 2637. No discrimination shall be made in favor of or against any person, corporation or locality, by means of rebates, drawbacks or otherwise. §§ 2630-2636. The pooling of earnings by competing lines is prohibited. \$ 2638. Schedules of maximum rates must be posted in every depot, and copies filed with the railroad commissioners. The commissioners shall see that all such rates are reasonable and just, and they may, upon the complaint of any person or of their own motion, determine whether or not the rates are just. § 2639. Copies of joint tariffs shall be filed with the railroad commissioners. § 2640. commissioners shall see that such joint tariffs are reasonable, and shall enforce the adherence to such rates. If the corporations refuse to make schedules, the commissioners shall prepare them. § 2641. For offenses respecting discrimination, pooling, rates, etc., each company or officer shall forfeit not more than \$5,000 for each offense, and be liable for triple damages to any injured party. §§ 2643-2645. The court may decide what rates are reasonable. § 2654. All express companies shall be served alike. §§ 2660, 2661. If construction is not begun within two years after filing the articles, and ten per cent. of the capital expended within one year thereafter, or if the road is not completed and put in operation within ten years from the date of filing the articles, the corporate powers shall cease as to the part of the road not in operation. § 2664. Five or more persons, or three or more railroad corporations, may form a corporation to construct a union depot. §§ 2667, 2668. The railroads of the state are divided into three classes, known as as class A, class B and class C. Class A includes all through or trunk lines; class B includes all branch roads owned, leased or occupied by such through line: class C includes all other roads or parts of roads owned, leased or occupied in the state, wholly or in part. The passenger rate shall not exceed three cents per mile for class A, and four cents per mile for classes B and C. §\$ 2672, 2673.

On the subject of an office within the state, see "General Provisions," infra.

General provisions.—Unless other provision is made in the act of incorporatiou, the first meeting shall be called by a notice signed by one or more of the corporators, and published in a county paper, seven days before the time of meeting. § 2481. When there is no one authorized to call a meeting, or the officers refnse to call it, a justice of the peace may issue a warrant to one of two or more members who may have requested such action. \$ 2482. As to the manuer of calling shareholders' meetings, and notice, etc., see § 2484. At every election of directors, the transfer books shall be produced as evidence respecting the qualification of those offering to vote. No one shall vote, in person or by proxy, any stock which has not stood in his name for the preceding thirty days. \$ 2486. No person shall vote on any shares belonging to or hypothecated to the "cornoration in which the election is held." \$ 2487. If an election is not held on the day appointed, it shall be the duty of the directors to notice an election to be held within sixty days after such appointed day, and at such election the votes shall be cast only by those who were qualified voters on the day when the election ought to have been held. § 2488. A failure to elect directors shall not effect a dissolution. § 2489. Cumulative voting must be allowed. § 2490. A copy of the articles must be filed with the secretary of state, and the corporate existence shall date from such filing. § 2492. All corporations must pay, npon filing their articles, \$50 for the first \$50,000 or less of capital, and \$5 for every additional \$10,000. No increase of capital shall be valid until there shall be paid \$5 for every \$10,000 or less of such increase. \$ 2493. When the articles and affidavit are filed, the directors may, if all the capital is not subscribed, open subscription books, at such places and upon such notice as they deem best. No subscription shall be taken without a cash payment of five per cent, of the amount subscribed. § 2494. No amendment shall confer greater rights or powers than could lawfully have been conferred by the original articles. § 2495. The directors may require subscriptions to be paid in such instalments and in such manner as the by-laws prescribe. \$ 2498. Stock or bonds shall be issued only "for money paid, labor done or money or property actually received." The capital stock or bonded indebtedness may be increased upon a vote of a majority of the stock, but such increase shall only be paid for as above. All fictitious issues or increase of bonds or stock are void. The bonded indebtedness shall not exceed the amount of the authorized capital; except that any railroad company may issue its bonds in excess of its capital stock for the purpose of constructing or acquiring another railroad, which shall connect with it, but the bonds so issued in excess of its capital stock shall not exceed the authorized capital stock of the company whose road is constructed or acquired, "and shall be secured by mortgage on the railroad franchises and property constructed or acquired with the proceeds thereof, or by the deposit as collateral security of the first-mortgage bonds of the railroad constructed or acquired with the proceeds thereof." Such bonds shall only be issued upon a majority stock vote. § 2499. The date and amount of any increase of stock shall be certified to the secretary of state. § 2501. Stock is personalty, transferable in the manner directed by the by-laws; but no stock shall be transferred until all previous calls thereon are paid. § 2502. Transfer and stock books shall be kept open for the inspection of stockholders. § 2503. For refusal to show the books the officer in charge of them shall forfeit \$250. § 2504. The directors may make by-laws as to the manner of voting ou the question of changing the number of directors or the corporate name. § 2506. No by-law regulating elections shall be valid unless made at least sixty days before the day appointed for the election. § 2507. Every corporation has power to have succession for twenty years, if no period is limited in the charter; to hold, purchase, mortgage, or otherwise convey the realty, and personalty necessary for its purposes, or such as may be acquired to secure the payment of any debt or liability, not exceeding the amount specified in its charter; and to change the number of directors to not less than three nor more than thirteen, and, in like manner, change its name, without affecting its rights, privileges and liabilities; and to reduce the par value of its shares, with a corresponding increase in the number thereof, by a majority stock vote; provided, that the corporation shall only engage in the business authorized by law or its charter. The other usual corporate powers may be exercised. § 2508. Am'd Laws 1893, p. 128. Upon the dissolution of the corporation the president and directors are trustees, with full powers to settle the corporate affairs. § 2513. For declaring a dividend when the corporation is insolvent, or which would make it so, all the directors present and not objecting shall be jointly and severally liable for existing debts and for any that may be contracted while they remain in office respectively. § 2515. Corporations may sue their members. § 2516. Execution against the corporation returned unsatisfied may be issued against the stockholders, "to the extent of the amount of the unpaid balance of such stock by him or her owned." But no stockholder shall be "individually liable in any amount over and above the amount of stock owned." \$ 2517. If debts are left unpaid upon dissolution, suits may be brought against those who were stockholders at the time of dissolution, without joining the company in the suit, and any stockholder who is compelled to pay may have an action against the other stockholders. \$2519. If any person is aggrieved on account of any election, he may apply to the circuit court for redress. §§ 2520, 2521.

Every corporation "created by or existing under the laws of this state" shall keep a place of business in the state, and have at least three of its directors citizens and residents of the state; and in the case of a railroad corporation the general office shall be on or near the line of its road. "Every corporation, whenever or however created or existing, which owns, controls or operates a railroad of one hundred and fifty miles or more in length in this state, and which railroad in this state was constructed under a franchise or charter granted by or derived from this state," shall have its general office on the line of such road in the state. At such office shall be kept the offices of the general manager, traffic manager, . auditor, treasurer and paymaster, general freight, ticket and passenger agents, together with all books of account, and papers pertaining to the business of such offices; and if the corporation was "created by or exists under" the laws of the state, there shall be kept at such office the office of the secretary of the corporation, and all the records and books of such corporation. Six months' failure to comply with any provision of this law shall cause a forfeiture of any charter or franchise granted by or derived from the state, and the corporation shall be enjoined from doing business in the state. Laws 1891, p. 78, Am'd Laws 1893, p. 124, Fictitious and gambling transactions in stocks and bonds are prohibited, under heavy penalties. Laws 1889, p. 98. Five or more may incorporate to construct electric railways, connecting county seats with any railroad. Such corporation shall have all the privileges of any railroad company organized under the laws of the state, and shall be required to have only such an amount of capital stock as the corporators may deem necessary. The corporation may create such amount of bonded indebtedness as it deems necessary. Laws 1893, p. 127.

Foreign corporations.— Every foreign corporation doing business in the state shall keep a public office in the state where legal process may be served, "and where proper books shall be kept to enable such corporation to comply with the constitutional and statutory provisions governing such corporation;" and such corporation shall be "subjected" to all the "liabilities, restrictions and duties" which may be imposed upon domestic companies formed under general laws, and shall have no other or greater powers. Such corporation shall only engage in the business authorized by its charter, or the general laws of Missouri, and shall not hold real estate for more than six years, except that necessary for its corporate business. No such corporation, doing business in the state, shall mortgage or otherwise incumber its realty or personalty in the state to the injury or exclusion of any citizen or corporation of the state who is its creditor; "and no mortgage

by any foreign corporation, except railroad and telegraph companies, given to recover any debt created in any other state, shall take effect as against any citizen or corporation of this state until all of its liabilities due to any person or corporation in this state at the time of recording such mortgage have been paid and extinguished." A duly certified copy of the charter, or certificate of incorporation, shall be filed with the secretary of state, and the principal officer or agent in Missouri shall forward, at the time, a sworn statement of the proportion of the capital stock which is represented by the property located and the business transacted in Missouri, and taxes equal to those collected from domestic companies shall be collected on such proportion of its capital stock. The corporation may then pursue its business for the time limited in its charter, unless this shall be for a greater time than is contemplated by the laws of this state, in which event "the time of duration shall be reckoned from the creation of the corporation to the limit of time set out in the laws of this state." For neglect to comply with this act the corporation shall be fined not less than \$1,000, and shall be deprived of any remedy, at law or in equity, respecting any contract or tort. This law does not apply to insurance companies. Laws 1891, p. 75, See, also, under "Railroads," § 2568.

As to reports, see "Railroads," § 2577.

Taxation.—The property of all corporations the taxation of which is not otherwise provided for by law shall be assessed and taxed like the property of individuals. § 7538, Am'd Laws 1891, p. 195. No person shall be required to list any portion of the capital stock or property of a corporation, where such corporation is required to list or return both its capital stock and property for taxation in the state, except in cases which may be otherwise specially provided for. § 7566. Where such capital stock and property is not listed, shares of stock are taxed as personalty. § 7510. The corporation shall, when required, give a certificate of the number and amount of shares held in the corporation, the names of the holders and the incumbrances thereon. Such shares may be sold for taxes, § 7610. All railroads and the property of any railroad company, real, personal or mixed, whether owned, hired or leased, shall be taxed for state, county and local purposes. § 7717. Every railroad company, whose road is so far completed as to allow the running of cars, shall furnish an annual statement to the state auditor, giving in detail the total length of the completed road, including branch or leased roads, the entire length in the state, the length of double or side tracks, with depots, etc., and the length, etc., in each county or municipality; the total number of engines and cars, including parlor and sleeping-cars, and all movable property owned, used or leased on the first day of June in each year, and the actual cash value thereof. § 7718. Duplicate statements of the property in the respective counties shall be furnished to the county clerks. § 7719. The state board then equalizes and assesses the valuation of the railroad property. If the railroad extends into another state, where a tax is levied on its rolling stock, the board shall assess only such proportion of the rolling stock as the number of miles of road in the state bears to the whole length of the road. § 7723. The board shall apportion the valuation of all the above specified property among the municipalities. Where a company liable to taxation on its road has been "consolidated into" a company which has an exemption from taxation, that portion liable to taxation shall be assessed separately. § 7725. Property not above specified, owned or controlled by the railroad company shall be assessed locally where it lies. §§ 7728, 7729. Railroad companies may recover from the owners of sleeping or other cars the taxes paid thereon. § 7752.

For the taxation of bridge, telegraph and express franchises, see §\$ 7755-7759. For taxation of express companies, see § 7767 et seq., Am'd Laws 1893, p. 220.

The property of the consolidated corporation specified in section 2786, supra, shall be taxed as other property, anything in the charter of either corporation to the contrary notwithstanding. § 2787. All the personal property of business and manufacturing corporations shall be taxed in the county in which it may be sit-

uated on the first day of June in each year. This provision does not apply to railroads or banks. Laws 1891, p. 77. Domestic corporations, other than railroad, building and loau, and insurance companies, must annually return to the secretary of state a detailed statement of its capital stock and property, real and personal, in the state. Foreign corporations report on their real and personal property. Laws 1893, p. 118.

Concerning the taxation of foreign corporations, see "Foreign Corporations,"

For taxation of insurance companies, see Laws 1891, p. 168.

For fees for filing the certificate of incorporation, see "Constitutional Provisions" above, and "Foreign Corporations."

8 958. MONTANA: 1 Constitutional provisions.—There shall be no grant of special privileges, franchises or immunities. Constitution of 1889, art. III. § 11. No special law shall be passed chartering banks, insurance companies or loan and trust companies, or "granting to any corporation, association or individual the right to lay down railroad tracks, or any special or exclusive privilege, immunity or franchise whatever," or exempting property from taxation, or "relinguishing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any corporation or person to this state, or to any municipality therein." Art. V. § 26. No act shall "delegate to any . . . private corporation or association any power to make, supervise or interfere with any municipal improvements, money, property or effects." Id., § 36. No act shall authorize executors, administrators, guardians or trustees to invest trust funds in the bonds or stock of any private corporation. Id., § 37. No act shall authorize the state or any municipality "to contract any debt or obligation in the construction of any railroad, nor loan its credit to or in aid of the construction of the same," etc. Id., § 38. No obligation or liability of any corporation owned by the state, or by any mnnicipal corporation, shall be exchanged, transferred or diminished by the legislature: nor shall such liability be extinguished except upon full payment thereof. Id., § 39. The legislature may impose a license tax upon corporations. Art. XII. § 1. "The power to tax corporations or corporate property shall never be relinquished or suspended, and all corporations in this state, or doing business therein, shall be subject to taxation for state, county, school, municipal and other purposes, on real and personal property owned or used by them and not by this constitution exempted from taxation," Id., § 7. "The franchise, roadway, roadbed, rails and rolling stock of all railroads operated in more than one county" shall be assessed by a state board, "and the same shall be apportioned to the counties, cities, towns, townships and school districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties," etc. Id., § 16. "The word property as used in this article is hereby declared to include . . . bonds, stocks, franchises," etc., but the stocks of any corporation shall not be taxed when the property of any such corporation, "represented by such stocks, is within the state and has been taxed." Id., § 17. Neither the state, nor any subdivision of the state, "shall ever give or loan its credit in aid of, or make any donation or grant, by subsidy or otherwise," to any corporation, "or become a subscriber to, or a stockholder in," any corporation, or a joint owner in any corporation, "except as to such ownership as may accrue to the state by operation or provision of law." Art. XIII, § 1. The legislature shall provide by general law for the organization of all corporations which shall not have begun business at the adoption of the constitution. But any such law may be altered or repealed. Art. XV, 58 1, 2. The legislature may "alter, revoke or annul" any charter of existing corporations, or of corporations hereafter organized. Id., § 3. The legislature shall provide by law that, in all elections of directors or trustees, every stockholder shall be entitled to vote in person or by proxy all his shares for

¹The acts of the legislature down to and including the laws of 1893 are included in this synopsis. 1755

as many persons as there are directors or trustees to be elected, or to cumulate his shares "and give one candidate as many votes as the number of directors or trustees multiplied by the number of his shares of stock shall be equal, or distribute them, on the same principle, among as many candidates as he shall think fit," and directors or trustees shall be elected in no other manner. Id., \$ 4. The legislature "shall have the power to regulate and coutrol by law the rates and charges for the transportation of passengers and freight." Any corporation, organized for the purpose, shall "have the right to construct and operate a railroad between any designated points within this state," and to connect the same at the state live with foreign lines. A railroad company may with its road intersect, connect with or cross any other railroad. Id., § 5. No railroad, express or other transportation company shall consolidate with any company owning or controlling a competing or parallel line. Such companies shall not in any manner unite their earnings or business with a parallel or competing line; nor shall any officer of any such company act as an officer of any company owning or controlling a parallel or competing line. Id., § 6. Discriminations against, or in favor of, any individual or corporation are prohibited. No transportation company shall charge more for a shorter than for a longer haul. Id., § 7. The legislature shall always have the power to take the property of corporations under the right of eminent domain. Id., § 9. No corporation shall issue stocks or bonds, except for labor done, services performed, or money and property actually received; and all fictitious increase of stock or indebtedness shall be void. The stock of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding a majority of the stock first obtained at a meeting held after at least thirty days' notice given in pursuance of law. Id., § 10. Foreign corporations shall not do business in the state unless they have an office and agent to accept service in the state. Foreign corporations shall exercise no greater powers than domestic corporations have. Id., § 11. Street railroads shall be built only with the consent of the municipal authorities. Id., § 12. No law retrospective in its operation shall be enacted for the benefit of any corporation. Id.. § 13. Lines of telegraph or telephone may be constructed and connected with other lines, but no telegraph or telephone company shall consolidate with, or hold a controlling interest in, any competing line. Id., § 14. If any domestic corporation consolidates with any foreign corporation, the same does not become a foreign corporation, but jurisdiction is retained over the corporate property within the state. § 15. Corporations shall not cause employees to contract against corporate liability for personal injuries, and all such contracts shall be void. Id., § 16. The legislature shall not pass any law "permitting the leasing or alienation of any franchise so as to release or relieve the franchise or property held thereunder from any of the liabilities of the lessor or grantor, or lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise, or any of its privileges." Id., § 17. "Dues from private corporations shall be secured by such means as may be prescribed by law." Id., § 19. "Trusts" or contracts, "for the purpose of fixing the price, or regulating the production, of any article of commerce, or of the product of the soil, for consumption by the people," are prohibited. The legislature shall, by adequate penalties, enforce the provisions of this section, and may declare a forfeiture of property and franchises, or, in the case of foreign corporations, may prevent them from doing business within the state. Id., § 20.

By the constitution of 1889 all territorial laws in force at the time the state was admitted, and not inconsistent with the state or federal constitutions, were continued in force until altered or repealed, or until they should expire by their own limitation.

The law now in force in regard to corporations is as follows:

Miscellaneous corporations.—Any three or more persons may form a corporation for the purpose of carrying on any manufacturing, mining or other business "designed to aid in the industrial or productive interests of the country and

the development thereof." They must "make, sign and acknowledge before some officer competent to take acknowledgments of deeds, and file in the office of the clerk of the county in which the business of the company shall be carried on and a duplicate thereof in the office of the secretary of state, a certificate in writing." stating (1) the corporate name; (2) the object of the incorporation; (3) the amount of capital stock: (4) the period of existence (not more than forty years): (5) the number of shares of stock: (6) the number of trustees who shall manage the business for three months, and their names; (7) the name of the place and of the county in which the corporate business shall be carried on. Compiled Statutes. 1887, § 446; Am'd L. 1893, p. 111. A copy of the certificate certified by the secretary of state shall be evidence of the existence of the company, and those who have "signed and acknowledged, and their successors, shall be a body corporate, The corporation shall be "capable in law of acquiring by purchase, pre-emption, donation or otherwise, and holding or conveying by deed or otherwise, any real or personal estate whatever which may be necessary to enable the said company to carry on their operations named in the certificate." § 447. One or more places of business may be named in the certificate. § 448. If any part of the business is to be done outside the state the certificate must declare such intention. \$ 449. There shall be from three to nine trustees, all stockholders, to be elected annually (after the first three months), at such time and place as the by-laws shall direct. Ten days' notice of the meeting shall be given in the nearest paper. Au election shall be made by the stockholders who attend, provided one-half of the stock is represented. The persons receiving the greatest number of votes shall be elected. Vacancies shall be filled in such manner as shall be prescribed by the laws of the company. The trustees shall all be elected at one time on a general ballot. Cumulative voting is provided for. \$ 450. If an election is not made on the day designated in the by-laws, the election shall be held on another day as provided in the by-laws, and all acts of trustees are valid until their successors are elected. The trustees may call in the subscriptions at such times and in such instalments as they deem proper, "not to exceed twenty per cent. in any one month." § 453. The trustees may make "such prudential by-laws as they deem proper for the management and disposition of the stock and business affairs of such company," consistently with the law. § 454. Stock is personal estate, and shall be transferable in such manner as the by-laws provide. But no transfer is valid, except as between the parties thereto, until the same is recorded. \$455. The stockholders of every company "shall be severally and individually liable to the creditors of the company . . . to the amount of unpaid stock held by them respectively, for all acts of and contracts made by such company, until the whole amount of capital stock subscribed for shall have been paid in." § 457. The trustees may purchase mines, manufactories, and other property needed in the corporate business, and may issue, in payment thereof, stock to the amount of the full value of such property. Such stock shall be deemed "full stock" and not liable to any further call. But this stock shall not be entered in the reports of the company as being issued for cash. § 458. The president and a majority of the trustees shall within thirty days after the payment of the first instalment make a certificate "stating the amount of the capital so fixed and paid in," and record the same with the county clerk. § 459. Within twenty days from the first of September annual reports shall be published in the nearest paper and filed with the county clerk. For failure to comply with this requirement, the trustees and the company shall be jointly and severally liable "for all debts of the company then existing, and for all that shall be contracted before such report shall be made." § 460. This law must be construed so as not to relieve the trustees from liability for debts contracted prior to the default. (See Gans v. Switzer, 9 Mon., 408 - 1890.) The trustees will not be relieved from liability under this section by alleging a previous dissolution by non-user of the franchises. Id. If the trustees declare any dividend while the company is insolvent, or which would render it insolvent, or which would diminish the capital stock, they shall be jointly and severally liable for all debts then existing, and for all that shall be contracted while they are in office. Any trustee filing his dissent with the county clerk and with the clerk of the company before the time fixed for the payment of the dividend will be relieved from liability. \$461. No loan shall be made to a stockholder, and the officers making such loan, or assenting thereto, shall be jointly and severally liable to the extent of the loan and interest for all debts contracted before the repayment of the loan. § 462. All officers signing a materially false certificate, report or notice "shall be jointly and severally liable for all debts of the company contracted while they are stockholders or officers thereof," § 463. No person holding stock as executor, etc., shall be personally liable as a stockholder, "but the person pledging such stock shall be considered as holding the same," and shall be liable, and the estate and funds in the hands of a guardian, etc., are liable. § 464. Any corporation may increase its capital stock to an amount necessary for its business, or diminish its capital stock, provided that, if the amount of debts and liabilities shall exceed the amount to which it is proposed to reduce the capital such liabilities shall be "satisfied and reduced so as not to exceed such diminished amount of capital." The business may also be extended or changed to any branch named in section 446. But such increase or reduction in the capital, or change in the business, must first be authorized by two-thirds of the whole stock, at a meeting called by the trustees after a six weeks' notice. \$\$ 467, 468, Am'd L. 1893, n. 112. A certificate must be recorded as required by section 446. § 469. If the indebtedness at any time exceeds the capital stock, the trustees assenting thereto shall be personally liable for the excess. \$ 470. The trustees must cause the treasurer to keep a book containing the names of all stockholders, showing their residences and the number of shares held by each, the time when they became owners, and the amount of capital stock actually paid in. The book shall be open to the inspection of stockholders and creditors. No transfer of stock shall be valid for any purpose whatever, "except to render the person to whom it shall be transferred liable for the debts of the company," until a full record of the transfer is entered on this book. Such book shall be presumptive evidence in any case against the company or the stockholders. Officers refusing or neglecting to make the proper entry, or to exhibit the book, shall be deemed guilty of a misdemeanor, and the company shall pay to the party injured fifty dollars for every neglect, besides the damages resulting therefrom. And the company shall forfeit fifty dollars for every day of neglect to keep such a book. § 471. Upon a written request by fifteen per cent, of the stock, the treasurer must furnish a sworn statement within twenty days, and keep a copy thereof in the office for six months, for the inspection of stockholders. Such statement cannot be demanded oftener than once in six months. § 472. Upon dissolution, the trustees shall be trustees of the creditors and stockholders. § 489. Any corporation desiring to remove its place of business to another county shall file with the county recorder a certified copy of its certificate of incorporation, and shall give notice of such removal by four weeks' publication in the nearest newspaper. § 490. The trustees of a mining corporation shall not loan, mortgage, sell, or otherwise dispose of, any of the mining ground or works until authorized by the stockholders at a meeting called to consider the question. § 492. Two-thirds of the stock must be voted in favor of selling, mortgaging, etc., before such property can be disposed of. § 493. The trustees may levy assessments to pay the proper expenses of the corporation. § 496. No such assessment shall exceed five per cent of the stated amount of capital stock. § 497. Stock may be sold to pay such assess-§§ 499-510. Assessments of this kind can only be made when the articles of incorporation provide that the stock of the company shall be assessable. § 512. Stock sold to satisfy such assessments may be purchased by the corporation, and while the same remains the property of the corporation it is not assessable, and no dividends shall be declared thereon. Stock so purchased shall be

subject to the control of the remaining stockholders. § 508. Foreign corporations before carrying on business in the state shall make a certificate designating an agent, who shall be a citizen of the state, upon whom legal process may be served; and shall also by such certificate state the principal place of business of the corporation in the state. The certificate is to be filed with the secretary of state. For failure so to do all contracts by the corporation with citizens of the state shall be void as to the company and cannot be enforced by it. L. 1893, p. 91.

Railroads.—Five or more may form a railroad company. \$ 677. The corporators must make a certificate specifying (1) the corporate name: (2) the location of the termini and the general route; (3) the amount of capital stock needed. A duly acknowledged copy of the certificate shall be filed with the county clerk, and the original certificate shall be filed with the secretary of state. § 678. The filing of the certificate completes the incorporation. Real and personal estate necessary for the corporate business may be acquired and conveyed. § 679. The corporation may "construct branches to any point in this territory and connect or consolidate their road with that belonging to any other person or corporation." \$ 680. The capital stock shall be divided into shares of \$100 each, and such shares shall be deemed personalty, subject to execution. An instalment of ten per centum shall be paid at the time of subscription, and the remaining instalments shall not exceed twenty-five per centum of the capital stock. Instalments shall not be called for oftener than once in three months. \$681. A majority of the persons named in the original certificate shall be authorized to open books for subscriptions after a notice of thirty days in a newspaper of the territory. When five per centum has been subscribed, the same persons may, by like notice, call a meeting of the stockholders to elect five or more directors, who shall hold office until their successors are chosen at the annual election. Each share has one vote, and a majority vote of those present at the first election shall elect. § 683. A majority of the directors may fill vacancies on the board. Id. The corporation may enter upon and take lands necessary for the construction of its road. § 685. If unoccupied lands are taken, claims for damages shall be barred in six years. Id. The company may appropriate "any road, street, alley, or public way or ground of any kind" necessary for the purpose of the road, but shall be responsible for injury to private property along such public way. § 686. Every company shall each year subsequent to the filing of the articles of incorporation complete fifteen miles upon each of its "lines, branches or extensions," and the whole line must be finished within seven years from the filing of the articles. § 688. The corporation may borrow money to an amount not exceeding the authorized capital stock, at any rate of interest, "and may execute bonds therefor in sums of not less than \$100, and secure the payment thereof by mortgage or pledge of the property and income of such corporation." Such mortgage shall, if so provided in the mortgage, be made a lien upon all the property of the company of whatever kind in possession of the company or to be acquired, "irrespective of the law now in force relating to chattel mortgages," and shall be held and enforced in the same manner as a mortgage of realty. § 691. The company may purchase or acquire by gift any lands convenient to secure the right of way, or may receive by grant any lands given to aid in the construction of the road. § 692. The corporation shall establish a principal office on the line of the road, and may change the same at pleasure, giving public notice of the change. § 694. Any such railroad company may contract and operate a telegraph on the line of its road. § 695. The provisions concerning grants for stations, etc., shall not apply to mineral lands of the United States. Id. This chapter shall not be construed to make the state or any municipality responsible for the obligations of any corporation. § 696. The directors, upon a vote of the stockholders, may increase the capital stock to an amount sufficient to cover the cost of construction. § 698. Any discrimination in rates, the granting of a pass or other privilege to any member of the legislative, executive or judicial departments of the state, or the wilful neglect to post schedules of rates, or the wilful failure to make required reports, shall be deemed a misdemeanor, and the corporation, on conviction, shall pay a penalty of \$1,000 for the first offense, \$2,000 for the second offense, and not less than \$5,000 nor more than \$10,000 for each subsequent offense. § 700. An annual report is required, for which the state provides an outline of fifty-six items. 8 701. A foreign corporation whose road reaches the state boundary may extend its line into the state, and become entitled to all the rights, powers, etc., which a domestic corporation has, by filing with the secretary of state a copy of a resolution of the board of directors designating the general route of the proposed extension. \$702. Any two companies, domestic or foreign, whose respective lines are wholly or partly within the state, may consolidate under any name, when their road, or any branch thereof, "so connect within this territory that they may be operated together as one property." Articles of agreement shall be entered into by the companies, under the corporate seals and the signatures of the presidents and secretaries, containing the terms and the mode of carrying the same into effect, and including the corporate name: the amount of capital stock; the number and amount of shares; the manner of retiring shares of the old corporations, or of converting them into or exchanging them for the capital stock of the resultant corporation; the number of directors and what officers it shall have, and "the persons who shall constitute the first board of directors and officers thereof, their term of office and the manner in which their successors shall be elected." The agreement shall not be effectual until adopted by a vote of at least three-fifths of the outstanding stock at a regular meeting or a meeting called for the purpose of considering the matter. A duplicate of the agreement, with a copy of each of the resolutions adopted by the stockholders of the respective corporations, properly attested and sworn, shall be filed with the secretary of state. The consolidation is then complete, and the new company is entitled to the same privileges, franchises, etc., as a domestic corporation. § 703. Any railroad wholly or partly within the state, or extending to the boundary line thereof, may purchase or lease the whole or any part of another line which will form with it a continuous line of railroad. But such lease or purchase must be authorized by a vote of three-fifths of the outstanding stock of each corporation respectively. § 704. Such company may also take, purchase, hold, sell and dispose of, or guaranty the payment of the capital stock, bonds and securities of any other railroad corporation whose line of railroad within this territory is continuous of or connects with its own line. Id. Any corporation, domestic or foreign, whose line is wholly or partly within the state "shall have power to create, issue and dispose of such amount and character of special, preferred or full-paid stock of the capital stock of such corporation as may be deemed advisable by its board of directors." § 705. Any railroad wholly or partly within the territory may "make, issue, negotiate and deliver its bonds, securities or obligations to such amount, bearing such rate of interest, and payable at such time or times as its board of directors may determine, and may negotiate, sell, pledge or otherwise dispose of the same at such price . . . as its board of directors may determine," and n ay secure the same by such mortgages or deeds of trust upon any of its "property, income and franchises" as the directors may determine. Such mortgage or deed of trust "shall be taken, held and enforced in the same manner as mortgages of real estate," and "the filing thereof in the office of the secretary of state shall be notice of its existence and contents to all parties whomsoever." § 706. The certificate of incorporation may be amended. Le 1893, p. 147. Conditional sales of rolling stock and "car trusts" are legal, provided an acknowledgment thereof by the vendee or lessee is recorded in the office of the secretary of state and the various county clerks where the road runs. L. 1893, p. 148. Sales of tickets by ticket brokers are prohibited under penalty of fine and imprisonment unless such brokers are licensed, and they are prohibited from selling at cut rates below the rate regularly charged the public. L. 1893, p. 150. Foreign or domestic railroad corporations may subscribe to the stock of any other railroad corporation in the state, or purchase the stock or bonds thereof, or guaranty the bonds thereof or otherwise aid the same, and domestic railroad corporations may build, buy, lease or consolidate with any domestic or foreign railroad corporation, or may sell or lease the whole or any part of its railroad or branches, constructed or to be constructed, to any other foreign or domestic railroad corporation. Foreign railroad corporations may build railroads in the state. Foreign corporations so building or acquiring railroads may exercise the power of eminent domain. A majority in interest of the stockholders must first approve of the consolidation, lease, sale or purchase, however, in writing or in meeting assembled. Foreign corporations acting under this act must have an office in the state where process may be served, and must file their articles of incorporation. Alien corporations are not given the benefit of this act. Prior sales and consolidations are legalized L. 1893, p. 157.

Taxation.—The term "property" includes bonds, stock and franchises, but stocks are not taxed if the property represented by such stocks is within the state and has been taxed. L. 1891, p. 74, § 4. In making up the credits for assessment no deduction shall be made for any instalment payable on stock. Id. The stockholders in every bank, state or national, "must be assessed and taxed on the value of their shares of stock therein, in the county, town, city or district where such bank . . . is located, and not elsewhere, whether such stockholders reside in such place or not." The accounting officer of each bank must furnish the assessor a verified statement "showing the amount and number of shares of the capital stock. . . . the amount of its surplus or reserve fund, the amount of investments in real estate, which real estate must be assessed and taxed as other real estate." § 6. In assessing shares of stock each stockholder "must be allowed all the deductions and exemptions allowed by law in assessing the value of other taxable personal property," and assessments shall not be at a greater rate than upon other "monied capital" in the hands of individuals. § 7. In making assessments there must be deducted from the value of such shares "such sum as is in the same proportion to such value as the assessed value of the real estate of such bank . . . in which shares are held bears to the whole amount of capital stock of such bank," § 8. Shares in national banks not located in the state, owned by residents, are not taxed. § 9. "The franchise, roadway, roadbed, rails and rolling-stock of all railroads operating in more than one county" are assessed by a state board. "Other franchises, if granted by the authorities of a county or city," must be assessed within that county or city: "if granted by any other authority," they must be assessed where the principal place of husiness is situated. § 11. The property of every corporation must be assessed in the county where it is situated, and in the name of the corporation. § 23. "Railroads operated in one county and not assessed by the state board," etc., and telegraph and telephone lines must be listed in the county where the property is situated. § 30. The president or other officer of any corporation operating a railroad in more than one county must furnish the state board a sworn statement in detail of the value of all the road, including every manner of property used in carrying on the railroad business. § 43. The state board must assess the "franchises, roadway, roadbed, rails and rolling-stock of all railroads operated in more than one county." All rollingstock shall be assessed against the company using such rolling-stock. Assessments must be made to the corporation owning or leasing the road, and upon the entire line within the state, including the right of way. All buildings and other property, except as above provided, shall be assessed in the county where they lie. The state board must "apportion the total assessment of the franchise, roadway, roadbed, rails and rolling-stock of each railroad to the counties, cities, towns, townships and school districts . . . in proportion to the number of miles of railroad laid in such counties." § 44. "All such railroad property is taxable upon said assessment at the same rates, by the same officers and for the same purposes as the property of individuals within such city, town, school, road and lesser taxation districts respectively, and such taxes must be collected in the same manner and by the same officers as other taxes are collected." Mines purchased from the United States are taxed at the price paid; but the surface value of real estate for other purposes is also taxed. The annual net proceeds of all mines are taxed as other personal property. § 3. Every mining corporation must return annually a verified statement of the gross yield of the mine and the total expenditure in producing the same. § 50. Such expenditures must not include the salaries of those persons not actively engaged in working the mine, or personally superintending the same. § 51. The tax is a lien on the mines, § 57. Every corporation is liable, after notice, for the poll-tax of employees, and may deduct the same from the wages of such employees, and the corporate property may be sold to satisfy the assessment. §§ 170-172. The fee of the secretary of state for filing a certificate of incorporation is \$2. Comp. L 1887, § 1969.

§ 959. NEBRASKA: 1 Constitutional provisions.—Local or special laws granting to any corporation or individual the right to lay down a railroad track or any special or exclusive privileges, immunities or franchises are prohibited. Art. III, § 15. The state shall not donate to any corporation or individual. Id., § 18. "Every person and corporation shall pay a tax in proportion to the value of his, her or its property franchises." Art IX, § 1. Corporations shall not be released or discharged from taxation. Id., § 4. Railways are declared to be public highways. Reasonable rates may be fixed by law. The liability of railroad corporations as common carriers shall be limited. Art. XI, § 4. Railroad corporations doing business in the state must keep a public office in the state for the transaction of its business, where transfers of stock shall be made, and in which must be kept, for public inspection, books in which shall be recorded the names of stockholders and their respective shares, the amount of stock paid in by each stockholder, the amount of assets and liabilities, etc. The officers in control of the road must make annual reports under oath to the auditor of public accounts. Art. XI, § 1. The rolling and all movable property of any railroad corporation are subject to sale on execution. Id., § 2. No railroad or telegraph company shall consolidate, in whole or in part, with any competing line, "and in no case shall any consolidation take place except upon public notice of at least sixty days to all stockholders. . . ." Id., § 3. All foreign corporations shall file a copy of their charters duly authenticated, also a verified statement of their condition and an agreement consenting to be sued in the territory, and designating a resident agent whose consent shall also be filed. §§ 442, 443. "No railroad corporation shall issue any stock or bonds, except for money, labor or property actually received and applied to the purposes for which such corporation was created," and any fictitious stock, dividends or increase of capital or indebtedness shall be void. Id., § 5. The legislature may correct abuses and prevent unjust discriminations in the charges of express, telegraph and railroad companies, and if the laws enacted for such purpose are disobeyed the legislature may declare a forfeiture of the property and franchises of the companies. § 7. Foreign corporations shall not exercise the right of eminent domain, or acquire a right of way, or secure real estate for depot or any purpose until they become a body corporate in accordance with the laws of the state. § 8. No political subdivision of the state shall subscribe for, or own any interest in the capital stock of any private corporation. § 1 (b). The state must provide by general law for the organization of all corporations for profit. § 1 (c). The construction of a street railway in any city, town or incorporated village shall not be authorized by the legislature "without first requiring the consent of a majority of the electors" of such town, city or village. § 2(b). "In all cases of claims against corporations or joint-stock associations, the exact amount due shall first be ascertained, and after the corporate property shall have been exhausted, the original subscribers thereof shall be individually liable to the extent of their unpaid sub-

 $^{^1}$ The acts of the legislature down to and including the laws of 1893 are included in this synopsis. 1762

scription, and the liability of the unpaid subscription shall follow the stock." § 4 (b). "In all elections for directors or managers of incorporated companies, every stockholder shall have the right to vote in person or proxy for the number of shares of stock owned by him, for as many persons as there are directors or managers to be elected, or to cumulate said shares and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them upon the same principle among as many candidates as he shall think fit." \$ 5 (b). Every stockholder in a bank is individually liable to its creditors, "over and above the amount of stock by him held, to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder." All banking corporations shall publish quarterly statements made under oath. §7 (b). No city, county or other subdivision of the state "shall ever make donations to any railroad or other work of internal improvement unless a proposition to do so shall have been first submitted to the qualified electors thereof." In any case the combined donations in a county shall not exceed ten per cent of the assessed valuation of such county, except that a city or county may, by a two-thirds vote, jucrease such indebtedness five per cent, in addition to such ten per cent. No evidences of such indebtedness shall be valid unless there shall be indersed thereon a certificate of the secretary of state and auditor of state. Art. XII. § 2. The credit of the state shall never be given or loaned in aid of any corporation or individual. § 3.

Miscellaneous corporations .-- Any number of persons may form a corporation for any lawful business, including any works of internal improvement. Compiled Statutes of 1891, ch. 16, § 123. Every corporation, as such, has power to hold real estate necessary for its legitimate business. § 124. Every corporation, when not formed by legislative enactment, must record its articles of incorporation in the office of the county clerk of the county in which the business is to be transacted. § 126. Corporations for works of internal improvement must also file a copy of their articles of association with the secretary of state. § 127. The articles of incorporation must fix the limit of liability to which the corporation shall at any one time be subject, which liability must not at any time exceed twothirds of the capital stock. But this limitation does not apply to "debts for the risks of insurance companies, deposits in banks, and the notes, bonds and debentures of any loan or trust company, organized under the provisions of this chapter, where the payment of such notes, bonds or debentures shall be secured by the actual transfer of real estate, by trust deed or mortgage, for the payment of such notes, bonds or debentures, which said real estate so transferred shall be of twice the value of the par value of such notes, bonds or debentures." § 128. If a corporation created by the legislature does not organize within one year its corporate powers cease. § 129. "Notice must be published in some newspaper near the principal place of business for four weeks." § 130. Such notice must contain (1) the corporate name; (2) the name of the principal place of business; (3) the nature of the proposed business: (4) the amount of capital authorized and the conditions of paying in the same; (5) the time of commencement and termination of the corporation; (6) the highest amount of liability to which the corporation is to be subject; (7) what officers are to conduct the affairs of the corporation. § 131. corporation formed without legislative enactment" may begin business as soon as its articles are filed with the county clerk, "and shall be valid if a copy of its articles be filed in the office of the secretary of state, and the notice required be published within four months from the time of filing such articles in the clerk's office." § 132. "Every change in any of the above matters shall be recorded and published in the same manner as the original articles are required by law." § 133. The consent of two-thirds of the members is necessary for a dissolution, unless a different rule is adopted by the by-laws. § 134. A copy of the by-laws must be posted for public inspection. § 135. Annual statements of debts, signed by the president and a majority of the directors, must be published in the nearest

newspaper, and in default of such publication the stockholders, after the assets are exhausted, shall be jointly and severally liable for all existing debts, "and for all that shall be contracted before such notice is given to the extent of the unpaid subscription of any stockholder to the capital stock of such corporation, and in addition thereto the amount of capital stock owned by such individuals." For failure of the corporation to give notice or comply with the other requisites of organization, the liability of stockholders is the same as that imposed in the preceding section. § 139. For deception as to the resources and liabilities, a penalty is imposed. § 140. Corporations whose charters expire by their own limitation, or by the voluntary acts of the stockholders, may continue to act for the purpose of winding up their business. \$ 143. The want of legal organization cannot be set up as a defense by persons acting as a corporation, nor by these contracting with such a company. § 144. Manufacturing companies may be incorporated by any number of persons, with the same general powers as are conferred upon bridge companies. The incorporators must make and sign a certificate and forward the same to the secretary of state, and when said certificate is recorded and copied by him the incorporation is complete. Ch. 16, § 37. The annual meeting of stockholders shall be held on the first Monday of January in each year. If directors are not elected at this meeting, such election shall take place at a special meeting after thirty days' published notice. Directors must be stockholders. A record of all business transactions, stock subscribed and transferred, etc., shall be open to the inspection of stockholders. § 38. A majority of the incorporators may open subscription books, and operations may be commenced upon a subscription of ten per cent. of the stock. § 39. All combinations between individuals or corporations dealing in or manufacturing like products, to fix a common price, or limit the sale or manufacture of any product or article, or make a common fund of products or profits, are unlawful. Ch. 91a, § 1. Trusts and pools of every description are prohibited. § 2.

Railroads. - Five or more may incorporate. Ch. 16, § 72. The amount of capital stock necessary to construct the road must be named in the certificate. The certificate must be acknowledged before a notary public and certified by the clerk of the district court, and forwarded to the secretary of state, who shall record and preserve the same in his office. A copy certified by the secretary of state shall be prima facie evidence of the existence of the corporation. § 73. When the foregoing provisions have been complied with the incorporation is complete. § 74. The capital stock must be divided into shares of one hundred dollars each, and such shares shall be deemed personal property subject to execution. § 76. An instalment of ten per cent. on each share must be payable at the time of subscription, and the residue must be paid as the directors may require. § 77. The corporation may borrow money, and may execute bonds and promissory notes therefor. to be secured by the property and income of the company. § 84. The offices may be anywhere on the road and may be changed at pleasure. § 87. The consolidation of two or more lines may be effected by the directors. The directors of the consolidating companies may determine the number of shares of the new corporation and the value of each, the manner of converting shares of the old corporation into shares in the new, the manner of compensating dissenting stockholders, etc. The new corporation shall have the combined rights, powers and privileges of the old companies, and shall be subject to any and all restrictions and obligations imposed upon the old companies. Any dissenting stockholder shall be paid the market value of his stock at the date of the consolidation. § 89. Such agreement of the directors shall not be binding upon the corporations until sanctioned by each company by a two-thirds stock vote at a meeting held after a notice of ninety days. § 90. A duplicate of the agreement must be filed with the secretary of state. § 91. Any railroad company may, by subscription to the capital stock of another company or otherwise, aid such company in the construction of its road for the purpose of forming a connection with such road. Or one company

may lease the road of another company to form a connection or continuous line. Two connected lines may enter into a combination for their common benefit consistent with the object for which they were created. \$ 94. Any railroad company may purchase and use real estate. § 95. Stockholders are individually liable to creditors of the company only to the extent of their unpaid subscriptions. Any railroad company in the state may consolidate with any non-competing line in an adjoining state after the approval of the stockholders of each company owning a majority of the stock, at a meeting held after sixty days' notice or after the consent in writing of such majority. \$ 114. Any line may be extended into another state. § 115. Any railroad company has power to mortgage any part of its property or franchises or execute deeds of trust to secure money borrowed for the construction and equipment of its roads, and may issue bonds in sums not less than \$500 secured by such mortgage or deeds of trust, bearing interest at a rate not to exceed ten per cent, per annum, convertible into stock or not, as shall be expressed on the face of the bond. Such bonds may be sold at such price as the company deems proper. No plea of usury shall be allowed the company if the bonds are sold below their par value. § 117. No notice, express or implied, shall limit the liabilities of a railroad company as common carrier, unless it shall appear that such limitation was actually brought to the knowledge of the opposite party and assented to by him in express terms. Ch. 72, art. L § 5. Any railroad company operating a line in an adjoining state may extend its road into the state after complying with all the statutes in respect to the formation of railroad corporations. Such company must keep an office in the state in a county into which its road extends, Art. II, § 1. Any company thus extending its line may mortgage, lease or sell that part of its road, and all property connected therewith, situated in the state, to any other railroad company within the state. § 2. Any such company extending its line, or authorized to build a new line within the state, may mortgage, lease or sell its road and franchise, or any part thereof, within the state to any person or persons on such terms as may be agreed upon, and the purchasers may consolidate with "any other railroad company" upon such terms as may be agreed upon; provided, that no sale, purchase or consolidation shall be made under the provisions of this act until authorized by a majority in interest of the stockholders. § 3. All contracts made prior to such transfer, lease, mortgage or consolidation shall be binding on the assignees, lessees or mortgagees. § 4. A public office must be kept in the state by any railroad company operating a road in the state. Art. VI, § 1. A book must be kept for public inspection. But corporations not operating over ten miles of road shall be exempt from the provisions of this act. § 2. The directors must report annually to the auditor of public accounts. § 3. Any company failing to comply with the provisions of this act shall forfeit its right to do business in the state. § 4. In addition, the principal officers of such corporation, thus neglecting to comply with the law, shall be subject to a fine of not more than \$1,000 or imprisonment for not more than three years. \$ 5. Unjust discriminations in favor of or against any person are unlawful. Art. VIII, § 2. Discriminations in favor of or against any company, corporation or locality are unlawful. § 3. Charging more for a shorter than a longer haul over the same line, the shorter distance being included in the longer, etc., is unlawful. § 4. Pooling is prohibited. § 5. The penalty for any violation of this act is payment of damages to the party aggrieved and the costs of the suit. § 9. A state board of transportation has power to inquire into the management of the business of common carrier railroads under the provisions of this act. §§ 11, 12. For failure to obey any lawful order of the board the court may issue writs of injunction and writs of attachment against any railroad common carrier, and for failure to obey such writs a fine of \$500 per day may be imposed. § 16. The board may require annual reports. § 19. In 1893 an act was passed regulating the rates of railroads (L. 1893, ch. 24). This act is now being contested in the courts.

Foreign corporations.—Any foreign corporation may become a domestic corporation by filing with the secretary of state a true copy of its charter or articles of association and a certified copy of a resolution adopted by the board of directors, accepting the provisions of this act. Ch. 16, § 215. No foreign corpoporation shall take or hold real estate by "descent, devise, purchase or otherwise," but this provision shall not prohibit any foreign corporation, having any "liens upon real estate or any interest therein, whether heretofore or bereafter acquired. from holding or taking a valid title to the real estate subject to such liens," nor shall it prevent such corporation from enforcing any lien or judgment, and the corporation may become a purchaser at a sale to enforce such debt or judgment. Real estate thus acquired shall be sold within ten years. Ch. 73, §§ 70-73. provisions of this act shall not apply to the real estate necessary for the construction and operation of railroads. § 73. Nor to the real estate necessary for erecting and maintaining manufacturing establishments. Id. Nor to any real estate lying within the corporate limits of cities and towns. Id. Real estate held contrary to the provisions of this act shall "revert and escheat" to the state. Id.

Taxation. - All shares of stock held by residents, the shares of stock of banks doing business in the state, and the capital stock of all companies incorporated under the laws of the state are taxed. Ch. 77, art. I, § 1. Shares of stock are not taxed if the capital stock of the company is assessed in the state. § 7. "The capital stock and franchises of corporations and persous, except as may be otherwise provided," shall be listed and taxed where the principal place of business is located. § 8. Domestic corporations except insurance companies when listing their property for taxation, shall deduct from the market value of their capital stock "the total amount of all indebtedness, except the indebtedness for current expenses - excluding from such expenses the amount paid for the purchase and improvement of property," and shall deduct also "the assessed valuation of all its real and personal property (which real and personal property shall be listed and valued as other real and personal property is listed and assessed under this chapter)." The remainder shall be listed in the name of the company as capital stock. § 32. The stockholders in every bank located within the state shall be assessed on the value of their shares where the bank is located, whether the stockholders reside in such place or not. The assessment shall be according to the ownership and value on the first day of April annually. Shares of stock in national banks outside the state shall not be taxed. § 33. The tax is a lien on the shares. § 36. Dividends shall not be paid to stockholders until their taxes are paid. Officers paying dividends to stockholders whose taxes are delinquent shall be liable for the taxes. The collector of taxes may sell the stock upon which the taxes are due and unpaid. § 37. Railroad and telegraph companies must make a return to the auditor of public accounts of all property along the right of way and around the depots necessary for the operation of the line, which property shall be assessed by a state board as personal property, and the valuation per mile shall be apportioned for taxation to the counties into which the line extends, All other property must be assessed as realty or personalty where it is situated. §§ 39, 40. Insurance companies are taxed on the annual excess of premiums over losses and ordinary expenses and on realty. § 38.

§ 960. NEVADA: 1 Constitutional provisions.—"The legislature shall pass no special act in any manner relating to corporate powers, except for municipal purposes." Constitution of 1864, art. VIII, § 1. "All real property and possessory rights to the same, as well as personal property in this state, belonging to corporatious now existing or hereafter created, shall be subject to taxation the same as property of individuals." Id., § 2. "Dues from corporations shall be secured by such means as may be prescribed by law; provided, that corporators

¹ The acts of the legislature down to and including the laws of 1893 are included in this synopsis.

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in corporations formed under the laws of this state shall not be individually liable for the debts or liabilities, of such corporations." Id., § 3. Corporations created under the territorial laws shall be governed by those laws until the legislature passes laws for their regulation, according to the provisions of the constitution. Id., § 4. No corporation shall appropriate a right of way until full compensation therefor is secured. Id., § 7. "The state shall not donate or loan money or its credit, subscribe to or be interested in the stock of "any corporation. Id., § 9. "No county, city, town or other municipal corporation" shall become a stockholder in any corporation whatever, or loan its credit in aid of any except railroad corporations. Id., § 10. The state shall never assume the debts of any corporation whatever, unless such debts were created in the public defense. Art. IX, § 4.

Miscellaneous corporations.— Corporations may be formed for specified purposes, including manufacturing, mining, transportation and banking, "or for the purpose of engaging in any other species of trade, business or commerce, foreign or domestic." Gen. Stat. 1885, ch. 8, § 802. Any three or more persons desiring to incorporate "may make, sign and acknowledge, before some person competent to take acknowledgment of deeds," and file and record with the county clerk, a certificate which shall specify (1) the corporate name; (2) the object of the incorporation; (3) the amount of capital stock; (4) the period of existence (not more than fifty years); (5) the number of shares; (6) "the number of trustees and their names, who shall manage the concerns of the company for the first six months;" (7) the name of the place, and the name of the county, in which the principal place of business is to be located. § 803. A copy of such certificate shall be received in all courts as prima facie evidence of the facts therein stated. § 804. When the certificate shall have been filed the corporators shall be a body corporate for the period limited. The company may regulate the trausfer of its stock, and may purchase, hold and convey any real and personal estate requisite for its purposes. § 805. If no purchaser appears at an assessment sale who is willing to take the stock and pay the assessment, the corporation may purchase such stock and hold the same for its own benefit. The stock so purchased shall be subject to the control of the remaining stockholders, and a majority of the remaining shares shall be deemed a majority of all the shares for the purpose of voting at any meeting. Id. The corporate powers shall be exercised by a board of not less than three trustees, who shall be stockholders, and who must subscribe to an oath. All elections shall be by ballot, at meetings within the state called as provided in the by-laws. Every stockholder has the right to vote, in person or by proxy, all his shares "for as many persons as there are trustees to be elected, or to cumulate said shares and give one candidate as many votes as the number of trustees multiplied by the number of his shares shall equal, or to distribute them on the same principle among as many candidates as he shall think fit." Those receiving the greatest number of votes shall be elected. The trustees fill vacancies. On a petition in writing to the district judge, signed by the holders of a majority of the stock, and verified by the signers, to the effect that they hold the amount set opposite their names, the judge shall issue a notice to the stockholders, calling a meeting for the purpose of removing any of the officers of the company. The judge shall preside, and his decision is final respecting the qualification of voters. The vote of a majority of all the stock of the company is necessary for removal. § 806. The vacancies thus occasioned are filled at the same meeting. Id. If a majority of any newly-elected board shall for thirty days neglect to qualify and file with the company their oath of office, a meeting shall be called by any officer, upon the request of one-third of the stock, to elect trustees instead of those failing to qualify. § 807. "Whenever the capital stock of any corporation is divided into shares, and certificates thereof are issued," the stock of the company is personal estate. Transfers may be made by indorsement and delivery of the certificate, but are only valid as between the parties thereto until the same are entered on the books. A married woman may transfer her stock, receive dividends and give any proxy or power respecting her shares as though she were a femme sole. \$810. The stockholders of any corporation may, by the hy-laws, prescribe the "time, manner and amounts in which the payment of sums subscribed by them respectively shall be made;" but if the by-laws do not thus provide the trustees shall have power to regulate the payment of subscriptions, and may levy and collect such assessments upon the capital stock as they think the interests of the company require. Notice of each assessment must, in all cases, be given to the stockholders personally, or by publication once a week for four weeks. § 811, Am'd L. 1891, ch. 58. Persons holding stock as executors, etc., may vote such stock. \$ 812. Every stockholder may pledge his stock by delivery of any evidence of his interest, and still vote the same at all meetings. \$813. Trustees can only declare dividends upon net profits. For dividing or withdrawing any of the capital stock, or reducing the same contrary to law, those trustees who do not enter their dissent at large on the minutes of the board, or who were not present at the time, shall, "in their individual and private capacities, be jointly and sev-erally liable to the corporation and the creditors thereof, to the full amount so divided, withdrawn, or reduced, or paid out." \$814. The total amount of corporate debts "shall not at any time exceed the amount of capital stock actually paid inand in case of an excess, the trustees under whose administration the same may have happened, except those who caused their dissent therefrom to be entered at large on the minutes of the board of trustees at the time, and except those not present. . . . shall, in their individual and private capacities, be liable, jointly and severally, to the said corporation, and in event of dissolution, to any of the creditors thereof, for the full amount of such excess." § 815. The trustees must keep a hook containing the names of all stockholders, showing the number of shares held by each, and the time when they became owners. Such book, and all books of the company, shall be open to the inspection of stockholders on all days excepting legal holidays. Any stockholder or creditor may demand certified copies of entries in such books. § \$17. Any officer who shall fail to make the proper entry in such book, or who neglects to exhibit papers as required, or who shall refuse to give a certified copy of an entry, "shall be deemed guilty of a misdemeanor, and shall forfeit and pay to the party injured a penalty of not less than one hundred dollars, nor more than one thousand dollars, and all damages resulting therefrom." § 818. The capital stock may be increased or diminished according to the needs of the corporation, but no reduction shall be made to an amount less than the corporate liabilities. § 819. Upon the dissolution of the corporation the trustees shall be trustees of the creditors and stockholders. § 822. The district judge may dissolve the corporation, after a vote in favor thereof hy a majority of the stockholders. § 823. The principal place of business may be removed to another county by filing with the clerk of that county a copy of the articles of incorporation. § 824. Unless the stockholders provide otherwise in the by-laws. only an amount greater than half of the capital stock of a mining corporation need ever be subscribed, when the amount of capital stock consists of "the aggregate valuation of the whole number of feet, shares or interest of any mining claim in this state," for the development of which the corporation was formed. Each owner in said mining claim will be deemed to have subscribed such an amount as will represent the value of the interest in the mine which he conveys to the corporation. § 825. Corporations formed for mining, milling or ore-reduction purposes may subscribe to stock in any corporation formed for constructing any work calculated to aid in the development of any mine in the state, and shall have all the liabilities and rights of individual stockholders. § 829.

Railroads.—Any number of persons, not less than three, "either in this state or the United States, being subscribers to the stock of any contemplated railroad," may form a railroad corporation. § 834. When \$1,000 for every mile of the road has been subscribed, and ten per centum of that amount paid in in cash, to

a treasurer to be selected from the subscribers, then the said subscribers may, in person or by written proxy, after a five days' notice from the treasurer, adopt articles of association, and may elect from among the subscribers not less than five nor more than thirteen directors. Id. Said articles shall set forth (1) the name of the corporation; (2) the period of existence (not more than fifty years); (3) the amount of capital stock (which shall be divided into shares of not more than \$100 each, nor less than \$10 each, as the articles may declare, and which shall be the actual contemplated cost of construction, together with the cost of right of way, motive power, "and every other appurtenance and thing, for the completion and running of said road, as nearly as can be estimated by competent engineers):" (4) the names and number of the directors (who shall hold office until others are elected according to the provisions of the by laws); (5) the termini of the road. the counties into which it shall extend, and its estimated length. Each subscriber must sign his name, naming his residence, place of business and the number of shares he will take. But, if a person who has paid his ten per centum is absent from the state, he may sign the articles by proxy. § 835. There must be attached to the certificate an affidavit made by three of the directors named, setting forth, in substance, that the required amount of stock has been subscribed and ten per centum thereof paid in. Id. Said certificate shall be filed with the secretary of state, and thereupon all who may be, or may become, subscribers, and all persons who may become stockholders, shall be a body politic and corporate, The corporation may hold and convey all real and personal property needed in the railroad business, and in general shall possess "all the powers and privileges, for the purpose of carrying on the business of the corporation, that private individuals and natural persons now enjoy." § 836. A copy of the articles of association shall be kept in the office of the secretary of the corporation for the inspection of any person. Id. The directors named in the articles shall organize within five days after their "election," having been notified of their election by the temporary treasurer. The secretary and treasurer must give bonds. § 837. Each succeeding board may open books for subscriptions, "but no subscription of stock, except the original subscriptions, shall be binding on the company or parties so subscribing until the same shall have been accepted and approved by a resolution of the board. In case a greater amount of acceptable stock shall be subscribed than the whole capital required by such company, the board of directors shall distribute such capital stock so subscribed as equally as possible among the subscribers; but no share thereof shall be divided in making such distribution, nor shall a greater number of shares be allotted to any one subscriber than by him subscribed for." Id. Annual meetings for elections must be held in a county on the line of the road. A majority vote of the stock represented at the meeting elects the directors. A stockholder can only vote the stock which he has owned for ten days. Directors must be absolute owners of stock qualified to vote at the election at which they are chosen. A majority of the directors must be residents of the state at the time of their election. § 838. The directors, or one-fourth of the stock, may call a meeting at any time between the annual meetings by giving fifteen days' public notice. No business shall be transacted at such meeting other than that specified in the published notice. § 839. The capital may be increased or reduced to the necessary amount by a vote of a majority of the stock; or the holders of a majority of the stock may, at an annual or called meeting, provide for a division among the stockholders of any surplus capital or funds, provided "that no such division or distribution shall be made until the road shall be built and equipped between the extreme points named in the articles of association." Id. The legislature may change the rates of fare and freight of all narrow gauge railroads constructed under this act. § 840. At any general meeting two-thirds in value of the stockholders may remove any president or director and elect others to fill their places, provided notice of the intended removal was given in the call for the meeting. § 841. The directors may fix the compensation of subordinate officers. § 842. Any such officer may be removed by the board and the vacancy filled. Id. The directors may fill vacancies in their own number. Id. The directors may make by-laws for the transfer of stock and for the conduct of all the corporate business, provided such by-laws are approved by a majority of the stockholders, and are not inconsistent with the laws of the state or the articles of association. § 843. The directors shall cause to be kept a book. called the "Record of Corporation Debts," in which the secretary shall record all written contracts of the directors, and a "succinct statement of the debts of the company,- the amount thereof and with whom made," and a memorandum shall be made on the margin when a debt is paid. The book shall at all times be open for the inspection of parties in interest. § 844. "No contract shall be binding upon the company unless made in writing." Id. The secretary shall keep books in which shall be recorded the proceedings of all meetings of the company or directors, and all business transactions. He shall also keep a "Book of Stockholders," containing the names of all who are, or have been, stockholders, showing their place of residence, the times and amounts of subscriptions, amount of cash paid in by each, and the time when they ceased to be owners of stock. book shall be open for the inspection of stockholders and creditors. A transfer book shall also be kept in the same office. § 845. Stock is deemed personal es-§ 846. No share is transferable until all previous calls thereon are fully paid. Id. No greater instalments than ten per centum of the amount of subscription may be demanded by the directors, unless otherwise agreed in the articles of subscription. § 847. The corporation shall have power to borrow, from time to time, under such restrictions as may be imposed by two-thirds in value of the stockholders, such sums of money, not exceeding in all the amount of capital, "as may be necessary for the construction and equipment of the road, at a rate of interest not to exceed fifteen per centum per annum, and to execute bonds or promissory notes therefor, in sums not less than \$1,000 in any one note or bond, and to secure said notes or bonds may mortgage their corporate property and franchise, and pledge the income of the company; and the directors of such company shall also provide, in such manner as to them may seein best, a sinking fund, to be especially applied to the redemption of such bonds on or before their maturity, and may also confer on any holder of any bond so issued for money borrowed, or in payment of any debt or contract, for the construction or equipment of such road as aforesaid, the right to convert the principal due or owing thereon into stock of such company at any time within six years from the date of such bond, under such regulations as the company may adopt." § 849. Within thirty days from the payment of the last instalment of the capital limited by the company a certificate stating the fact of such payment must be filed with the secretary of state. \$ 850. The company may receive, and in any manner convey, donations of real estate to aid in the accommodation of the railroad, and may purchase, hold and convey, in the same manner as individuals, any real estate necessary and proper for the railroad purposes. \$851. Any railroad "may cross, intersect, join and unite its railroad with any other railroad, either before or after constructed, at any point upon its route and upon the grounds of such other railroad company." Id. Any county, city or town may donate lands necessary for the use of any railroad. § 854. Lands used for any structures connected with the road shall not be held beyond the time when the legal existence of the company ceases, nor after the location of the tracks has been changed therefrom, nor after the company has ceased to use the structures for the maintenance of the track for five years in succession. In each such case the lands shall revert to the grantor and his assigns. § 856. Two or more companies may "amalgamate and cousolidate" their capital stock, in the manner agreed upon by the directors, with the written consent of the holders of three-fourths of the stock. Notice of the consolidation shall be given by publication, and a copy of the new articles of association shall be filed with the secretary of state. § 874. A certified map of the route

must be filed by every road with the clerks of the counties through, or into, which the road runs. \$ 877. An annual report must be made to the secretary of state, giving, in minute detail, the condition of the company. Failure to make the report on or before the first day of February each year subjects the company to a penalty of \$500 daily until such report shall be filed. § 878. It shall be unlawful to charge more than ten cents per mile for passenger, and twenty cents per ton for freight, transportation. § 885. "If such railroad company shall not within two years after the filing of its original articles of association begin the construction of its road, and expend thereon at least five per cent. on the amount of its capital stock, and finish the road, and put it in full operation within six years, its act of incorporation shall be void." § 888. All the officers signing a false report, certificate or notice shall be "jointly and severally liable for all the debts of the company contracted while they are stockholders or officers thereof, and shall likewise be guilty of a misdemeanor," and shall be fined in a sum not exceeding \$1,000. \$ 889. If the directors shall declare any dividend when the company is insolvent. or which would render it insolvent, those directors who do not file a certificate of absence or objection shall be "jointly and severally responsible for all the debts of the company then existing, and for all that shall thereafter be contracted, so long as they shall respectively remain in office." § 890. Street railroad corporations may be formed under this same act. § 893. Discriminations and rebates are unlawful. §§ 894, 895. Pooling is declared unlawful. § 896. The "long and short haul" discrimination is prohibited. § 897. Schedules giving minute information as to rates must be posted. § 898. For violation of any of the provisions of the last five sections the person offending shall pay to the person injured the full damages which such person has sustained, and shall pay to the state a fine of not less than \$2,000. § 900. Any officer or agent willingly suffering the performance of any act prohibited by said sections, or allowing the omission of any act therein required to be done, shall be guilty of a misdemeanor and shall be fined not less than \$2,000. § 901. The words "person or persons" mean any person, corporation, officer, agent or other person or persons acting in any of the matters mentioned in this act. § 903. Corporations may be formed by not less than three persons for the construction and operation of freight-transportation lines, including narrow-guage railroads, after a subscription of \$200 for each mile of railroad and \$100 for each mile of canal or flume, ten per cent, of which must have been paid in. The act is to encourage the construction of cheap transportation lines. The company shall not "be obliged to carry passengers." The method of incorporation is the same as that above described for ordinary railroads, §§ 906-910. When the issuance of county bonds in aid of a railroad is dependent upon a petition of the owners of a majority of the taxable property in the county, the property of the railroad company shall be excluded from all the calculations. § 911. Any railroad company, or other corporation, or person, may construct and operate a telegraph line as provided in sections 915-921. If construction is not begun and five per cent. of the capital stock expended within four years, the "act of incorporation shall be void." L. 1893, ch. 86.

Foreign corporations.— Every foreign corporation owning property or doing business in the state shall file with the secretary of state a certificate naming and appointing an agent within the state, upon whom process may be served, which certificate must be renewed as often as a change is made or a vacancy occurs. If any corporation fails for thirty days after a vacancy occurs to file such certificate, process may be served upon the company by delivering a copy to the secretary of state. L. 1889, ch. 44. Every such corporation must file with the county recorder of each county in which it does business an authenticated copy of its certificate of incorporation, with a certified list of the officers of the company. Comp. Laws 1885, § 1073. Any officer or agent representing a company doing business contrary to the provision of this act shall be deemed guilty of a misdemeanor, and fined from \$50 to \$500, and may, in addition, be imprisoned six months in the

county jail. § 1074. Any domestic corporation may, upon the written request of the holders of three-fourths of the stock, consolidate with any corporation, domestic or foreign, on terms to be agreed upon by the boards of directors. § 1075. The consolidation shall be evidenced by a certificate reciting the acts sought to be accomplished, the property to be conveyed, and the name of "the receiving corporation," and the property shall be transferred without further conveyance, such certificates must be filed with the secretary of state, § 1076.

Taxation.— An act of 1891 repeals all the existing laws on the assessment and collection of taxes for state and municipal purposes. An annual tax of seventyfive cents on every hundred dollars of taxable property is levied for state purposes. L. 1891, ch. 99, § 1. No stocks or corporate property are exempted from taxation. 8 5. The term "real estate" in this act includes railroads. The term "personal property "includes the rolling-stock and other personal property used in operating a railroad: the capital stock of all corporations (except mining corporations), and all property of every kind owned by a bank, except real estate. § 6. The county assessors shall assess all corporate and other property (except that to be assessed by the state board). They require from the officers of corporations statements of the corporate property, and such officers are punished for failure to furnish the statements, or for falsity therein, by fine or imprisonment, or both. §§ 8, 10. "The owner or holder of any stock in any firm, incorporated company or association, the entire capital of which is invested in property which is assessed, or the capital of which is assessed, shall not be assessed individually for his stock in such company or association." § 13. The property of every corporation is taxed in the county where it is situated, and the tax thus levied and collected in any county will be deducted "from the aggregate amount of taxes imposed upon or paid by said company for the same property" in the county where the principal office is situated. Id. The net proceeds of all mines are assessed for taxation for state and county purposes. § 75. The tax is a lien on the mines and mining claims. § 76. Every mining corporation must keep correct account-books for the inspection of assessors; and for refusal to show such books the officer in charge is subject to a fine of \$100 to \$500, or three months' imprisonment, or both. § 79. Banks must pay license taxes ranging from \$200 per month for those doing a business of \$500,000 or more per month to \$12 per month for those doing a business of less than \$25,000 per month. § 118. Common carriers regularly transmitting any gold dust, silver or hulliou must pay a license tax of \$150 quarterly. Id. The fee of the secretary of state for filing each certificate of incorporation is \$5, and for recording each certificate forty cents per folio. Comp. Laws 1885, \$ 1798. A state board shall annually assess all railroads and rolling-stock "at their cash value," and apportion the assessment to the various counties "in proportion to the number of miles of main track laid in such counties; provided, that to each county shall be apportioned the total assessment of side-track laid therein." L. 1891, ch. 51, § 4. Each railroad company must furnish to the board a detailed statement of the number of miles of road which it operates within and without the state, the value of the whole road, and the value of the part within the state. the number of each kind of rolling-stock used on the whole line, the number, kind and value of rolling-stock used in the state, and of that owned by the company and operated without the state, on its own or other lines; the gross earnings of the whole road, the gross earnings in the state, and the amount received as rental for any line that is leased; the cost of operating the road and the net income for the year, and the amount of dividend declared; the capital stock authorized and the amount paid in; the funded debt; the number of shares authorized and the number of shares issued; "any other facts the state board of assessors and equalization may require." § 8. If the required statement is not made, the assessment which the state board shall make will be conclusive and final. § 9. The board shall assess "all railroads, and the rolling-stock and side-track of all railroads, operated in the state. Assessments shall be made to the corporation . . . owning the same, and shall be made upon the entire railroad within the state, which shall include the right of way, bridges, culverts, tunnels, cuts, fills, embankments and the land covered by the right of way, as well as the track of such railroad, including the rails, couplings, spikes, ties, etc. The depots, stations, shops and buildings erected upon the space covered by the right of way; and all other property owned by such person, corporation, or association of persons, shall be assessed by the assessor of the county wherein they are situated." The state board shall transmit to the county auditor the assessed value per mile "as fixed by pro rata distribution per mile of the assessed value of the whole railroad and the rolling-stock of such railroad within the state, and the amount apportioned to the county; the number of miles of side-track of such railroad within the county and its assessed value; and the valuation so fixed shall be taxed for city, town and district purposes, at the same rates and by the same officers as the property of individuals within such city, town or district." \$ 10. The board shall "consider, treat and assess" the railroad "as an integral part of a complete, continuous and operated line of railroad, and not as so much land covered by the right of way merely, nor as so many miles of track consisting of iron rails, ties and couplings," § 11. The president or other managing officer of every railroad corporation shall, upon demand, state in writing, under oath, to every county assessor where the road runs, the number of miles of road in the county; also the number of miles in the state; also the value of all rolling-stock used in the state; also the proportion thereof of that county based on the total number of miles, except such parts of the rollingstock as are not used in the county. The valuation thereof by the company is not binding on the assessor. The assessor shall assess for taxation such property, real and personal, in his county, including a proportion of the rolling-stock as stated above. L. 1893, ch. 103.

§ 961. NEW HAMPSHIRE: 1 Constitutional provisions.—There are none.

Miscellaneous corporations.—Any five or more adults may, by written articles of agreement, form a corporation for any lawful business, except banking and "the construction and maintenance of a railroad." When the articles are executed and recorded with the town clerk and the secretary of state, the corporators become a body corporate. Gen. Laws 1878, ch. 152, § 1. The certificate shall specify (1) the object of the corporation; (2) the place of business; (3) "the amount of capital stock to be paid in." § 2. The capital stock shall be not less than \$1,000 nor more than \$1,000,000. The corporation may vary the amount within those limits, and also the number of shares, at a meeting called for the purpose. Within ten days after increasing or diminishing the capital, or the number of shares, the vote must be recorded with the town clerk and with the secretary of state. § 4. The voluntary dissolution of such corporation is provided for in chapter 72, Laws 1887.

Railroad corporations.— Any number not less than twenty-five, a majority of whom are residents of the state, may associate, by written or printed articles of agreement, for forming a railroad corporation. Laws 1883, ch. 100, § 1. The articles shall state (1) the corporate name; (2) the termini of the road, and its length as near as may be; (3) the name of each city, town and county into which the route will extend; (4) the gauge; (5) the amount of capital stock (not less than \$15,000 for each mile when the gauge is more than three feet, nor less than \$6,000 per mile where the gauge is three feet or less, to be divided into shares of \$100 each); the names of at least seven persons to be directors until others are elected. § 2. Each corporator shall subscribe his name and residence, stating the number of shares he will take, "but no subscriber shall be bound to pay beyond ten per cent, of the amount of his subscription unless the corporation is established." Id. The corporate name must be one not in use by any corporation in

¹ The acts of the legislature down to and including the laws of 1893 are included in this synopsis.

the state, and can only be changed by an act of the legislature. § 3. The "associates" may, at a meeting called for the purpose, reduce the capital stock, but not below the limit fixed in section 3, and the par value of a share shall not be reduced below \$100. "The directors shall be subscribers to the articles of association and a majority of them shall be inhabitants of this state. They shall appoint a clerk who shall be an inhabitant of this state, and who shall be sworn to the faithful discharge of his duties, and who shall record the doings of the directors and the proceedings of the association." They shall also appoint a treasurer, who shall give a bond. The clerk and treasurer hold office until permanent elections are made to those offices. The directors fill any vacancy in these offices, or in the board, which occur before the incorporation. The directors shall cause a copy of the articles, and a plan of the line, to be filed with the clerk of each city or town into which the road will run, and shall publish the articles in a county paper. Id. After the full amount of capital stock has been subscribed in good faith by responsible persons, an application must be made to a justice of the supreme court. who shall, if it appears to him that the law has been complied with, issue a certificate stating that the articles are properly drawn. § 4. The directors shall then record the articles, and all the certificates connected therewith, with the secretary of state, who shall record the same and issue a certificate of incorporation. § 5. The directors may call the first meeting of the corporation "at such time and place in this state and for such purposes as they may think the interests of the corporation require." A notice of such meeting shall be sent by mail to each stockholder, at least seven days prior to the day of meeting. At the first meeting "or any adjournment thereof" the corporation may make by-laws. choose directors "and all necessary officers and agents, and transact any other business of which notice has been given in the notification of the meeting," § 6-"When the corporation has been duly organized as herein provided, the directors may apply by petition to the supreme court . . . setting forth the facts relating to the establishment and organization of the corporation, its termini, and the route on which it is desired that said railroad shall be located, to determine whether the public good requires the laying out or construction of such railroad." The court shall "forthwith give such notice as justice may require, and, if no sufficient objection is shown, may refer said petition to the railroad commissioners, or to three referees to be appointed by it, who shall give notice, hear the parties as county commissioners are required to do in cases of petitions relating to highways referred to them, at which hearing any person whose business or property may be affected by such laying out and construction shall be heard." § 7. The commissioners shall report to the court whether, in their opinion, the public good requires such railroad. § 8. The capital stock may be increased from time to time at special meetings for the purpose, "giving to existing stockholders the right to take the new stock in proportion to their old stock before offering the same to new subscribers." § 11. The capital may in like manner be diminished "by reducing the stock of each stockholder pro rata." The gauge may also be changed. A certificate of any change in the capital or gauge must be filed with the secretary of state. Id. If at least twenty per cent of the original capital is not spent upon the road within four years, and if the road is not completed and open for use within six years, the corporate powers and existence shall cease," except as to the parts ready for use. § 12. No railroad corporation shall enter upon any property for the construction of its road until at least twenty per cent, of the parvalue of each share of the capital stock has been actually paid in, nor commence running its trains "until its paid-up capital stock shall be equal to at least onehalf its cost, including equipment." § 13. Any railroad may issue stock solely for the construction and equipment of a branch or extension, the location of such branch or extension being under the direction of the court and the commissioners: "provided, that such new stock shall be entitled to dividends only at the same rate as may by law be divided on the stock of the corporation before such

issue, or without additional capital stock if its indebteduess is not thereby increased." \$ 14. Within one year after the completion of the road, a man and profile thereof, with tables of grade, etc., certified by the engineers, must be filed with the secretary of state. § 16. At least one meeting shall be held each year to elect such number of directors as the by-laws may prescribe, and such meeting shall be held at such time and place within the state as the by-laws may prescribe or the directors may determine. Id. One company may by contract allow another company to perform all the transportation of passengers and freight over its line. Any railroad corporation may lease its road and railroad property to another railroad company, upon such terms and for such time as may be agreed upon by the directors and approved by "two-thirds of all the votes cast on that subject by the stockholders of each corporation," voting at the meeting held for the purpose. And any two or more such companies may apply to the supreme court, "to determine whether the public good will be promoted by the union of said cornorations, and, if said court shall decide that the public good will be promoted by a union of said corporations, they may unite and form a new corporation," with all the rights and powers, and subject to all the liabilities, of the corporation forming the union, "upon such terms and conditions, and with such guaranties," as may be agreed upon by two-thirds of all the votes cast at the meeting called for the purpose of considering the question. The rates of transportation existing August 1. 1883, shall not be increased on any part of the line leased or united, and any decrease in the operating expenses resulting from the union shall be met by a reduction of rates. "But no competing railroads, now prohibited by law from leasing or uniting, shall have a right under the provisions of this act to unite with or lease each other unless said roads, or one of them, has heretofore leased or united with some other road or roads for the purpose of forming a continuous line, or shall hereafter, or at the time of such lease or union. unite with or lease some other road for such purpose." Leases, and the terms of consolidation under this act, shall be filed with the secretary of state; also a profile and map of the route. The principal place of business, and principal office of the manager of a company formed by lease or consolidation, shall be within the state, unless otherwise provided by the legislature. The first meeting of the new corporation shall be called by one or both of the presidents of the uniting corporations, after a seven days' notice in a county paper. The legislature may take any of the uniting roads according to the provisions of their several charters, or the general laws. § 17. "Railroad corporations created by the laws of other states, operating roads within this state, shall have the same rights for the purposes of operating, leasing or uniting with other roads as if created by the laws of this state," § 18. "Such new railroad corporation may, if legally necessary to perfect such union, procure the assent of all the stockholders of the several corporations to the terms of union, and they may exchange their shares of stock in the former corporation for shares in the new corporation on such terms as have been agreed to by the votes of the corporations as aforesaid." & 19. If the new corporation cannot procure such consent, "such corporation or person holding stock may, if legally necessary to perfect such union, apply to the supreme court, have the value of the interest of such stockholder in the corporation, over and above its debts and liabilities, appraised by said court," etc. Id. "In like manner said corporation may, if legally necessary, procure the arrest of any bondholder or person holding a lien on the property of the corporation," and if the corporation and the bondholder cannot agree, an application may be made to the court, as provided in section 19, "if legally necessary." § 20. "On payment or tender of the amount of such appraisal, with interest to the date of such tender or payment, to the party holding such stock, bonds or lien, the interest of such holder of stock, bonds or lien shall cease." § 21. "Said corporation may issue new stock or bonds, and sell the same to an amount sufficient to make such payment or tender, and such bonds may be secured by mortgage on its road, if the corporation shall so vote," § 22. "Said corporation may fix the amount of its capital stock, and bring the stock of the uniting corporations to a common basis. but the capital stock of said new corporation shall not exceed the aggregate capital stock of such corporations actually issued and paid for at par at the time of such union, or that may be issued and paid for at par for the construction of branches or extension under section 14 of this act." \$ 23. "No dividend shall be made by such united corporation to any greater amount in the aggregate than such separate corporations are allowed by law to make at the date of such union." "Any railroad corporation organized or united under the provisions of this act may issue its bonds for the purpose of constructing, completing, improving or equipping its road, and for the purpose of liquidating the indebtedness of the corporation, to an amount not exceeding its capital stock actually paid in at the date of such issue, and may mortgage its road to secure the same if the corporation shall so vote." § 25. Chapter 5 of the Laws of 1889, entitled "An act amending chapter 100 of the Laws of 1883, and authorizing certain railroad corporations to form corporate unions and to make contracts of lease," provides in detail for settling the rights of dissenting stockholders in all uniting companies, upon a petition of the corporation to a justice of the supreme court. Said act provides in full for the consolidation of certain specified roads, and for the lease, purchase and business contracts of certain other roads, regulating the rights and liabilities of the specified corporations making such agreements and of the stockholders in such corporations, and prescribing the method of organizing the particular corporations named in the act formed by lease, purchase or consolidation, limiting the amount of their capital stock, etc., etc. This act contains the following provision: "No existing right of railroad corporations to lease or unite with other railroad corporations shall be impaired by this act, and such corporations and their stockholders shall have all the rights and remedies given by this act." § 16, ch. 5, Laws 1889. The directors of railroad corporations shall establish just and reasonable rates of transportation, and lines authorized by law to connect with each other shall furnish at reasonable rates proper means of transportation for the cars, passengers and freight of any connecting line. Laws 1883, ch. 100, § 26. The "long and short haul" abuse is prohibited. § 27. For violation of any provision of this act a corporation shall, in addition to liability for all damages caused by such violation, be liable for each offense in a penalty of \$500. § 28. "Corporations established by law for the construction and maintenance of railroads have the general powers given by law to other corporations, and those granted by their charters so far as they have not been subsequently changed by law." Gen. Laws 1878, ch. 158, § 1. "Any railroad corporation may purchase, hold and convey real estate lying near to or adjoining their road, not exceeding in value five per cent, of its capital stock," § 3. "No railroad corporation shall be exonerated from the payment of any bond or obligation issued by the directors in pursuance of authority given at any legal meeting, by reason of any discount made to the purchaser thereof in accordance with the unanimous vote of the corporation." § 4. Exact accounts of receipts and expenditures shall be kept by the company, "and in every year when its net receipts exceed the average of ten per cent, on its expenditures from the commencement of its operations, the excess shall be paid into the treasury of the state, until otherwise directed by the legislature." § 5. If the treasurer does not reside in the state and keep his office therein, an assistant treasurer shall be appointed to reside in the state and keep an office at the principal place of business therein. All dividends due to the resident stockholders of any railroad wholly or partly within the state shall be payable at the office of the treasurer or assistant treasurer in the state, "uuless otherwise requested by them." Attachments of stock shall be made by leaving copies at the same office, and transfers shall be filed there, "and such attachments and transfers shall have priority according to priority of filing in the office of either of said officers." § 6. The provisions of the preceding section do not apply to a foreign

corporation owning and operating a portion of its road in the state, unless that nortion of its road in this state is represented by capital stock made and issued "under the authority of this state." § 7. "No railroad corporation shall increase the amount of its capital stock without the consent of the legislature first had and obtained, and any officer thereof who shall aid and abet therein shall be punished by fine not exceeding twenty thousand dollars, and by imprisonment not exceeding two years." § 8. "No certificate of shares in the capital" stock of any railroad corporation shall be issued after the number of shares specifically limited in and by the charter of such railroad shall have been issued at the par value thereof, limited in said charter, unless such issue, beyond the number so limited, shall have been authorized by enactment of the legislature. subsequent to the charter and previous to such issue; and all provisions contained in railroad charters authorizing an increase of the capital stock of said railroads, respectively, beyond the number of shares specifically limited therein. shall be void and of no effect as to any increase of capital hereafter made." 8 9. Any officer issuing a certificate contrary to the provisions of the preceding section shall be imprisoned not exceeding one year, and fined not exceeding \$500. or be imprisoned not exceeding three years, and such certificate so issued shall bevoid. \$ 10. Rival and competing domestic companies shall not consolidate their lines within or without the state, and no such railroad corporation shall, in any manner, manage or control the business or earnings of any part of any suchcompeting or rival line, except in accordance with some "lease, contract or arrangement" authorized by the legislature and approved by the governor and council. § 11. Any officer or agent who shall violate the preceding section shall be subject to a fine or liability not exceeding \$500 for each offense. And upon the application of any citizen, an injunction shall be issued to restrain, under heavy penalties, any officer or agent from violating any provision of said section. \$ 12. "The two preceding sections shall apply solely to the operation and control of any roads by rival lines, or parts thereof, and not to contracts or leases for the running and operation of any road constructed as an extension or continuation of a separate and independent line, or as parts and parcels of the same, or to any side branches tributary or secondary to such line, all which are specially exempted from the provisions of said sections." § 13. "No sale, lease, mortgage or contract for the use of any railroad shall be valid unless it shall be in writing. filed in the office of the secretary of state, and authorized by the legislature." Ch. 159, § 2. All records, accounts and papers are subject to inspection by the legislature and the railroad commissioners. § 6. An annual report of the corporate "acts and doings, receipts and expenditures must be made to the governor and council." § 7. "When the net income of any railroad shall exceed ten per cent. upon its stock, the legislature may alter and revise the rates of toll for freight and passengers as they may deem just." § 9. If the proprietors of any railroad shall violate the provisions of any statute, for which violation no punishment is provided, they may be fined not exceeding \$1,000 for each offense, and shall also be liable for damages to any person injured. § 10. Any officer or agent knowingly violating the provisions of any statute when no remedy is provided may be fined for each offense not more than \$100. § 11. "No title to any real estate or interest therein shall be acquired by or against the proprietors of any railroad by any adverse possession, however exclusive or long continued." Ch. 160, § 25. The legislature "or others by its authority" prescribes the terms on which one railroad shall transport the cars, passengers and freight of a connecting line. Ch. 164, § 1. "No contract between two or more railroad corporations for the use of their roads shall be legal and binding for a longer time than five years, nor unless sanctioned in writing by the railroad commissioners and approved by the governor and council." § 10. "The trustees to whom any railroad has been assigned or conveyed in mortgage for the benefit of creditors shall call a meeting of the creditors whose claims are secured by such mortgage, once a year," to be

held near the railroad. Notice shall be published in two daily papers of Boston, and in one paper in each county in which the railroad is located. Ch. 165, § 1. If the trustees, on the application of the creditors to the amount of one-third of the sum secured, do not call the meeting within fourteen days, five or more of the creditors holding one-third of the claims may call the meeting. § 2. At such meeting the trustees must make a report like a directors' report to stockholders. \$3. At any such meeting the creditors may elect from three to five trustees, being creditors, and a majority of them being residents of the state. Each creditor has one vote for every hundred dollars of his debt, and may vote by proxy. § 4. A board of railroad commissioners shall, by one of their number, examine into the affairs of all railroads at least once a year, and report to the secretary of state all the acts and doings of every railroad: also whether they are proceeding according to law in the conduct of their husiness. Ch. 157, §§ 7, 8, and ch. 101, L. 1883, § 4. The annual expenses of the board, including the salaries of members and the expense of an accountant, shall be borne by the several railroads in proportion to their gross receipts, and shall be apportioned by the board of equalization, the same to be collected in the manner provided by law for the collection of taxes on railroads. L. 1883, ch. 101, § 3. The commissioners shall have general supervision of all railroads. It shall be the duty of the board to fix the maximum rates for all railroads, and to change the same as the public good may require. Am'd Laws 1893, ch. 5, § 4. Every railroad corporation shall, whenever requested, furnish to the board any information concerning the condition and management of the road. "and particularly copies of all leases, contracts, agreements for transportation with express companies, or otherwise to which it is a party." § 9. The board shall, from time to time, examine the hooks and accounts of the company, and fix the times for publishing statements of the doings and condition of the road. § 11. Upon the application of a director, or of the owner or owners of one-fiftieth of the paid-in capital stock, or of the owner of bonds or other evidences of debt equal in amount to one-fiftieth of the paid-in stock, the board shall examine the financial condition of the company and publish a statement of the same in a daily paper of Concord. § 12. The board shall at all times have access to the list of stockholders, and may cause the same to be copied for the use of the board or of stockholders. § 13. For refusal to exhibit its books, or to keep accounts in the manner prescribed by the board, or for neglect to comply with the lawful directions of the board, every railroad company shall forfeit for each offense a sum not exceeding \$1,000. § 14. The board shall prescribe the form for the annual returns which the directors are required to make to the board. The form may conform to that required by the interstate commerce commission, if one month's notice of the proposed change is given to the corporation. § 16, Am'd Laws of 1889. ch. 48.

The conditional sale of rolling stock and equipment is provided for. The contract must be recorded with the secretary of state. Laws 1893, ch. 25.

Railroad and steamboat companies shall submit to quarantine regulations. Laws 1893, ch. 30.

General provisions.—At least one director in every domestic corporation, having stockholders resident in the state, must be an actual inhabitant of the state. Every corporation may have "perpetual succession" unless incorporated for a limited term. Gen. Laws, ch. 147, § 3. By-laws not repugnant to the laws of the state may provide for the election and removal of members; prescribe the times and places of meetings, and the manner of calling and conducting them; and may regulate the number of officers, their powers and duties, the mode of choosing them, and their term of office. § 4. Corporations may make only the contracts necessary for the transaction of their business, and shall not be capable of binding themselves as sureties or guarantors. § 5. They may purchase, hold and convey only the real and personal estate necessary for their authorized business, "not exceeding the amount authorized by their charter or by statute." § 6. The

debts due the corporation may be secured by mortgage, pledge or attachment of any property, real or personal. But property acquired by reason of such mortgage, pledge or attachment shall not be held for more than two years. § 7. A clerk must be appointed, and he shall be and continue a resident of the state and keep his office in the state. \$8. All records and files in the office of the clerk shall be open to the inspection of stockholders, and of creditors whose demands are due and unpaid, and of their attorneys. \$ 10. All accounts and minutes kept by any officer, "all records of certificates and transfers of shares, all original certificates and transfers on file, and original papers and evidences of debts due to such corporation," may be inspected by any stockholder, and by every creditor whose demand is due and unpaid, "so far as they have any relation to the claim of such creditor." \$11. The clerk, or any other officer or agent, must furnish. on demand, and on payment of the fee allowed to clerks of court for such services, to any stockholder, or to any such creditor, a certified copy of any vote, record or account, and of any original paper which such party is entitled to inspect. § 12. Any officer who shall fail for seven days to comply with a lawful demand for such certified copy shall forfeit for such offense a sum not exceeding \$1,000, to be paid to the party aggrieved. § 13. If there is a failure to hold the annual meeting, or if for any reason a meeting cannot otherwise be lawfully called, a justice of the peace shall, upon the written application of the owners of one-twentieth of the stock or property, issue to one of the applicants a warrant to call a meeting. §§ 15, 16. Any corporation whose power may in any manner expire shall continue a body corporate for three years for the purpose of closing up its affairs. § 17. The legislature may at any time alter, amend or rereal a charter, "or modify or annul the powers of any corporation," whenever the public good requires. But the existing liability of the corporation or officers shall not be impaired thereby. § 18.

The following provisions apply to all dividend-paying corporations: Corporations shall be organized within three years from the passage of the act of incorporation. Ch. 148, §§ 1, 2. The business of the corporation shall be managed by the directors. "subject to the by-laws and votes of the corporation," and by officers appointed by the directors or the corporation. § 3. There shall be at least three directors, unless otherwise provided in the charter, one of whom shall be elected president by the directors or the corporation, as the charter or by-laws may prescribe. § 4. The amount of capital stock "shall be fixed and limited by the corporation at its first meeting, and the number and amount of shares." § 5. At any meeting called for the purpose, the corporation "may increase or reduce its capital stock and the number of shares therein, but the capital stock when so increased shall not exceed the amount authorized by law." § 6. The corporation, "by the unanimous vote of all the shares represented at any meeting called for that purpose, or by the written consent of all the stockholders" filed with the clerk, may increase or diminish the number of shares, but the capital stock shall not be increased or diminished at the same time, and the par value of the shares shall not be fixed below \$50. § 7. Shares shall not be disposed of at less than par value, except at auction sales to collect assessments. § 8. Only certificates for full-paid stock shall be issued, unless the amount actually paid is stated in the certificate. § 9. A record of the names and residences of the stockholders, and the number of shares owned by each, must be kept. § 10. The delivery of a stock certificate to a bona fide purchaser or pledgee for value, with a written transfer of the same, or a written power of attorney to sell, assign and transfer the same, signed by the owner, shall transfer the title as against all parties; but such transfer shall not affect the right of the corporation to treat the holder of record as the holder in fact until the transfer is recorded or a new certificate issued. § 12, Am'd L. 1887, ch. 16. The free transfer of shares shall not be restricted by the by-laws. § 13. The corporation may, at the first meeting, or any meeting called for the purpose, assess upon each share such sums as they think best, not exceeding in all "the amount at which the shares were originally limited." Or such assessments may be made by the directors, § 15. Except in banks whose charters make other provision each share has one vote, but no stockholder shall vote more than one-eighth of the whole number of shares. § 18. A stockholder who is challenged must swear that he is a bong fide owner of the shares claimed by him. § 19. Any one holding stock as executor, etc., or any person who has pledged his stock as collateral security, may vote as a stockholder. \$ 20. Except in railroad corporations, any stockholder may vote by proxy. But no stockholder shall be proxy for another stockholder, and no person shall act as proxy for more than one stockholder. § 21. Proxies are good only for one meeting, which shall be named therein. § 22. No shares on which assessments are due and payable shall be voted. § 23. In railroad corporations, proxies are allowed only in case of women stockholders, and those who are unable to attend the meeting by reason of sickness, infirmity or old age. Such proxies must have affixed an affidavit stating the cause of non-attendance. At such meetings no proxy shall vote on shares exceeding in par value \$5,000, including his own shares, if he is a stockholder. § 24. A stockholder can be represented by only one proxy at the same meeting. Id. The penalty for fraudulently voting, or fraudulently receiving or procuring the transfer of stock for the purpose of voting thereon, or for directly or indirectly soliciting "any proxy for any other person to vote upon." is imprisonment not exceeding one year, or a fine of \$500, or both. § 25. dividend shall be made, and no part of the capital stock shall be withdrawn or refunded, to any of the stockholders, where the property of the corporation is insufficient, or will be thereby rendered insufficient, for the payment of all its debts." Ch. 149, § 3. Excepting banks and insurance companies, corporations shall not contract debts or incur liabilities "exceeding one-half of its capital stock then actually paid in and unimpaired, and of its other property and assets." § 4. No loan shall be made by any corporation, excepting banks, to any stockholder therein. § 2. If any corporation violates any of the three preceding sections, the directors not dissenting shall be individually liable to the amount of such loan, dividend or sum refunded or withdrawn or of the excess of debts and liabilities above half the capital stock paid in and of the other property and assets, for all the debts and contracts of the corporation then existing or contracted while they respectively remain in office. § 5. Any stockholder receiving any loan or dividend made in violation of sections 3 and 4 shall, "to the amount by him received, be individually liable for all the debts of the corporation then existing or afterward contracted, until the same is repaid, or paid to the creditors of the corporation." § 7. Stockholders, except in banks and railroads, "shall be liable for all debts and contracts of the corporation until the whole amount of the capital fixed and limited by such corporation shall have been paid in," and a certificate to that effect, under oath, signed by the treasurer and a majority of the directors, has been filed with the clerk of the city or town in which is situated the principal place of business. "Stockholders in railroads shall be liable only to the amount of the par value of their stock therein and not otherwise." This section applies to the stockholders of "loan and trust companies and all other corporations except banks, empowered to do a banking busi-§ 8, Am'd Laws 1889, ch. 63. "No vote or obligation given by any stockholder, whether secured by pledge or otherwise, shall be considered as payment of any part of the capital stock." § 9. If there is no place of business in the state, files and records required to be kept by the town clerk shall be kept in the office of the secretary of state. § 10, Am'd Laws 1889, ch. 14. All corporations, except railroad and banking companies, shall annually in the month of May make a return to the town clerk and the secretary of state of the assessments voted and paid in, the debts due to and from the company, and the value of all the corporate property and assets. Failure so to do renders the treasurer and directors "individually liable for all the debts and contracts of the corporation then exist-

ing or which shall be contracted until such return is made." \$11. No person holding stock as executor, etc., or as collateral security, shall thereby be personally liable as a stockholder, but the pledgor is liable, and the funds in the hands of an executor, etc., are liable. § 13. All officers signing a false certificate, return or notice shall be "individually liable for all the debts of the corporation contracted while they were in office," § 14. Any stockholder who has voluntarily naid any corporate liability, after demand for payment thereof, which he was legally bound to pay, may recover from the other stockholders by a suit in equity: "but no director, officer or stockholder who advised or consented to any act in violation of the provisions of this chapter shall recover against any stockholder who did not advise or consent thereto." \$ 15. The treasurer of railroad corporations, and the clerk of other corporations, except banks, shall annually in May, until the capital is paid in and a certificate to that effect filed, cause to be filed with the town or city clerk a list of the names and residences of stockholders; and any person whose name is on such list is deemed a stockholder until he files with such town clerk a certificate of transfer signed by the treasurer or clerk of the corporation. §§ 16. 17. For neglect to make the annual return in May, any treasurer or clerk shall forfeit, to any person who will sue, a sum of \$50 for every such neglect; and for wilful omission to return such list, or to deliver such certificate to any stockholder, with intent to delay or defraud any stockholder or creditor, he shall be fined not more than \$5,000, or be imprisoned not more than three years, or be both fined and imprisoned. §§ 18, 19. The directors and treasurer of all corporations, except banks, in default of filing with the town clerk, within thirty days after the capital stock is fully paid in a certificate declaring such payment, are "liable for all the debts of the corporation contracted after the expiration of said thirty days and before such certificate shall be made and recorded." § 20. Any officer who shall have paid any liability imposed upon him by this chapter may recover the amount so paid from the company, but has no claim therefor against individual stockholders. \$21. The only way to enforce "the payment of a debt of a corporation against the individual stockholders thereof" is by a bill in equity. Ch. 150, § 1. If any officer whose duty it is to call a meeting shall refuse or unreasonably neglect to call a meeting to provide for the payment of a corporate debt which has been demanded, he shall forfeit \$1,000, to be paid to the person injured. \$8.3.4. Chapter 54, Laws 1879, provides that the question of cumulative voting shall be submitted to the people at the November election in 1880, but the later session laws contain no further reference to the subject. The supreme court may dissolve any corporation, or decree such relief as may be just, upon petition of one-fourth in interest of the stock-Laws 1891, ch. 46. All foreign manufacturing corporations, doing business in the state, shall have the power to "acquire, purchase, hold or convey real estate and other property." Laws 1889, ch. 101.

For the laws governing foreign insurance companies see Gen. Laws, ch. 174, and Laws 1891, ch. 54.

Taxation.— No private act of incorporation, "bereinafter described and assessed," shall have the force of law until the corporators shall have paid into the state treasury the following sums, to wit: "On every act incorporating, chartering or renewing the corporate powers of any bank except savings banks," one dollar per thousand on the largest amount of capital authorized, and on "every supplement thereto, except such as provide for an increase of capital," twenty-five dollars; on every act "incorporating, chartering or renewing the corporate powers of" any savings bank, one hundred dollars, and "for every supplement thereto," twenty-five dollars; on every act "incorporating, chartering or renewing the corporate powers of" any railroad or insurance company, fifty cents per thousand on the largest amount of capital authorized in said act so incorporating, chartering, renewing or extending the powers of any such corporation, and "for every supplement thereto, except such as pro-

vide for an increase of capital," twenty-five dollars; on every act "incorporating, chartering or renewing the corporate powers of "any other company which has for its object a division of profits, fifty dollars, and twenty-five dollars for every supplement. Gen. Laws. ch. 13, \$ 5. Railroad realty not used for the ordinary purpose of operating the roads, and all real estate so used for which no part of the capital stock was expended, "shall be appraised and taxed as real estate." Ch. 53. S 5. The real estate of mining companies is taxed as realty until a dividend can be declared from the profits of the business. § 3. Personal property liable to taxation includes stock in domestic corporations, except manufacturing and railroad corporations: stock in foreign corporations, owned by residents of the state if the same is not taxed to the owners by the towns where the corporation is located: the surplus capital on hand of banking institutions. 86. "No statute provisions shall be so construed as to subject any stock to double taxation," § 8. Stock, except in manufacturing and railroad corporations, though pledged, mortgaged or assigned as security, is taxed to the general owner where he resides, if in the state, otherwise to the corporation at its principal office in the state. Ch. 54. § 5. Stock in banks is taxed to a resident owner where he resides: to a non-resident owner where the bank is located. § 7. Unless other provision is made, corporate property is taxed "to the corporation by its corporate name in the town in which it is located." § 8. For false returns the tax is increased four-fold. Ch. 55. \$ 5. A principal officer of every corporation shall furnish an account of all shares and denosits owned by any inhabitant of a town, upon the request of a selectman of that town. § 15. For wilful neglect so to do, the officer shall be fined not more than \$400. § 16. Persons transferring stock to avoid taxation, or making deposits under fictitious or false names, or false residences, for such purpose, are punished by a fine of not more than \$1,000. § 17. Corporate property is sold for taxes the same as that of individuals, Ch. 58, \$ 12. Railroads are taxed by a state board of equalization. Ch. 61. Every railroad corporation in the state, not exempted from taxation, shall pay an annual tax upon the actual value of the road, rolling stock and equipments, as near as may be in proportion to the taxation of other property in all the cities and towns. "But any portion of every railroad which has not been completed and opened for use for the period of ten years from the 15th day of September in each year, preceding the time when such tax is assessed, shall be exempt from taxation." Ch. 62, § 1, Am'd Laws 1881, ch. 53 and ch. 75. The state board shall determine the value of railroad property and the rate of taxation upon the same. § 2. For neglect to furnish the state board with required evidence, a railroad corporation shall be required to pay a tax of two per cent. upon its "authorized capital stock and debt." § 5. Upon failure to pay the assessed tax in September, interest shall be added at the rate of ten per cent. per annum. § 6. One-fourth of the railroad tax is apportioned to the towns in proportion to the share of corporate capital expended therein for buildings and right of way. Each town receives such proportion of the residue as the whole number of shares in such town bears to the whole number of shares in the corporation. The remainder goes to the state. § 7. The treasurer of every railroad corporation shall keep the names and residences of all stockholders, and a list of the number of shares owned by each, and shall annually, on or before June 1, send to the state treasurer a statement under oath of the number of shares owned in each town. For failure herein he shall forfeit \$100. §§ 9, 10. Every telegraph corporation shall pay an annual tax as near as may be in proportion to the taxation of other property in the state, upon the value of the telegraph line, including the office furniture and machinery. The state board shall assess the tax. § 14, Am'd Laws 1881, ch. 53. A railroad corporation may endeavor to secure a reduction of its tax assessments by application to the supreme court, any abatement granted by said court to be deducted from the subsequent annual taxes. Laws 1881, ch. 53. Shares in domestic banks are taxed at their par value to resident owners thereof in the town in which they reside; to non-resident owners, in the town where the bank is located. Ch. 65. § 1. The cashier of every bank must annually send to the towns in which shareholders reside a list of all the shareholders in his bank, and furnish to the assessors of the town where the bank is located a list of foreign stockholders. SS 2. 3. The penalty for failure so to do, in either case, is \$100 for each offense, § 4. The town where the bank is has a lien on the shares for taxes, and the hank has a lien on the shares and dividends of foreign shareholders. §§ 1, 5. The real estate of savings banks is taxed as other real estate. § 6. Treasurers of savings banks must transmit to the state treasurer an annual statement under eath of the amount invested in real estate within the state, and of the amount of deposits and accumulations in their banks, giving the amount deposited by the residents of the respective towns, and specifying the amount of deposits or accumulations owned by uonresidents or those whose residence is unknown. \$7. The tax shall be one per cent on the amount of deposits and accumulations so returned, which is not invested in real estate, the same to be paid by the bank. § 8. The tax is apportioned among the towns in proportion to the deposits of residents. § 9. Stocks subject to taxation in the state, standing in the name of any savings bank, but held as collateral, shall be reported with the owner's uame by the treasurer under oath to the assessor of the town where the owner resides, if in the state, otherwise where the bank is located. Ch. 170, § 17. Towns may by vote exempt from taxation for not more than ten years all property and capital used in any manufacturing business, provided no exemption be granted in favor of property or capital previously exempted by any other town in the state. Ch. 53, § 10, Am'd Laws 1887, ch. 21. Stock fire insurance companies shall pay, in lieu of all other taxes, one per cent. on their paid-up capital. Laws 1887, ch. 57. Every foreign insurance company shall pay a tax of one per cent. on its premium receipts within the state, under penalty for failure of having its license revoked at the discretion of the insurance commissioner. Gen. Laws, ch. 174, §§ 4, 5. Foreign manufacturing companies shall conform to the general laws as to taxation, the same as home corporations. Laws 1889, ch. 101. Any corporation "obtaining a charter or an increase of capital stock from the legislature," or under the law relating to voluntary corporations, which shall not carry on its business in the state and have its principal office therein, shall, before receiving its charter or "certificate of record of voluntary corporation," pay a charter fee of "one per cent. on the stock allowed, or on the increase, when the same does not exceed fifty thousand dollars: three-fourths of one per cent, when more than fifty thousand dollars and not exceeding one hundred thousand dollars;" one-half of one per cent, when from \$100,000 to \$1,000,000; and three-eighths of one per cent, when in excess of \$1,000,000. The pretense of a purpose to establish the business of the corporation in the state to avoid payment of the charter fee, and failure to do so, forfeits the charter, and the stockholders become liable as partners on all contracts made by the corporation, and no suit shall abate because of non-joinder of all the partners. Laws 1889, ch. 89.

§ 962. NEW JERSEY: 1 Constitutional provisions.— No county or municipality shall give any aid to, or loan its money or credit to, or have any interest in any stock or bonds of, any corporation. Amendments to Constitution of 1844, art I, § 19. Neither the state nor municipal corporations shall donate land or money to, or for the use of, any corporation whatever. Id., § 20. No private, special or local bill shall be passed granting to any corporation or individual any exclusive privilege, immunity or franchise whatever, or the "right to lay down railroad tracks." The legislature shall pass no special act conferring corporate powers, "but they shall pass general laws under which corporations may be organized and corporate powers of every nature obtained, subject nevertheless to repeal or alteration at the will at the legislature," Id., art. IV, § 7.

Miscellaneous corporations.—Three or more may incorporate "for any lawful business purpose whatever," excepting insurance, banking or other busi-

¹ The acts of the legislature down to and including the laws of 1893 are included in this synopsis. 1783

ness intended to derive profit from the loan and use of money; also excepting railroad companies or any other company which shall need the right of taking and condemning lands (except those for the damming of rivers and streams, and for the purposes pertaining thereto). A certificate must be made which may (in the case of any company conducting mining operations as a part of its business) contain a provision "that the board of directors shall have full power to levy assessments on general stockholders until the stock of such stockholders shall be fully paid up: that then and in every such case no action of the stockholders of such company shall be necessary in order to impose, levy and collect such assessments." This section shall not be construed "to forbid the formation of any company under said section which shall propose to carry on transportation by means of a railroad operated by it as lessee thereof, if such railroad be already built, and has acquired its right of way and other appurtenances, and which new corporation formed does not in fact need to acquire the right of taking or condemning lands; but such corporation shall not in any case be authorized to acquire lands for right of way additional to that by it leased as aforesaid. . . . This act shall apply as well to corporations already formed and in possession of leased railroads as to those hereafter formed." Revision of 1877, p. 179, Am'd Sup. 1886, p. 149, Laws 1888, ch. 80, Laws 1889, ch. 264. The certificate shall set forth (1) the corporate name: (2) the place or places of business, within or without the state, and the objects of the incorporation; (3) the total amount of the capital stock (which shall be not less than \$2,000), the amount with which they will begin business (which shall not be less than \$1,000), the number of shares and the par value thereof (but a corporation for the purpose of keeping herd registers need only have a capital of \$200); (4) the names and residences of the stockholders, and the number of shares held by each: (5) the time of the commencement and the termination of the corporation (the period of existence not to exceed fifty years). The certificate shall be proved and recorded the same as deeds of real estate, and then filed in the office of the secretary of state. Revision of 1877, p. 179, Am'd Sup. 1886, p. 149. The original certificate may, with the assent of a majority in interest of the stockholders at a special meeting, be amended by a certificate to be executed, recorded and filed in the same manner as the original certificate; and such certificate shall take the place of the original certificate, and be deemed to have been recorded and filed on the date of filing and recording the original certificate. But nothing shall be inserted inconsistent with the law under which the corporation was organized, and nothing herein contained shall affect any pending suits, or impair any accrued rights of action against stockholders or directors. The amended certificate shall not increase or decrease the capital stock. Laws 1893, ch. 254. Upon filing the certificate the corporate existence hegins at the time fixed in the certificate, but the legislature may, at pleasure, dissolve any such company. Revision, p. 180. Any such company may carry on part of its business without the state, and have one or more places of business out of the state, and may hold, purchase and convey real and personal property out of the state the same as if such property were sitnated in the state: provided, that the certificate shall state what portion of the business is to be carried on outside of the state; in what town or city, county and state, its principal place of business out of the state is to be situated; in what other states or countries it proposes to do business, and also the name of the city or town and county in which the principal part of the business within the state will be transacted. p. 180, Am'd Laws 1889, ch. 265. The directors must be stockholders. There shall be a secretary and a treasurer. p. 180. There shall be not less than three directors, and, except as hereinafter provided, they shall be chosen annually by the stockholders, at a time and place designated by the by-laws. One of the directors shall be chosen president, either by the directors or by the stockholders, as shall be directed by the hy-laws. But, by a provision in the original certificate, any company may classify its directors in respect to the time for which they shall severally hold office, the several classes to

he elected for different terms: provided, that no class shall be elected for a shorter period than one year, or for a longer period than five years, and that the term of at least one class shall expire each year. "Any such company whose directors shall be so classified, and which shall have more than one kind of stock. may, by so providing in its original certificate of incorporation, or in its by-laws. confer the right to choose the directors of any class upon the stockholders of any class or classes, to the exclusion of the others." p. 180, Am'd Laws 1889, ch. 265. Any corporation making a classification of this kind may, at any subsequent time, by a majority vote of the outstanding capital stock, repeal any or all of the provisions for such classification, or for electing certain classes of directors by certain classes of stockholders. Each share, of whatever class, shall have one vote. The meeting may be called by a majority in interest of the stockholders of all classes. Laws 1893, ch. 268. The number of directors may be increased, or decreased to not less than three, with the assent in writing of the holders of two-thirds of the stock. Laws 1893, cb. 254. The secretary and treasurer shall also be chosen annually, either by the directors or stockholders, as the by-laws shall direct. All other officers are chosen in such manner and for such terms as the by-laws may direct. p. 181. Vacancies shall be filled in the manner provided by the by-laws. Id. Absent stockholders may vote by proxy. The by-laws may determine the manner of calling and conducting meetings: the number of shares that shall entitle a stockholder to one or more votes; what number of stockholders shall attend, or what number of shares shall be represented, at any meeting to constitute a quorum; and if a quorum is not so determined, a majority in interest shall make a quorum. Id. The first meeting shall be called by a notice signed by a majority of the corporators, such notice to be published two weeks before the time of meeting, in a county paper, or to be served personally on all the corporators two days before the meeting. Notice may be waived by the agreement of all the corporators. Id. Any "company shall have power to create and issue certificates for two kinds of stock, namely, general stock and preferred stock; which preferred stock shall at no time exceed two-thirds of the actual capital paid in, and may be made subject to redemption at par at a fixed time, to be expressed in the certificate thereof: and the holders of such preferred stock shall be entitled to receive, and the said company shall be bound to pay thereon, a fixed yearly dividend, to be expressed in the said certificate, not exceeding eight per centum, payable quarterly, halfyearly or yearly, before any dividend shall be set apart or paid on the said general stock, and in no event shall the holder of such preferred stock be individually or personally liable for the debts or other liabilities of said company, but in case of insolvency such debts or other liabilities shall be paid in preference to such preferred stock;" but, unless otherwise provided in the original articles, such preferred stock shall only be created by the directors authorized "by a vote of at least twothirds of the stock voted at a meeting of the general stockholders, duly called for that purpose," Id., Am'd Laws 1889, ch. 265. Shares of stock are personalty, and shall be transferable on the books in such manner as the by-laws provide. If transfers are made as collateral security, that fact shall be expressed in the entry. Certificates of stock must be signed by the treasurer. p. 181. The directors may, from time to time, "assess upon each share of general stock such sums of money as two-thirds of the stockholders in interest shall direct," not exceeding, in the whole, the amount at which each share was originally limited. Such assessments shall be paid in such instalments, and at such times, as the directors shall direct, after a thirty days' notice in a county paper. Id. After the payment of the last instalment of the capital stock fixed and limited by the certificate, the president and the secretary or treasurer shall make a certificate stating the amount of capital fixed and paid in, which certificate, sworn to by the officers making the same, shall be filed with the secretary of state within ten days. p. 182, Am'd Laws 1893, ch. 254. A like certificate shall be made and recorded, upon the payment of the last instalment of an increase of capital stock. Id., Am'd Laws 1893, ch. 254.

If such officers shall neglect to perform the duties required of them by the two preceding sections for thirty days after a written request so to do by a creditor or stockholder, "they shall be jointly and severally liable for all the debts of the company contracted before such certificate shall be recorded as aforesaid." Id. Every such company may, by a two-thirds stock vote, at a meeting called for the purpose, change the nature of its business. A certificate of the proceedings must be made and recorded with the secretary of state within ten days after the meeting. p. 182, Am'd Laws 1893, ch. 254. For proceedings in case of dissolution, see pp. 182, 1288, Am'd Sup. 1886, p. 154, and Laws 1893, ch. 254, Transfer books, and books containing the names of stockholders, shall be open for the inspection of stockholders for thirty days before an election; and ten days before an election the officer in charge of the transfer books must make an alphabetical list of the stockholders entitled to vote, and the number of shares held by each, the same to be open for inspection by any stockholder. For neglect herein, each officer shall forfeit \$200. Such books shall be the only evidence as to who are the stockholders entitled to examine the same, or to vote at the election, p. 183. Unless otherwise provided in the charter, certificate or by-laws, each stockholder shall, at such election, be entitled to one vote in person or by proxy, for each share of stock held by him. But no proxy shall be voted on allowed or received for more than three years from its date; nor shall any share be voted which has been transferred on the books within twenty days of the election. Persons holding stock as executors, etc., or pledgors of stock, may vote such stock at all meetings. All laws intended to prevent non-resident stockholders from voting on the stock held by them are repealed. p. 184. The list of stockholders provided for above must be produced by the directors at such election, and any director who refuses to present such list for the inspection of the stockholders shall be ineligible to any office at such election. Id. At any election other than the first election, no clerk, judge or inspector shall be elected director, nor be appointed to any vacancy caused by the unlawful election of such elective officer. No company shall vote upon its own stock which it has purchased, or taken for debts. The supreme court has power to hear complaints and decide disputes concerning elections, Id. No by-law of the directors regulating the election of officers shall be valid unless made thirty days previous to an election, and subject to the inspection of any stockholder. The stock-book shall be the authority on questions regarding the right to vote. p. 185. If the time fixed for elections passes without an election, the president and directors, or upon the request of five stockholders the secretary, must call a meeting for that purpose. A judge of the supreme court may order a notice of an election, upon the request of a stockholder, and may punish the directors for contempt of court for refusing to obey such order. At any such postponed election the shares shall be voted only by those in whose names they stood on the books at the time when the regular election should have been held. Id., and p. 196. No person can be elected director unless a bona fide stockholder at the time of his election, and upon ceasing to be a bona fide stockholder he ceases to be director. Id. Within thirty days after an election, all corporations doing business in the state must file with the secretary of state a verified list of all officers, for which a blank will be furnished by the secretary of state. Id., Am'd Supp., p. 169. In all cases where it is not otherwise provided, all meetings of stockholders shall be held at the principal office or place of business in the state. The directors may hold their meetings, have an office, and keep their books (except stock and transfer books) outside of the state, if the by-laws so provide. But a principal office or place of business shall always be kept within the state, where stock and transfer books shall be kept, and the chancellor or the supreme court may summarily order any of the books to be brought into the state and kept therein, and for failure to obey the order the charter may be forfeited and the directors punished for contempt. p. 186. If for any reason a legal meeting cannot be otherwise called, three or more stock holders may call a meeting by

a ten days' notice in a county paper. Id. All manufacturing corporations shall. annually, "after reserving over and above their capital stock paid in, as a working capital for said corporation, a sum to be specified by their hoard of directors, and not exceeding the amount of one-half of the capital stock, paid or secured to be naid, declare a dividend of the whole of their accumulated profits exceeding the amount so reserved as a working capital, and pass the share or dividend of each stockholder of such profits to the credit of their respective stockholders, and pay the same to such stockholders on demand." Id. If any part of the capital stock shall be refunded to the stockholders before the payment of all the cornerate debts contracted previously to the recording and publishing of a copy of a vote for that nurpose, as required above in case of a reduction of capital stock, the president and directors shall be "jointly and severally liable for the payment of the said last-mentioned debts; and the stockholders shall also be liable for any such sums of money as they may respectively receive of the amount so withdrawn." Id. "Nothing but money shall be considered as payment of any part of the capital stock of any company organized under this act, except as hereinafter provided for the purchase of property; and no loan of money shall be made to a stockholder or officer therein;" and if any such loan shall be made, the officers who shall make it, or who shall assent thereto, "shall be jointly and severally liable, to the extent of such loan and interest, for all the debts of the company contracted before the repayment of the sum so loaned." Id. It is enacted that subscriptions to the capital stock of any corporation organized under this act, or any supplement thereto, "may be paid wholly or partly in cash, or wholly or partly in property of the full value thereof, and the stock so issued shall be declared and be taken to be full-paid stock, and not liable to any further call, neither shall the holder thereof be liable for any further payments under any provisions of this act or the act to which it is a supplement." Laws of 1893, ch. 254. "The directors of any company incorporated under this act may purchase mines, manufactories or other property necessary for their business, or the stock of any company or companies owning mining, manufacturing or producing materials, or other property necessary for their business, and issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be declared and be taken to be full-paid stock and not liable to any further call; neither shall the holder thereof be liable for any further payment under any of the provisions of this act; and said stock shall have legibly stamped upon the face thereof, 'issued for property purchased,'" and in all statements this stock shall be reported according to the facts respecting its issue. p. 187, Am'd Laws 1889, ch. 265. Any stock thus issued for "property purchased" may, by a vote of the directors, whenever the certificate of incorporation shall authorize the exercise of such a power, contain a provision guarantying a minimum yearly dividend, payable yearly, half-yearly or quarterly, but only out of the actual profits of the company; "provided, that such provision shall not contain a guaranty of any larger dividend than is authorized to be paid on preferred stock of such company; such guarantied dividend to be paid before any dividend paid on the general stock of said company not containing any such provision; the holder of such guarantied stock shall be entitled to participate equally with the other holders of general stock in the profits arising out of the business of the company, and receive full dividends whenever the annual dividend, or the sum of dividends in any year, upon the entire capital stock of said company, shall exceed the dividend named in such guaranty; the holders of such guarantied stock shall have all the rights of holders of the general stock of such company, including the right to vote and receive dividends thereon, and such guarantied stock may be converted into an equal amount of the preferred stock of the company issuing the same, carrying no larger dividend; and the directors of any company, for the purpose of retiring the guarantied stock of such company, may issue and exchange therefor an equal amount of its preferred stock, carrying no larger dividend than that guarantied stock; provided, that the amount of preferred stock so issued shall, at no time, exceed two-thirds of the entire capital of the company issuing the same; and provided further, that the preferred stock so issued shall be entitled to dividends on a par with the preferred stock before issued only with the assent of the holders of preferred stock then outstanding, or in case it shall have been so provided in the original certificate of incorporation, or in the certificates for preferred stock outstanding." This amendment shall not apply to corporations formed under a special charter or a corporation in the hands of a receiver. Sup., p. 149, Am'd Laws 1889, ch. 266. All the officers who shall have signed a certificate or public notice which is false in any material particular "shall be jointly and severally liable for all the debts of the company contracted while they were stockholders or officers thereof." Revision of 1877, p. 187. For remedies against insolvent or dissolved corporations, see pp. 187-194, and p. 1289, Am'd Sup., pp. 166, 167. Upon dissolution, the president and directors are trustees of the corporation, with full powers to settle up the affairs of the company, and the corporation shall continue to exist for the sole purpose of closing up its affairs. Upon the petition of any creditor or stockholder, the chancellor may appoint one or more receivers. instead of the aforesaid trustees, to wind up the corporate affairs. p. 187. The president and directors, acting as trustees, or a majority of them, may determine when and how the corporate property shall be disposed of, and may take mortgages, secured by bond, for not more than fifty per cent of the purchase price. Laws 1892, ch. 22. Corporate creditors' remedy against stockholders or officers may be at law or in equity. Any officer or stockholder who shall pay any corporate debt for which he is liable may recover the same from the company, in which case only the corporate property, and not that of stockholders, may be taken: No sale or other satisfaction shall be had of the property of any director or stockholder for a corporate debt until execution against the corporation is returned unsatisfied, and any suit against such director or stockholder for such debt shall. after execution is levied or other proceedings taken to acquire a lien, be staved until such return shall have been made. p. 194. Before applying to the legislature for an act of incorporation, or a renewal of a charter, "or any alteration in the law so incorporating them," a six-weeks' notice must be given in a county paper, specifying the objects of the incorporation or application, the amount of capital stock requisite to carry their objects into effect, and, in case of an application for any alteration in a charter, such notice must state, specifically, the alteration to be applied for. Id. All contracts or agreements for the "sale, letting, leasing, consolidating, merging, or in any manner disposing of or transferring the franchises, privileges, or any part thereof," of any corporation formed by or under the laws of the state shall be proved or acknowledged like conveyances of real estate, and be recorded with the secretary of state within two months after the execution thereof; and unless lodged with the secretary of state for record within thirty days from the date of the execution thereof, the same shall be of no effect until recorded. But this act shall not be construed to render such contracts or agreements invalid as between the parties, or as to parties having notice thereof, whether the same be recorded or not. p. 195. Foreign corporations doing business in the state shall be subject to all the provisions of this act so far as the same can be applied to foreign corporations. p. 196. Whenever the original certificate of any corporation formed under a general law is defective by reason of any omission, the same may be corrected, and the corporate existence will thereupon date from the filing of the original certificate. p. 197, Am'd Laws 1887, ch. 123, Am'd Laws 1892, ch. 226. Every corporation, as such, has, among other powers, the power to have succession perpetually, unless a period is limited in the charter or certificate; to hold, purchase and convey such real estate and personalty as the corporate purposes require, not exceeding the amount limited in the charter, and all other real estate which shall have been bona fide mortgaged to such company by way of security, or conveyed in satisfaction of debts previously contracted in the course of their dealings, or purchased at sales upon judgments obtained for such

debts, "and to mortgage any such real and personal estate with their franchises," The power to hold real and personal estate shall include the power to take the same by devise or bequest. The corporation may make by-laws fixing and altering the number of directors, and for the transfer of its stock, with penalties for the breach thereof not exceeding \$20. Such powers shall vest in every corporation, though they may not be specified in the charter or certificate. pp. 175-177. whole capital has not been paid in, and the amount paid in is not sufficient to satisfy the claims of creditors, "each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share, as fixed by the charter of the company, or such proportion of that sum as shall be required to satisfy the debts of the company," p. 178. The charter of every corporation, whenever granted, shall be subject to alteration or repeal at the will of the legislature. Id. No corporation organized under this act shall make dividends, except from the surplus or net profits of the business, or reduce the capital stock, except according to this act, without the consent of the legislature; and all the directors present and not dissenting upon a violation of this section shall in their private capacities, "jointly and severally, be liable at any time within the period of six years after paying any such dividend to the said corporation, and to the creditors thereof, in the event of its dissolution or insolvency, to the full amount of the dividend made or capital stock so divided, withdrawn, paid out or reduced, with legal interest on the same from the time such liability accrued." p. 178. If any corporation is hereafter created by special charter, such corporation shall immediately have all the powers and be subject to all the provisions of said charter unless such act of incorporation shall direct to the contrary. p. 179. And in addition shall be possessed of all the powers and be subject to all the restrictions contained in this act, so far as the same are consistent with the aforesaid act of incorporation. Id.

Fer gas companies, see pp. 460-464, and Sup., pp. 326-328.

For insurance companies, see pp. 506-18, and Sup., pp. 386-397; Laws 1892, chs. 80, 154, 155, 156, 157, 231.

For provisions respecting horse and street railways, see Sup., pp. 363-371, Laws 1887, ch. 175, Laws 1888, ch. 48. Laws 1889, ch. 208, Laws 1890, ch. 70, Laws 1891, ch. 241, ch. 28, and ch. 237; Laws 1893, chs. 68, 69, 75, 129, 168, 169, 172; Laws 1892, ch. 279. Chapter 237 of the laws of 1891 authorizes the consolidation of street railways.

Any corporation whose object is the improvement and sale of and owning lands at or near the seaside resorts of the state, not located on the line or at the terminus of any railroad of the state, may, by a vote of a majority of the stock, subscribe for the capital stock of any railroad company about to construct its line of railroad so as to extend to or through the lands owned by such company; provided such subscription does not exceed one-fifth of the amount of the capital stock of the subscribing company. Sup. 1886, p. 146.

Any corporation formed under the above act (pp. 175 et seq.) may change the par value of its shares by filing with the secretary of state the assent, in writing, of two-thirds of the stock, and also a certificate, under the hands and seals of said stock-holders, stating the par value to which it is proposed to change said shares, such certificate to be acknowledged and recorded in the same manner as the original certificate; provided that such assent and certificate shall be filed within thirty days after the execution thereof. Sup., p. 151. When a corporation formed under a special act is limited to a certain amount of capital stock, it may reduce its capital by filing with the secretary of state the written assent of two-thirds of the existing capital stock, and a certificate specifying the amount to which the capital will be reduced, such certificate to be published for three weeks in a county paper; and in default of compliance with this section, the directors shall be "jointly and severally liable for all debts of the company contracted before the filing of the said certificate, and the stockholders shall also be liable for any such sums as they may respect-

ively receive of the amount so reduced." But no such reduction shall be construed to reduce any taxes required to be paid by any such special acts. Sup., p. 151. Co-operative corporations may be formed for any of the purposes specified above in the general act by seven or more persons with a capital of from \$1,000 to \$50,000. Id., p. 162. Only one director of a domestic manufacturing company need be an actual "inhabitant and resident" of the state, provided the name and residence of such director be filed with the secretary of state. Id., p. 162. The act of March 23, 1882, provides for the issue of bonds or additional stock, or both, by an insolvent manufacturing corporation, in full or part settlement of claims against it, with the consent of the claimants. Id., p. 162.

For electric light, heat and power corporations, see Sup., p. 163.

For storehouse, pier, dock and stockyard corporations, see Id., pp. 164, 165, For provisions respecting land improvement companies, see Rev., p. 567, and Sup., pp. 412-417.

Any corporation, excepting railroad and canal companies, may increase its capital stock to such an amount as may be determined by the board of directors: provided, that the corporation shall, before the issue of any shares representing such increase, file with the secretary of state a certificate setting forth the amount of the increase and the number of shares into which it will be divided, and also the assent, in writing, of two-thirds of the stock. Laws 1889, ch. 105. "It shall be lawful for any corporation of this state, or of any other state, doing business in this state, and authorized by law to own and hold shares of stock and bonds of corporations of other states, to own and hold aud dispose thereof in the same manner and with all the rights, powers and privileges of individual owners of shares of the capital stock and bonds or other evidences of indebtedness of corporations of this state." Laws 1888, ch. 269. Any company formed under a special charter may decrease the number of its directors to not less than three, by filing with the secretary of state the written assent of two-thirds of the stock, and also a duly acknowledged certificate. Laws 1888, ch. 22. It is lawful for corporations of the state, formed under the general act for the improvement of lands, the business of hotel-keeping, "and the transportation of goods, merchandise or passengers upon land or water, having their principal office in, or carrying on business. in whole or [in part], in the same county, at any time to consolidate and merge such companies and their corporate rights, franchises, powers and privileges into a single corporation." The directors of any two or more such companies may make an agreement for the consolidation, prescribing the terms and conditions thereof, the mode of carrying the same into effect, the corporate name, the place or places of basiness, in the state or elsewhere, the number of directors, the amount of capital, the number of shares and the par value of each share, the period of duration (not to exceed fifty years), and the manner of converting the stock of the old company or companies into the "stock or obligations" of the new company; "and it shall and may be lawful for said agreement of consolidation to provide that such merger of any one or more of said companies so desired to be consolidated may take place by the new company purchasing and holding stock of said old company and issuing its stock, as for property purchased in lieu thereof, when, and in that event, the said old company whose stock is so purchased shall remain in existence, and no merger of its property or franchise into the new company shall take place, anything herein contained to the contrary in anywise notwithstanding." Said agreement shall not be valid until submitted to the stockholders of the respective companies, at a meeting thereof, after a fourteen days' notice, mailed to each stockholder, and published one week before the meeting, and approved by a majority of the stock represented at such meeting, each share being entitled to one vote. Upon filing with the secretary of state the agreement, and proof of compliance with the above provisions, the merger or consolidation is completed. The consolidated company shall have all the rights and powers conferred by the general act. If any stockholder shall at such meeting,

or within twenty days thereafter, object to the consolidation and demand payment for his stock, and serve a notice in writing to that effect upon the president. secretary or treasurer of the new company, within ten days after their election, he shall receive from the new company "the fair value of his stock" at the time when the agreement of consolidation was made. Upon the filing of said agreement, etc., all the rights, franchises and property of the old companies shall be transferred and vested in the new company without any other deed or transfer. Laws 1888, ch. 294. Any such company formed under said general act or the supplements thereto may "purchase and hold stock in the capital of any one or more corporations formed under said acts for either of the said purnoses, and issue its own stock as for property purchased therefor;" provided, that said corporations shall have their principal office in, or be carrying on business, in whole or in part, in the same county; and provided further, that the said business of transportation may be incidental to or necessary for the furnishing of proper facilities of travel to and from the lands or hotels of such companies to the nearest points of established railroad transportation. Laws of 1888, ch. 295. For the general canal law, see Revision of 1877, pp. 936-940. The period of existence of any corporation, excepting a "turnpike or toll company" created under a special charter. may be extended for not more than fifty years. Sup., p. 150, SS 21-26. The corporate name may be changed by a two-thirds vote of the directors. Laws 1893, ch. 254. "Any two or more corporations organized or to be organized under any law or laws of this state for the purpose of carrying on any kind of business of the same or a similar nature may merge or consolidate such corporations into a single corporation, which may be either one of said merging or consolidating corporatious or a new corporation to be formed by means of such merger and consolidation;" provided, that the provisions of this act shall not apply to railroad, insurance, turnpike or canal companies. The directors may make a joint agreement, prescribing the terms of the consolidation; the name of the new corporation; the number, names and residences of the first directors and officers; the number of shares of the consolidated corporation, common or preferred, and par value of each; "and the manner of converting the capital stock of each of said merging or consolidating corporations into the stock or obligations of such new or consolidated corporation, and in case of creation of a new corporation, how and when the directors and officers shall be chosen or appointed," together with such other provisions as they may deem necessary. The said agreement shall be submitted to the stockholders of each company, separately, at a meeting called by a twenty days' notice mailed to each stockholder, and must be adopted by a two-thirds stock vote of each corporation, each share having one vote, in person or by proxy, and be filed with the secretary of state. All the rights, privileges, property, etc., of each corporation shall, without further act, vest in the new or consolidated corporation, which shall also discharge all the duties and obligations of each of the said corporations. Where the corporations thus uniting are authorized to exercise any franchise for public use, any dissenting stockholder may petition the court for appraisers to determine the market value of his stock, upon the payment of which his stock shall be transferred to the consolidated corporation. Such new corporation shall have power to issue "bonds or other obligations, negotiable or otherwise, and with or without coupons or interest certificates thereto attached, to an amount sufficient, with its capital stock, to provide for all the payments it will be required to make or obligations it will be required to assume, in order to effect such merger or consolidation; to secure the payment of such bonds or obligations it shall be lawful to mortgage its corporate franchises, rights, privileges and property, real, personal and mixed;" provided, such bonds shall not bear a greater rate of interest than six per centum per annum; "and that it shall also be lawful for said new or consolidated corporation to purchase, acquire, hold and dispose of the stocks of other corporations of this state or elsewhere, and to exercise in respect thereto all the powers of stockholders thereof;" and that it shall

also be lawful for such corporation "to issue capital stock, either common or preferred, or both, to such an amount as may be necessary, to the stockholders of such merging or consolidating corporations in exchange or payment for their original shares, in the manner and on the terms specified in said agreement of merger or consolidation; which agreement may also provide for the issue of preferred stock based on the property or stock of the merging or consolidating corporations conveyed to the new or consolidated corporation, as well as upon money capital paid in, and may fix the amount of such preferred stock." All acts or parts of acts inconsistent herewith are repealed. Laws 1893. ch. 67.

Any corporation created under the general law, to which this act is a snpplement, shall have power to "purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of the shares of the capital stock of any other corporation or corporations created under the law of this or any other state, and to exercise, while owners of such stock, all the rights, powers and privileges, including the right to vote thereon," which natural persons could exercise; also to "purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of any securities or evidences of debt created by other corporation or corporations of this or any other state," in the same manner and to the same extent as natural persons. All acts inconsistent with this act are, to the extent of such inconsistency, hereby repealed. Laws 1893. ch. 171.

For surety companies, see Laws 1893, ch. 118.

For bond and indemnity companies, see Laws 1893, ch. 153.

For electric companies, see Laws 1893, ch. 287.

For trust companies, see Laws 1893, ch. 164.

Respecting corporations for building bridges across boundary streams, see Laws 1892, ch. 253.

As to laborers' liens, see Laws 1892, ch. 273.

As to consolidation of gas, electric, heat and power companies, see Laws 1892, ch. 257.

For turnpike companies, see Laws 1892, chs. 111, 209.

Provision is made, in the case of any manufacturing company, specially chartered, for exchanging any portion of its full-paid stock for assessable stock, with the assent of the holders, and for issuing preferred stock. Laws 1892, ch. 264.

A very important statute is that by which any corporation organized under this act may purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of the shares of the capital stock or securities or evidences of debt of any other domestic or foreign corporation. Laws 1893, ch. 171, given more in detail supra.

Railroads.—Seven or more may incorporate where the road to be built is less than ten miles in length, but where the proposed road is ten miles or more in length the number of corporators shall be at least thirteen. The corporators may make and sign articles of association in which shall be stated (1) the corporate name; (2) the period of duration; (3) the termini of the road; (4) the length of the road, as near as may he; (5) the name of each county in the state into which the road will run; (6) the amount of capital stock (which shall be not less than \$10,000 for every mile of road), and the number of shares; (7) the names and residences of seven directors, where the road will be less than ten miles in length, or of thirteen directors where the length of the road is ten miles or more, a majority of whom shall be residents of the state. Each subscriber shall give his place of residence, and state the number of shares he will take. On compliance with the provisions of the next section the articles may be filed for record with the secretary of state; and thereupon the corporators, and all who shall become stockholders, shall be a corporation. Besides the powers granted to corporations in general. such railroad corporation shall have power to take and hold such voluntary grants of real estate and other property as shall be made to aid in the construction and accommodation of the railroad, the real estate thus received to be held for the

purposes of the grant only; to purchase, hold and use all such real estate or other property as may be necessary for the construction and maintenance of the railroad, and for stations and other accommodations necessary to accomplish the object of the incorporation; and to exercise all other powers hereby granted. Revision of 1877, p. 909, § 89. Such articles shall not be filed and recorded, until at least \$2,000 of stock for each mile of the proposed read is subscribed and paid. bona fide in cash, to the directors named in the articles, nor until the directors shall have deposited said sum with the state treasurer, the same "to be repaid [by the state treasurer] to the directors of the said 'company, or to the treasurer thereof. in sums of \$2,000 for each mile of said railroad, upon the construction of which it shall be proved, to his satisfaction, that the said company have expended at least the sum of \$2,000, nor until there is indersed on such articles of association, or annexed thereto, an affidavit," made by at least five directors, that the amount of stock required by this section has been bona fide subscribed, and that it is intended, in good faith, to construct and operate the road. \$ 90, Am'd Sup. of 1886, p. 825, \$ 14. When the articles and affidavit have been filed, the directors may, if the whole of the capital has not been subscribed, continue to receive subscriptions until the whole capital stock has been subscribed. At the time of subscribing each subscriber shall pay to the directors ten per cent, of the amount of his subscription, and no subscription shall be received without such payment, \$ 92. There shall be thirteen directors, excepting where the road is less than ten miles in length, in which case the number of directors shall be seven. They shall be chosen annually in the manner prescribed by the by-laws, and in the election of directors each share shall be entitled to one vote. Vacancies in the board shall be filled as the by-laws direct. No person shall be a director unless he is a stockholder and qualified to vote at the election at which he may be chosen. At any election the books shall be exhibited to the meeting, if a majority of the stockholders present demand it. § 93, Am'd Sup., p. 826, § 16. The directors shall anpoint one of their numbers president, and may also appoint a secretary and treasurer, and such other officers as shall be prescribed by the by-laws, and shall allow such salaries to the officers and president as the board think proper. § 94. The directors may call in subscriptions in such manner, and in such instalments, as they deem proper. § 95. Stock is personal property, and shall be transferable in the manner prescribed by the by-laws; but no shares shall be transferred until all previous calls thereon shall have been paid in full. § 96. If the capital stock is found insufficient for constructing and operating the road, the company may, with the concurrence of two-thirds of all the stock, at a called meeting, increase its capital, from time to time, to any necessary amount. § 97. The company may be made liable for labor furnished to a contractor for the construction of the road. § 98. Lands may be entered upon and surveyed, and, after paying or tendering the proper compensation, the road may be constructed over any lands, and into any city, town or village named as a terminus, after a survey of the routes bas been deposited with the secretary of state. Either before or after the completion of the main line, branch lines may be constructed within the limits of any county through which the said road may pass, and the company may "enter upon, take possession of, hold, have, use, occupy and excavate any lands," and do all other things suitable or necessary for the completion, repair or mauagement of said railroad. Deposits shall be made with the state treasurer before the construction of branch reads, as provided above in case of the main line. All branches shall be commenced within six months from the filing of the survey, and be completed within two years from the commencement of con-§ 99, Am'd Laws 1891, ch. 78. As to the assessment of damages in favor of those whose lands are taken, see §§ 100, 101. Rates may be such as the company think reasonable, but not more than three cents per mile for passengers, nor more than ten cents per mile per ton for any kind of property. Freight charges between intermediate stations shall not exceed those between the ter-

mini. § 103. The president and directors shall declare such dividends as they think proper out of the net profits. § 104. Any company incorporated under this act may "purchase, have and hold" real estate at or near the termini of the road, or at any other point on the line where the directors think proper to build a depot, not exceeding ten acres in each place, and may erect houses, workshops and other buildings and improvements considered necessary for the uses of their business, and may receive the rents and emoluments thereof. Any company owning and operating a railroad wholly within any county of the state whose charter authorizes the company to purchase, have and hold real estate at the termini of its road, and at denots along the way, not exceeding one acre at each place, may take and acquire title to real estate at the termini and intermediate stations to any amount not exceeding ten acres at each place, as may be deemed necessary for the use of the company. "It shall be lawful for any corporation incorporated under this act or under any of the laws of this state, at any time during the continuance of its charter, to lease its road or any part thereof to any other corporation or corporations of this or any other state, or to unite and consolidate as well as merge its stock, property and franchises and road with those of any other company or companies of this or any other state, or to do both; and such other company and companies are hereby authorized to take such lease or to unite, consolidate, as well as merge its stock, property, franchises and road with said company, or to do both, and after such lease or consolidation the company or companies so acquiring said stock, property, franchises and road may use and operate such road and their own roads, or all or any of them, and transport freights and passengers over the same and take compensation therefor, according to the provisions and restrictions contained in this act, notwithstanding any special privilege heretofore granted or hereafter to be granted to another corporation for the transportation of freights and passengers between any points on the lines of said roads or any other points within or without the state: " provided, that nothing in this act shall authorize any corporation existing under a special charter to charge greater rates than may be authorized by their respective acts of incorporatiou. § 105, Am'd Supp., p. 828, § 20; and Laws 1887, ch. 81. As soon as any part of a railroad is in operation, the president shall file with the state comptroller a statement, under oath, of the cost of said road, including equipments, appendages and all expenses; and annually thereafter he shall make a like statement of the cost and expenses connected with the road, including the cost of road-bed. § 107. Any corporation formed under this act may, from time to time, borrow such sums of money, not exceeding in the whole its paid-up capital stock, as may be necessary to build or repair the road, and secure necessary equipments; and may secure the repayment thereof by the "execution, negotiation and sale of any hond or bonds, and secured by mortgage on said lands, privileges, franchises and appurtenances of and belonging to said company;" provided, that no plea of usury shall be allowed to such company in connection with any such transactions. Said bonds shall constitute a first lien on the railroad, its cars, real estate and franchises, and the proceeds of said bonds shall be used for the purpose of constructing the railroad. If any person or persons shall issue such bonds "to any greater amount than the amount, at the time of such issue, shall have been actually paid up on the capital stock of such railroad," such person or persons shall be guilty of a misdemeanor, and shall be punished by a fine of not more than \$5,000, or by imprisonment for not more than three years, or by both. § 108, Am'd Supp., p. 824, § 12. Companies whose roads shall be constructed under the provisions of this act shall have the right to connect their railroads with any other railroads within or without the state, upon such terms as may be agreed upon by the management of said roads; and if the companies cannot agree upon the terms of such connection, a commission shall be appointed by the supreme court to settle the question and fix the terms. All companies whose roads are "crossed, intersected or joined" shall receive from

each other and forward all goods and property intended for points on their roads. with the same dispatch as that exercised in the care of individuals and other cornorations, and at no greater rate than the rate pald by individuals and other corporations over the same line. § 111. The company shall commence the proposed road within six months from their organization, and if the proposed road is less than fifty miles in length, at least one track shall be opened and completed within two years from the date of commencement; and if the said road shall exceed fifty miles in length, the company shall have for completing its road an additional six months for each twenty miles in excess of the said fifty miles: "provided, the road shall be opened for public use in all cases where fifty miles of track are laid;" provided also, that any company formed under this act, and failing to comply with the provisions of this section, shall thereby forfeit its franchises: provided, further, that the time during which a company may be enjoined by the court from prosecuting its work shall not be conned as a part of the time limited for completing the road. § 122. For any violation of sections 89 and 90. or any neglect to comply with any of the provisions of said sections, the company or persons so offending shall forfeit \$250 for each and every offense. \$ 123. The corporation is authorized to build viadnots over navigable streams. \$ 124, Am'd Sup., p. 827, § 18. No franchise heretofore granted to construct a railroad, or to operate any ferries on other lines of travel, and take tolls or fares therefor, shall hereafter continue to be exclusive, and no like franchise hereafter granted shall be or be construed to be exclusive, unless in such grant heretofore made or hereafter to be made it be expressly so provided. All corporations organized under this act shall be subject to all general laws, now or hereafter to be passed, regulating railroads and their operation. § 126. The legislature may alter or repeal any provision of this act, provided no corporation hereafter organized shall be affected thereby unless the act making the repeal or alteration shall so expressly declare. § 127. (Sections 89-127 are the act of April 2, 1873.) When any corporation incorporated under the above act has located the route of its road, it may relocate any part of its road not built, in the same manner and under the same conditions as though the part to be relocated had never been located; provided, that the company shall first secure the consent of any one who holds stock on the condition of the original location; and provided, that the location shall not be changed in any city except to comply with an ordinance of the common council already passed; and provided, also, that no relocation shall be made where the right of the company to cross the land of any person is the subject of litigation, and that such relocation shall be made within twelve months from the time of the original location. § 128. Any railroad company may charge ten cents for each passenger, or five cents per hundred for freight, for the whole distance carried, when the present legal rate does not amount to that sum. §§ 34, 35. No railroad or canal company shall charge or receive any greater rate for freight transported between way stations, or between a way station and either terminus, than they charge or receive for freight between the termini of the road. § 37. Any charge in excess of the legal rates causes the company to forfeit \$100 for each offense. § 38. Any railroad company may receive from "any express or transportation company, person or firm" any amount agreed upon for carrying "express goods or other property," notwithstanding any limit to the contrary in the railroad company's charter or otherwise, § 40. Every railroad and canal company in the state shall make annual reports to the legislature. §§ 51, 52. The report is due on the first Tuesday in January; and for failure to report by the first Tuesday in February such company shall forfeit \$10,000. § 54. Elaborate provisions are prescribed for the reorganization of railroads after a foreclosure sale thereof. § 56 (Act of March 27, 1874); §§ 167-171 (approved March 25, 1875); Act of April 11, 1887 (Laws 1887, ch. 125); Rev. of 1877, p. 944, §§ 165, 169 (Act of April 9, 1875). "Whenever the railroad and franchises of any railroad corporation of this state or any part or parcel of the same" has been or shall be sold at any judicial sale, it shall be lawful

for "any other railroad corporation of this state which owns, leases or operates a railroad having a physical connection therewith" to purchase such railroad and franchises, or any part thereof, "either at the said sale or thereafter, from the purchaser or purchasers thereof," or from his or their heirs or assigns; and upon the completion of such sale, the said railroad and franchises, or the part so purchased, "shall vest in and be merged with and become a component part" of the railroad and franchises of the corporation purchasing the same: provided. that the purchasing corporation shall file with the secretary of state a map of the railroad so purchased. Laws 1893, cb. 79. Railroad companies may hold land at their statious necessary for railroad purposes, notwithstanding any limitation in their charter, or in the general laws. But all lands thus held in excess of the amount limited in the charters shall be taxed like other lands in the same locality. Rev. of 1877, p. 919, § 65. Any railroad, canal or transportation company in the state may lease, purchase, hold and convey any real estate that may be necessary for the corporate business in any adjoining state, the law of such state not prohibiting. \$ 68. It shall be lawful for the stockholders of any existing corporation, or of any new corporation organized under the act respecting railroads and canals, upon the sale and purchase of any railroad, canal, turnpike or plankroad, and of the corporate rights, liberties, privileges and franchises of the corporation owning the same, as provided for by the said act [the reference is to an act of March 27, 1874], to agree in writing that the holders of any bonds of such corporation thereafter issued and secured by mortgage of the property and franchises thereof, shall have and exercise the right of voting at all stockholders' meetings, either for election or other purposes, in the same manner as stockholders; such voting to be either in person or by proxy, and such persons to cast as many votes "in right of their said bonds" as they would be entitled to cast "if holders of stock of par value equal to the amount thereof," Every bondholder availing himself of the privilege thus granted shall be subject to the same liabilities as a stockholder to the amount of his bonds. \$83. The agreement provided for in the preceding section must be stated in the certificate of organization, or in a supplementary certificate, and every such certificate shall be signed by all the stockholders. § 84. The president of every corporation formed under the act to which this is a supplement, or under the act of March 25, 1875, or under the act of April 9, 1875, shall be a director and may vote as such, and the board of directors of such corporation shall consist of as many persons as shall be constituted such board "according to the charter of the corporation originally existing and by virtue of such acts or either of them newly organized, anything in any act to the contrary notwithstanding." § 88. (The three preceding sections are parts of the act of April 21, 1876.) Whonever any railroad or canal company becomes insolvent or fails for ninety days after the same becomes due to pay the principal or interest on any mortgage, the chancellor may, upon the application of any creditor, mortgagor or stockholder, appoint a receiver or trustees, and such receiver may sell or lease the mortgaged property, the purchaser taking the place of the corporation in all respects, if they file a certificate accepting the charter of the former corporation. p. 917, § 57, and p. 1281, § 1. Provision is made for the formation of companies to build and operate tramways. Laws 1988, ch. 236. Any railroad corporation formed under any law of the state, whenever a majority of the directors shall so decide, may purchase or rent of any domestic company any boats or vessels, and also any wharves, piers, docks, landings and buildings at or uear any terminus of its road "capable of being of use in the transportation of freight or passengers;" and "such other company or companies are hereby authorized and empowered to make such sale or lease, whenever a majority of the directors thereof shall decide." Laws 1888, ch. 140. State officers, judges, court clerks and members of the legislature "shall pass and repass free of charge" on the road of any company incorporated under the general act. Rev. of 1877, p. 935, § 125. The penalty for charging a higher rate than is allowed by law is

\$100 for each offense, p. 942. \$ 154. If any company shall fail for ten days to run daily trains on any part of its road, the chancellor shall appoint a receiver unon the petition of any citizen. This provision shall not apply to roads at the seaside not exceeding four miles in length, intended merely for the accommodation of summer tourists. § 160, Am'd Sup., p. 834, § 42. Municipalities may enter into contracts with railroads for the relocation of their roads within the the city. \$ 163. Railroads may condemn lands for depot purposes and other legitimate uses along the right of way. § 172. Whenever the railroads of the state shall cross each other, or approach each other within a distance of one mile. and the corporations shall agree to connect their roads, either company may construct a branch to form such connection, and may condemn laud in the manner prescribed by the charter, "provided that in no case shall any connection be made without mutual consent in writing under seal of such cornorations." p. 823, SS 21-24. Any railroad company formed under the general act may establish and operate ferries, when the terminus or termini of the road may be on the rivers or navigable waters of the state, subject to the provisions of said act respecting rates: or the company may make contracts with other ferry companies for transporting freight and passengers. § 25. A railroad may be constructed upon or across any street or highway in a municipality, which such municipality acquired by condemnation, and which was under tide-water in 1864, if authorized by the governing body of the municipality. § 33. If the capital stock is found more than sufficient for the construction and operation of the road, the directors may, with the consent of two-thirds of the stock, reduce the capital. A copy of the resolution of the board must be filed with the secretary of state within thirty days. § 37. Any railroad which formally abandons a part of its road by reason of having made a connection with another railroad shall be paid by the state treasurer, out of the sum originally deposited by the company, a sum equal to \$2,000 for each mile abandoned, and a proportionate amount for a lesser distance. The abandoned route shall not again be used by the company without a resurvey and a deposit of the aforesaid amount with the state treasurer. § 40. Whenever a company has a duty imposed upon it or has a privilege which it is authorized to exercise, and the time is limited within which such duty is to be discharged or such privilege exercised, the time during which the company may be prevented by any court from performing its duty or exercising such privilege shall not be computed as a part of the time thus limited. § 41. Any company which has constructed a portion of its road may suspend the operation of such portion for such time or times as the directors deem necessary for the completion of the road, or for renairs, notwithstanding any law to the contrary heretofore passed. § 43. "Any railroad corporation created by special act or as lessees thereof, owning or operating a railroad within the state," may acquire title in the manner prescribed by the act under which such corporation was originally constructed, or by any supplementary act, to all lands necessary, in the judgment of the directors, to straighten or shorten the route, or connect points on the road by shorter lines, and to all lands necessary for depots and other purposes on such shortened or connecting lines. If any corporation shall have established a route which, when constructed, would straighten or shorten the route of any other railroad corporation aforesaid, or would connect points thereon, "forming thereby in connection therewith a shorter line therefor," the first mentioned corporation may transfer such route and any land or right of way by it taken or bargained for to such other railroad corporation; provided, that this section shall not authorize condemnation in any case where such connecting or shortening route shall have been constructed and in operation, and that such connecting, shortening or widening shall not be made within any incorporated city. §§ 49, 50. Any company may acquire lands for a change of location to avoid any natural difficulty in the way, and may sell the "section of road or location abandoned," in such manner as the directors see fit. But not more than one mile shall be thus abandoned. §§ 51, 52.

"It shall be lawful for railroad corporations chartered by or under the laws of this state, and whose railroads are now constructed and lie wholly within this state, and which have been authorized to hold other railroads under lease or to lease their properties, and which said corporations are now bound by contracts of lease, and also any such corporations whose railroads are now constructed and lying within the state, as are now authorized to consolidate their capital stocks or property or business, to absolutely consolidate and merge their corporate rights, franchises, powers and privileges into any one of such corporations so authorized as aforesaid, so that, by virtue of this act, such corporations shall be consolidated and merged, and so that all the property, rights, franchises and privileges by law vested in such corporation so merged shall be transferred to and vested in the corporation into which such consolidation and merger shall be made." § 53 (Act of March 7, 1878). The increase of capital stock "shall not be more than twenty per centum greater than the aggregate amount of the capital stock and shares of the corporations so consolidated and merged." Id. "The corporation into which such merger shall be made shall have the power and authority to issue honds, either registered or coupon, and to create a mortgage on a portion, or on all, of its property, real and personal, and also of all its rights, privileges and franchises. to trustees, to secure the payment of the bonds so issued, and to give and exchange the said bonds for the debts and obligations of the respective corporations so consolidated and merged;" provided, that the bonds so issued shall not exceed in amount the whole of the debt and obligations, and twenty per centum besides, of the consolidated corporations, and that the interest thereon shall not exceed seven per centum per annum. The bonds may be given in lieu of mortgages and debts. on such terms as may be agreed upon between the company and the creditors. Whenever two or more railroad corporations have "affected," or are desirous of "affecting," a consolidation and merger, "under or by virtue of the act to which this is a supplement [Act of March 7, 1878], or otherwise," and the bonded debt of said corporations is unequal in amount, or one or more of said corporations have no bonded debt, "it shall be lawful for all or either of said corporations having the lesser bonded debt, or no bonded debt, to receive in the preferred stock of the said consolidated corporation, or in bonds secured by mortgage upon the property and franchises thereof, an amount not exceeding one-half its or their capital stock respectively in lieu thereof, and in exchange for an equal amount of its or their own capital stock theretofore issued; which capital stock, when so received by the said consolidated corporation, shall be retired, canceled and destroyed. The amount of said preferred stock, or of bonds secured as aforesaid, so to be used in exchange for said capital stock, shall be fixed and determined by a vote of two-thirds of the stockholders in amount of the said consolidated corporation, or of the several corporations desirous of effecting such consolidation." Such consolidated corporation is authorized to issue its bonds at par to such an amount as may be necessary to carry out the purposes of this act, and to secure the same by its indenture of mortgage upon its property and franchises; it may also create, by a two-thirds stock vote, "for the purposes hereinbefore set out," a preferred stock to an amount not exceeding one-half of the authorized capital of the respective corporations so consolidated. The holders of such preferred stock shall receive a fixed half-yearly dividend, to be expressed in the certificates, before any dividend is paid on the common stock. §§ 58, 59 (Act of March 14, 1879). "It shall be lawful for any railroad company or corporation organized under the laws of this state to merge and consolidate their capital stock, franchises and property, with those of any railroad company or companies of this state whenever the said railroads, so to be consolidated, shall or may form a connecting or continuous line or lines of railroads; provided, that no railroad company claiming a contract with the state on the subject of taxation shall avail itself of the provisions of this act unless said contract is surrendered." The respective boards shall enter into an agreement, which shall be submitted to the stockholders of the respective companies at a special meeting, and be approved by two-thirds of the stock. A certified copy of the agreement so adopted must be filed with the secretary of state. and thereupon all the rights interests and liabilities of the several companies shall be deemed to be transferred to and vested in the new corporation, without further act or deed. At least one of the offices of the consolidated company must be in the state on the line of the road. The court shall, upon petition, appoint a commission to assess the damages done to any dissenting stockholder, and the new company has the option of paying such damages, or buying the stock of such stockholder at its market value, irrespective of any appreciation or depreciation on account of the consolidation. Bonds, with coupous or interest certificates. may be issued, "to an amount sufficient to cover all the indebtedness of the companies so merged and consolidated, and to aid in the completion and equipment of said railroad, to secure the payment of which it shall be lawful for them to create a mortgage, covering their corporate franchises, rights, privileges and property, real and personal; provided, that the bonds shall not bear a greater rate of interest than six per centum per annum; the bonds so issued may be given in lieu, exchange and satisfaction of and for all bonds or other debts against the companies thus merged and consolidated, upon such terms as may be agreed upon by and between the holders of said debts or claims," \$\$ 60-68 (Act of March 25, 1881, and April 17, 1885). (The title to the above act recites that the act authorizes "railroad companies incorporated under the laws of this and adjoining states" to merge and consolidate.) It shall be lawful for any railroad company incorporated under the laws of another state, when it has consolidated with any domestic company, under any law or statute, "to borrow any amount of money to aid in finishing, extending and equipping their railroad; to issue coupon bonds therefor, of the denomination of one thousand dollars each, and secure the payment of the same by a mortgage, covering the whole or any part of the property and franchises so merged and consolidated;" provided, the bonds shall bear no greater rate of interest than six per cent, per annum. acts or parts of acts inconsistent herewith shall be void. §§ 71-73 (Act of March 25, 1881). When any consolidation of domestic companies has been effected, the new company may file with the secretary of state a map of its lines, whereupon the lines described therein shall be deemed the lines of the company, the same as though the route had been so described in the original location of the road. And the new company shall have the same privileges as to the condemnation of land as it could have possessed if newly organized. Laws 1893, ch. 105. The corporate name may be changed. § 74. The holders of a majority of the capital stock of any railroad corporation which has no bonded indebtedness, and which does not pay expenses, or whose line has not been completed, may surrender the corporate rights, etc., and dissolve the corporation by filing a certificate with the secretary of state. The state treasurer shall thereupon pay to the company the amount that may have been deposited with him, as required by law. The directors shall sell the property at private sale and distribute the proceeds among the stockholders. §§ 75-77. No company doing business under a special charter shall charge more than three and one-half cents per mile for carrying passengers. § 78. Whenever equipment and rolling stock shall be sold, leased or loaned, on the condition that the title to the same shall remain in the vendor, lessor or bailor, for any purpose whatever, such condition shall not be valid as to any subsequent judgment creditor or purchaser without notice, unless the contract is acknowledged and recorded in the manner required, in case of mortgages, in the county in which is located the principal office of the vendee, lessee or bailee, within the state; nor unless each locomotive or car so disposed of shall have marked thereon the name of the vendor, lessor or bailor, or his assignee. § 89. No railroad company of the state shall lease its road to or consolidate with any foreign corporation without the consent of the legislature. Before such permission is granted all exemptions from taxation and all special provisions therefor shall

be surrendered. \$\$ 91, 92. Any company thus authorized to lease its railroad and franchises "shall in addition to the present power to borrow money and issue bonds and secure the payment thereof by mortgage, have power and authority to borrow money and issue bonds payable not more than one hundred years from the date thereof, to an amount sufficient to cover all its indebtedness, and to aid in the completion and equipment of its railroad," and to secure the payment of the same may mortgage all its property and franchises. Such bonds may be in lieu and satisfaction of all bonds or other corporate debts, "upon such terms as may be agreed upon by the holders of said debts or claims;" provided, that the bonds shall not bear a greater rate of interest than five per cent. per annum, "or than four per centum per aunum if guarantied as to payment of principal and interest falling due on said bonds by the railroad corporation accepting such lease." All acts and parts of acts inconsistent with the provisions of this act are repealed. § 94 (Act of April 12, 1886). The directors of any domestic railroad company may increase their number to not more than twenty, by selecting from the stockholders, from time to time, additional members to act as vice-presidents, who shall have such powers, perform such duties and receive such compensation as the directors may determine. All acts or parts of acts inconsistent herewith are repealed. § 96 (Act of Feb. 8, 1881). Railroad corporations may construct, acquire and operate lines of telegraph for commercial and public use. \$\$ 98-102. A railroad company may retain control, in whole or in part, of any portion of its road for which an improved or straightened line has been substituted, but must pay taxes thereon at the rate charged upon the real estate of individuals in the same district. § 105. No lease shall be made by a receiver or trustee appointed by the court or the chancellor, except upon a rental and security to be approved by the court and a majority of the stock. Rev. of 1877, p. 196, § 106; also Sup., p. 166, \$\$ 76, 77. Any railroad corporation of the state, the amount of whose mortgage indebtedness shall have been definitely fixed by special law, "shall have power, notwithstanding any such limitation, to borrow such sum or sums of money, from time to time, as shall be necessary to pay off or retire its existing and maturing mortgage indebtedness, to lay an additional track where its railroad is now composed of a single track and sidings, or to otherwise improve its railroad," and furnish equipment, "and to secure the repayment thereof by the execution. negotiation and sale of any bond or bonds secured by mortgage on the railroad, lands, privileges, franchises and appurtenances;" provided the whole mortgage indebtedness shall not at any time exceed the amount of the capital stock, and the bonds shall not bear a greater rate of interest than six per cent. per annum, and twothirds of the stock shall consent to such mortgage. All acts inconsistent herewith are appealed. Laws of 1887, ch. 29. Any domestic railroad sold at a judicial sale may be purchased by any corporation whose line forms a "physical" connection therewith; but the purchased road shall be subject to the general law taxing railroads. Laws of 1888, ch. 221. Any company formed or to be formed under the general act may purchase any amount of land for terminal purposes, but this act shall not enlarge the powers now existing to condemn land. Laws 1890, ch. 174. All companies formed or to be formed under the general act, whose railroads form connecting lines by means of intervening line or lines of any other corporation or corporations also formed or to be formed under the general act, and which, if having continuous lines, would have the right to consolidate, may nevertheless consolidate, though the intervening lines are not included in the consolidation. Any contract with the state for special taxation must be surrendered before such consolidation. Laws 1890, ch. 175. Corporations formed for the construction or repair of railroads or any work of internal improvement, may "subscribe for, take, pay for, hold, use and dispose of stock or bonds in any corporation or corporations formed for the purpose of constructing, maintaining and operating any such public works, with the same rights and privileges as individuals would be entitled to in like case;" and property, real or personal, necessary for corporate

nurposes. labor or materials may be received in payment of such subscriptions, in such instalments as the directors may agree upon. The stock shall be full-naid. and shall have stamped upon it "issued for property purchased." Laws 1891. ch. 175. Branch lines may be constructed by any domestic company to any mill. factory, manufactory or clay bed, whenever the hoard of directors think such branches would be for the interest of the corporation, and the right of eminent domain may be exercised for the construction of such branches. No such branch line shall be more than two miles long, and \$2,000 per mile must be deposited with the state treasurer, which sum shall be repaid when that amount per mile has been expended in the construction of the road. Laws 1893, ch. 90. Any corporation formed under any general law of the state may, in one certificate, change the corporate name, increase or decrease the capital stock, increase or decrease the number of shares and the par value of each. But the holders of two-thirds of the existing capital stock and a majority of the directors must consent to such certificate, and a certificate of the officers reciting the proceedings must be recorded with the county clerk and filed with the secretary of state. Laws 1892, ch. 2. It shall not hereafter be necessary for more than one director of any corporation formed under any law of the state to reside in the state. Laws 1893, ch. 55. Any corporation of the state may conduct its business outside the state, though there is no provision to that effect in the act or certificate of incorporation; provided, that an office is kept in the state. Laws 1892, ch. 56. Whenever, for three successive meetings of the directors, a quorum is not obtained, the stockholders may call special meetings and act as the directors, until a legal meeting of the directors is held. Laws 1892, ch. 54. Provision is made for issuing a new certificate of stock in place of one which has been lost. Laws of 1892, ch. 89.

As to the awards of the commissioner for land taken under the right of eminent domain, see Laws 1892, ch. 164.

General provisions. -- Any corporation of the state, whether existing under a special charter or a general law, may, by a vote of two-thirds of the directors, locate its principal office at any place in the state, irrespective of any location limited in the charter or the articles. A certificate of the proposed change must be filed with the secretary of state. Sup., p. 144, § 1. The corporate name may be changed by a like proceeding, the certificate stating the proposed change. § 2. When any company is limited by its charter to certain fixed times for declaring dividends, or for holding annual elections, such corporation may, at any time, change the dates so specified by a two-thirds vote of the stock at any regular meeting. § 4. Provision is made for the issue of new certificates to any owner thereof who may allege that his certificates have been lost or destroyed. §§ 8-11. Any domestic company, whose charter limits its capital and fixes the par value of the shares, may decrease its capital and the par value of its shares by filing with the secretary of state the written consent of two-thirds of the stock and a certificate of the amount of the reduced capital, which certificate must be published for three weeks in a county paper; and, in default thereof, the directors shall be "jointly and severally liable for all dobts of the company contracted before the filing of the said certificate," But no such reduction shall reduce the amount of taxes such corporation may have been specially required to pay. § 29. Any company may increase the number of its shares by subdividing the amount of each sbare, "including therein as well the par value thereof as also any assessments actually paid in thereon," into shares of such equal par value as it may agree upon, by filing with the secretary of state the assent in writing of two-thirds of the stock, and also a certificate under the hands of the said stockholders, stating the par value at which it is proposed to fix the shares, such certificate to be recorded with the county recorder of deeds. § 30. When any domestic company is limited to a certain amount of capital stock and a certain number of directors, either the capital or the number of directors, or both, may be increased by filing with the secretary of state the assent in writing, and a certificate, of two-thirds

of the stock. The additional stock shall be paid in cash, "or shall be issued in payment for land and other property acquired by said company for the purposes of its incorporation and for improvements upon or to its property to the amount of the value thereof." If the company has two or more classes of stock, common and preferred, such increase may be in any one or more classes, whether common or preferred, and the required assent shall be by two-thirds of each class of existing stock common or preferred. § 33. The directors of any domestic corporation may increase the capital stock to pay bonds which are due, or about to become due, or which may be paid by the company at its option, and for that purpose may issue and sell shares for cash only, but not below par. The president and secretary shall make a certificate of such increase and file the same with the secretary of state within thirty days thereafter. §§ 35, 36. If one or more of the corporators shall have died before organization, the survivors or survivor may, in writing, designate others to take the place of the deceased corporators. Laws 1887, ch. 79. The wages of laborers are a first lien upon the assets of an insolvent corporation. Laws 1887, ch. 71.

Foreign corporations.— Any foreign corporation may "hold, mortgage, lease and convey" real estate in New Jersey necessary for the corporate business in the state, or such as it may acquire by way of mortgage or otherwise, in the payment of debts; and foreign corporations having charter authority to engage in the business of "acquiring, holding, mortgaging, leasing and conveying real estate" are hereby authorized to conduct such business in New Jersey, and to that end to "acquire, hold, mortgage, lease and convey real estate in this state." Rev. of 1877, p. 195, § 99, Am'd Laws 1887, ch. 124; also Sup., p. 146, § 5. When a foreign railroad corporation has been authorized to hold property and exercise corporate privileges within the state, the directors may hold their meetings within the state. Rev. of 1877, p. 919, § 63. An office may then be kept within the state for the transfer of stock, and the corporate business may be transacted within the state. § 64. Any foreign railroad corporation, any part of whose route, acquired by lease or otherwise, shall lie within the state, or which shall have been authorized to exercise any franchise in the state, shall be deemed domestic companies "for the purpose of being sued or proceeded against if insolvent; . . . no suit of foreign attachment shall be brought against any such corporation." § 71. If a foreclosure suit is brought in the state in which such company was formed, and a suit to foreclose the same mortgage is brought in New Jersey, the suit in New Jersey shall be considered as auxiliary to the suit in such other state: and any purchaser under the foreclosure sale in such other state, forming a new corporation under the laws of such state, shall, in all respects, take the place, in New Jersey, of the corporation whose road was sold. If a receiver of the portion in the state shall have been appointed by the chancellor of New Jersey, such portion shall be placed on sale so that a purchase thereof may be made on one and the same bid by such persons as shall become purchasers under the aforesaid foreclosure sale. Such new company shall, within sixty days from its formation, file a petition with the New Jersey court of chancery, appending thereto a copy of its charter or certificate of organization, and if the laws of the state appear to have been complied with, the court of chancery shall so decree. Thereupon a copy of the petition, proceedings and decree shall be filed with the secretary of state, upon which the company is authorized to do business in the state. The company in any such case becomes a domestic company to all intents and purposes, the property remaining subject to all liens not affected by the said foreclosure sale. §§ 72-79. Any foreign railroad corporation having a route and exercising franchises in New Jersey shall be governed by the rules and laws adopted at or under its organization so far as the same are not repugnant to the laws of New Jersey. § 80. "It shall be lawful for foreign corporations to acquire, hold, mortgage, lease and convey such real estate in this state as may be necessary for the purpose of carrying on the business of such corporations in this state, or such as they may acquire by way of mortgage or otherwise in the payment of debts due to said foreign corporation; and foreign corporations having charter authority to engage in the business of acquiring, holding, mortgaging, leasing and conveying real estate are hereby authorized to pursue the conduct of such business in this state, and to that end to acquire, hold, mortgage, lease and convey real estate in this state." Conveyances or mortgages heretofore made to or by such foreign corporations are declared to be valid, both in law and in equity. Sup., p. 146; Am'd Laws 1887, ch. 124.

See reference to foreign corporations under "Miscellaneous Corporations."

Taxation.—The real and personal property of manufacturing corporations is taxed the same as that of individuals. Sup., p. 161, § 59 (Act of May 11, 1886). Certain other corporations must report annually to the state board of assessors, and pay a license tax as follows: Telegraph, telephone and cable companies, and express companies not owned by a railroad company and otherwise taxed, shall pay to the state two per centum upon their gross receipts within the state; gas and electric light companies pay one-half of one per centum upon their gross receipts in the state and five per centum upon dividends in excess of four per centum: oil and pipe-line companies pay eight-tenths of one per centum upon the gross receints in the state: insurance companies, other than life and mutual fire insurance companies, pay one per centum upon their gross premium receipts within the state: life insurance companies incorporated under the laws of the state pay one per centum upon their snrplus existing on the last day of December, annually, and thirty-five hundredths of one per centum annually upon the gross premium receipts in the state; each parlor, palace or sleeping-car company shall pay two per centum upon the gross amount of its receipts within the state; if any oil or pipe-line company has its transportation line partly within and partly without the state, its report to the assessors shall state the gross receipts on the whole line. and the tax shall be paid upon such proportion of the gross receipts as the line in the state bears to the whole line; all other corporations, excepting railway, canal and banking companies, and charitable, etc., organizations, shall pay annually one-tenth of one per centum "on all amounts of capital stock issued and outstanding, up to and including the sum of three million dollars; on all sums of capital stock issued and outstanding in excess of three million dollars and not exceeding five million dollars," a yearly tax of one-twentieth of one per centum, and the further sum of \$50 per annum on each \$1,000,000, or any part thereof, in excess of \$5,000,000; provided, that this act shall not apply to mining and manufacturing corporations, fifty per cent. of whose capital stock issued and outstanding is invested in mining or manufacturing operations within the state; but if such manufacturing or mining company doing business in the state has less than fifty per cent. of such capital stock so invested, such company shall pay the tax "herein provided for companies not carrying on business in this state," but shall be entitled, in computing the tax, "to a deduction from the amount of its capital stock, issued and outstanding, of the assessed value of its real and personal estate so used in manufacturing or mining." Sup. of 1886, p. 1016, §§ 156-162, Am'd Laws 1891, ch. 93; Am'd Laws 1893, ch. 76. The corporation may be restrained from the exercise of its franchise for failure to pay its tax within three months. Id., § 162. This act shall not apply to or affect the tax upon the premiums obtained in the state by foreign fire insurance companies, which tax shall be in lieu of the tax herein provided, and shall be collected in the manner "specially provided by law in relation thereto." § 163. All state taxes, or charges in lieu of taxes, imposed upon life insurance companies of other states, except taxes imposed by reciprocal or retaliatory laws, are hereby abolished; and as a substitute for such taxes all domestic companies shall pay, in addition to the tax on their surplus, specified above, a further annual franchise tax of thirty-five one-hundredths of one per centum upon the total gross premium receipts of such companies. The purpose of this act is to prevent retaliatory taxes by other states upon New Jersey companies. Laws 1891, ch. 7. The personal estate of corporations is assessed in the township or ward where the principal office is kept; the real estate of corporations is taxed where it lies the same as the real estate of individuals. Rev. of 1877, p. 1153, § 66. Private corporations of the state, except banks and mutual life insurance companies. "shall be and are hereby required to be respectively assessed and taxed at the full amount of their capital stock, paid in, and accumulated surplus; but any real estate which such corporation may lawfully own in any other state than this state shall not be liable to be estimated in such accumulated surplus, and the persons holding the capital stock of such corporations shall not be assessed therefor." § 74. All corporations not incorporated by the state "shall be assessed for the amount of capital usually employed in this state in the doing of such business not otherwise taxed by virtue hereof; and such assessment shall be made in the township or ward where such business is most usually carried on." § 77. Personal estate includes, for purposes of taxation, stocks in domestic or foreign corporations. § 63. The value of real estate of private corporations situate within the state is deducted from the amount of the "capital stock and surplus and funded debt," or of the "valuable assets," where there is no capital stock, § 81. The real and personal estate of corporations incorporated by any act of the legislature, or under any general law of the state, shall be taxed the same as that of individuals; but this section shall not apply to railway, insurance, canal or banking corporations. Sup., p. 170, § 93 (Act of March 7, 1878). All corporations, including manufacturing companies, formed under the general act of April 7, 1875, or acting thereunder, "shall hereafter be taxed upon their capital stock at its actual value and accumulated surplus." Sup., p. 161, \$ 57 (Act of March 14, 1879). The portion of the property of a consolidated company which is within the state is taxed the same as the property of other companies of the state. Sup. p. 841, § 65. All the property of any railroad or canal company not used for the corporate purposes is taxed the same as the like property of individuals in the same district. Laws 1888, ch. 208, § 1. The tax imposed by this act is in lieu of all other taxation upon the property subject to taxation by the provisions of this act. In all cases where the "real estate, tangible personal property and franchises of any company are assessed and taxed under this act, the shares of stock and the bonds and certificates of indebtedness of such company shall not be taxed in the hands of the shareholders, bondholders or creditors, except as hereinafter provided." Id. All railroad and canal property shall be assessed by a state board of assessors, to be appointed by the governor and senate, none of whom shall be interested in any such corporation. § 2, Am'd Laws 1891, ch. 98. The term "main stem" includes the road-bed, not exceeding one hundred feet in width, the road and passenger stations; the term "tangible personal property" includes rolling-stock, ferry-boats, tools, machinery and other tangible personalty of a railroad company, and the floating, movable and other tangible personal property of any canal company; also the locomotives and cars not belonging to the railroad company, but built for its use and actually used in the state, "or rnn under its control in this state by a sleeping-car company or other company;" but the rolling-stock of other corporations temporarily used on the railroad, and the floating or movable property temporarily used on a canal, but not forming part of the equipment of such road or canal, shall not be included in such term. § 3. Interested parties may have a hearing before the board, touching the question of valuation and assessment. § 5. A foreign lessee or operator of a domestic road or canal pays the same tax on all property owned or used within the state as a domestic company. Any "tangible personal property" used in the state by such foreign company only a part of the time shall be assessed such proportionate part of its value as the time it is kept within the state hears to the whole year. § 6. A deduction may be allowed from the value of mortgaged railroad or canal property, in which case such reduction is assessed to the mortgagee, in the same manner as the interest of the mortgagor is assessed.

\$ 7. Deductions are also allowed for other debts, when a deduction would be allowed to tax-pavers under the general laws, said indebtedness to be taxed like the indebtedness of individuals in like cases. The deduction shall be made pro rata from all the taxable property of the debtor. But no deduction for mortgage or other indebtedness shall be allowed unless asked for in the report required by this act. § 8. Upon the valuation as fixed by the board of assessors, each company shall pay to the state, for state purposes, one-half of one per centum, annually, upon each dollar of valuation; also a tax at a local rate fixed for county and municipal purposes upon other property in each district, upon the valuation of its realty used for corporate purposes in each tax district, including the road-bed (other than main stem), water-ways, reservoirs, tracks, buildings, water-works, riparian rights, docks, wharves and piers, and all other real estate, except "lands" not used for corporate purposes, which tax shall be fixed and computed by the state board: but the last-mentioned rate shall in no case exceed one per centum of the valuation of said property. §§ 9, 11. The property to be taxed under the preceding section for state purposes includes all the property mentioned above in said section, the "main stem" and water-way, all "tangible personal property," and the value of all remaining property, including the franchises. § 3. Any of said property may be sold for taxes. § 15. A statement must be furnished the board. according to a form to be furnished the corporations. § 17. Any corporation which shall fail to make the required returns shall forfeit not more than \$10,000. § 20. Any corporation paying taxes on leased property has an action therefor against the owner. § 21. Any corporation having a special contract with the state respecting taxation may relinquish the same and accept the provisions of this act. §\$ 25. 27.

The following "fees and taxes" shall be paid to the state: For certificates of organization, twenty cents per thousand dollars of the capital stock authorized, but never less than \$25; for certificates of increase of capital stock, twenty cents per thousand dollars of the total amount authorized, but never less than \$20; for certificates of consolidation, twenty cents per thousand dollars "of capital authorized, beyond the total authorized capital of the companies merged or consolidated;" provided, that the minimum fee shall be \$20; for certificates of extension or renewal of corporate existence, the same as for the original certificate; for certificates of dissolution, change of name or business, change of number of directors, amended or supplemental certificates (other than for increase of stock), decrease of stock, increase or decrease of par value or number of shares, \$20; for filing list of officers, \$1; all other certificates, \$5. Laws 1893, ch. 254.

§ 963. NEW YORK: 1 Constitutional provisions.—The legislature shall not pass a private or local bill granting "to any corporation, association or individual the right to lay down railroad tracks," nor granting "to any private corporation, association or individual any exclusive privileges, immunity or franchise . . No law shall authorize the construction or operation of a street whatever. railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained; or in case the consent of such property owners cannot be obtained, the general term of the supreme court in the district in which it is proposed to be constructed may, upon application, appoint three commissioners who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners." Constitution of 1846, art. III, § 18. The state shall not give or loan its aid or credit to any corporation. Art. VII, § 6, and art. VIII, § 10. Corporations shall not be created by special act, unless in the opinion of the legislature the

 $^{^{\}mbox{\tiny 1}}$ The acts of the legislature down to and including the laws of 1893 are included in this synopsis. 1805

objects of the corporation cannot be attained under general laws. General or special incorporating acts may be altered or repealed. Art VIII, § 1. Savings banks shall not have a capital stock, and their directors shall not have any interest in their profits nor be interested in their loans. Id., § 4. Stockholders in state banks which issue money are liable to creditors to the extent of the par value of their stock in addition to the subscription liability. Id., § 7. "No county, city, town or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association or corporation, or become directly or indirectly the owner of stock in or bonds of any association or corporation, nor shall any such county, city, town or village be allowed to incur any indebtedness, except for county, city, town or village purposes." Id., § 11.

Miscellaneous corporations.—Three or more persons may incorporate to carry on any lawful business by making, signing and filing a certificate which shall set forth the name of the proposed corporation; the objects for which it is to be formed, including the nature and locality of its business: the amount and description of the capital stock: the number of shares of which the capital stock shall consist, each of which shall not be less than five or more than one hundred dollars; the location of its principal business office: its duration, which shall not exceed fifty years; the number of its directors, not less than three nor more than thirteen, who shall each be a stockholder having at least five shares of stock; the names and postoffice addresses of the directors for the first year; the postoffice addresses of the subscribers and a statement of the number of shares of stock which each agrees to take in the corporation. The certificate may contain any other provision for the regulation of the business and the conduct of the affairs of the corporation and any limitation upon its powers, and upon the powers of its directors and stockholders, which does not exempt them from any obligation or from the performance of any duty imposed by law. L. 1892, ch. 691, § 2. If the stockholders desire to be liable to creditors for all the debts of the company, a statement to that effect may be inserted in the certificate. Id., § 6. The incorporators must be natural persons of full age, and two-thirds of them citizens of the United States, and a majority of them residents of New York state. Ch. 687, § 4. The certificate is filed with the secretary of state, and a certified copy is filed with the county clerk where the principal office of the corporation is located. Id. § 5. Informalities, defects, etc., in the certificate may be cured by filing an amended certificate. Id., § 7. The certificate of incorporation may provide for cumulative voting. Id., § 20. The business and powers of the company may be extended or altered by a supplementary certificate, provided three-fifths of the capital stock have assented thereto. Ch. 688, § 32. It may also contain a provision authorizing the corporation to purchase, hold and sell the stocks and bonds of other corporations. Id., § 40. The certificate of incorporation may also provide for preferred as well as common stock. Id., § 47. Companies shall not be formed under the above act if they may be formed under any other general act of the state. Ch. 691, § 1. No business shall be transacted until a certificate is filed that onehalf of the capital stock has been subscribed in good faith. Id., § 3. One-half of the capital stock must be paid in within one year or the corporation will be dissolved. A certificate of the payment must be filed. The dissolution of a corporation shall not affect remedies against it or its stockholders or officers. Id., § 5. The business of the company may be extended by filing a new certificate within one year from the time of the incorporation. Id., § 7. The consolidation of companies is provided for in detail, upon a two-thirds vote of the stock and upon paying to dissenting stockholders the appraised value of their stock. Id., §§ 8-12.

Railroads.—Fifteen or more may incorporate to build, maintain and operate a railroad, or to maintain and operate one already built and owned by individuals, by filing a certificate which sets forth in regard to the corporation (1) its name; (2) its duration; (3) the kind of road; (4) the length and termini; (5) the counties in which it is located; (6) the capital stock, which shall be at least \$10,000 per

mile: (7) the number of shares; (8) provisions as to preferred stock, if any: (9) the addresses of the directors, who shall be at least nine; (10) the principal place of business: (11) if a street surface railroad, the streets, avenues and highways traversed; (12) if a city or county steam railroad, various provisions, to be determined by commissioners: (13) the names and addresses of the subscribers, and the amount of their subscriptions; (14) the affidavit of three directors that at least \$1,000 per mile has been subscribed and paid in, and that it is intended to construct the road. If such affidavit is false in regard to the amount paid, the incornoration shall be void. See Laws 1892, p. 2052, giving ch. 565, Laws 1890, as amended in 1891 and 1892. The incorporators must be natural persons of full age. and two-thirds of them citizens of the United States, and a majority of them residents of New York state. Laws 1892, p. 1802, § 4. The certificate is filed with the secretary of state, and a certified copy is filed with the county clerk where the principal office of the corporation is located. Id. \$5. Informalities, defects, etc. in the certificate may be cured by filing an amended certificate. Id., p. 1803, § 7. The certificate of incorporation may provide for cumulative voting. Id., p. 1807. \$ 20. The business and powers of the company may be extended or altered by a supplementary certificate, provided three-fifths of the capital stock have assented thereto. Id., p. 1833, § 32. It may also contain a provision authorizing the cornoration to purchase, hold and sell the stocks and bonds of other corporations. Id., p. 1834, § 40. The certificate of incorporation may also provide for preferred as well as common stock. Id., p. 1837, § 47. A railroad company for the purpose of obtaining fuel may acquire and sell stock in any foreign corporation owning land in another state. Id., p. 2054, § 4. It may "borrow such sums of money as may be necessary for completing and finishing or operating its railroad, and issue and dispose of its bonds for any amount so borrowed, and mortgage its property and franchises to secure the payment of any debts contracted by the company for the purposes aforesaid." Id., p. 2055, § 4, being so amended in 1892. (This provision was added in 1892, and under the rule of construction laid down in section 33. Laws of 1892, page 1813, it probably prevents section 2, chapter 688, Laws of 1892, from being applicable to railroads.) If the company does not begin construction and expend ten per cent, of its capital stock within five years, and shall not complete the work within ten years, "its corporate existence and powers shall cease." Id., p. 2055, § 5. The legislature may reduce railroad rates until the annual profits do not exceed ten per cent, of the capital actually expended, provided the railroad commission have first passed upon the amount of annual profits for the year last past. Id., p. 2073, § 38. A railroad company incorporated under this act shall not begin work until its articles of incorporation have been published in each county through which it is to run for three weeks and proof thereof has been filed with the railroad commissioners, nor until the railroad commissioners have certified "that public convenience and necessity require the construction of said railroad as proposed in said articles of association." The application to the commission must be within six months after the publication. If the commission refuse to grant the permission, a new application may be made after one year from that time. If the commission deny the application, an appeal may be made to the court and the court has power to grant it. This section does not apply to street railroads, Id., p. 2083, § 59. Two or more railroads, constructed or not yet constructed, may consolidate if thereby a continuous or connected railroad is formed, upon a two-thirds vote of the stock. Id., pp. 2084-2087, §§ 70-75. The foreclosure of an interstate road, the larger part of which lies in another state, may be had in such other state. Id., p. 2088, § 76. Upon the foreclosure sale of an interstate road, the greater part of the road being out of the state, a foreign corporation owning that part may own the part in the state. Id., p. 2088, § 77. "Any railroad corporation or any corporation owning or operating any railroad or railroad route within this state may contract with any other such corporation for the use of their respective roads or routes, or any part thereof, and thereafter

use the same in such manner and for such time as may be prescribed in such contract. Such contract may provide for the exchange or guaranty of stock and bonds of either of such corporations by the other, and shall be executed by the contracting corporations under the corporate seal of each corporation, and if such contract shall be a lease of any such road and for a longer period than one year. such contract shall not be binding or valid unless approved by a vote of the stockholders owning at least two-thirds of the stock of each corporation," which is voted on at the meeting. The notice of the meeting of the stockholders must be given at least thirty days and published for four weeks previous to the meeting. and the lease must show that the stockholders have approved of the same, and must be filed in the same way as the certificate of incorporation. Id., p. 2089. \$ 78. (As amended by ch. 433, Laws 1893.) The lessee may issue its own stock in exchange for the stock of the lessor, and upon obtaining a majority the directors of the former become the directors of the latter, and upon obtaining all its stock the lessor's property shall vest in the lessee. Id., p. 2090, § 79. The consolidation or lease of parallel or competing roads is prohibited unless the railroad commissiou consent to the same. This provisiou is not applicable to street railroads. Id., p. 2091, § 80. A mortgagee may purchase a railroad at foreclosure sale, and may hold the same for six months, and then convey it to a railroad corporation. A reorganized railroad corporation need not build the road beyond the line already constructed, provided the railroad commission consent thereto. Id., p. 2091, § 83. The incorporation, rights, powers and privileges of street railroads are provided for. Id., pp. 2092-2110, art. IV. also ch. 434, Laws 1893. The railroad commission consists of three persons. Id., p. 2127, § 150. The board "shall have general supervision of all railroads and shall examine the same and keep informed as to their condition and the manner in which they are operated, for the security and accommodation of the public, and their compliance with the provisions of their charters and of law," Id., p. 2129, § 157. They shall prescribe the form of the reports to be made by the railroads; shall investigate accidents, and may require repairs, additional rolling stock, new stations, new terminals, and "any change of the rates of fare for transporting freight and passengers," or in the mode of operating the road or conducting the business, but a hearing thereon must first be given to the corporation. For refusal to comply, the facts shall be laid before the attorney-general for action. The supreme court may compel compliance. Id., pp. 2130, etc., §§ 158, 159, 161, 162,

Special provision is made for the incorporation of ferry companies, navigation companies, stage-coach companies, tramway companies, pipe-line companies, gas and electric light companies, water-works companies, telegraph and telephone companies, turnpike, plank-road and bridge companies. See Laws 1892, p. 2137.

Provisions applicable to all stock corporations.— The principal office of a company shall be in the county, town or city in which its principal business is carried on. L. 1892, ch. 687, § 3. The name of the company shall not so nearly resemble the name of another domestic corporation as to be calculated to deceive. Id., § 6. The certificate of incorporation shall be presumptive evidence of incorporation. Id., § 9. Stockholders may adopt by-laws. A by-law regulating elections must be published at least thirty days before the election. Id., § 11. The directors may adopt by-laws in addition to those adopted by the stockholders. Id., § 29. Each share of stock held by a stockholder for ten days before the election or meeting has one vote. A pledgor of stock still standing in his name may vote thereon. No person shall vote or give a proxy on stock or bonds which have not been owned by him for ten days prior to the meeting, even though they still stand in his name. The sale of votes or proxies is prohibited. The corporate record of stockholders is conclusive upon the inspectors of election subject to the above provisions. Id., § 20. Stockholders may vote by proxy, the proxy being in writing. A proxy is good for only eleven months unless a further term is specified. All proxies are revocable. Id., § 21. Upon a challenge, a stockholder must swear that he has not agreed to vote in a certain way for a financial consideration, and that he has not sold his stock or bonds, and that he still owns them. A proxy upon challenge must take the same oath upon information and belief. Inspectors may administer the oath. Id., § 22. Any person complaining of an election may apply to the supreme court upon notice, and the supreme court may, after hearing the matter, declare the election valid or order a new election or give any relief that is right and just. Id., § 27. Any stockholder may stay proceedings upon any illegal claim against the corporation or to which the corporation has a valid defense where the directors are in collusion with the plaintiff or have defaulted, or if the action is for the benefit of any director. Id., § 28. At least two of the directors must be residents of the state. Id., § 29. If a corporation other than a railroad, turnpike, plank-road or bridge company does not organize and commence its husiness or undertake the discharge of its duties within two years from the date of its incorporation, "its corporate powers shall cease." Id., § 31.

The mortgage debt of a corporation, excepting a purchase-money mortgage on real estate, "shall not exceed the amount of its paid-up capital stock, or an amount equal to two-thirds of the value of its corporate property at the time of issuing the obligations secured by such mortgages, in case such two-thirds value shall be more than the amount of such paid-up capital stock. No such mortgages, except purchase-money mortgages, shall be issued without the consent of the stockholders owning at least two-thirds of the stock of the corporation, which consent shall be in writing and shall be filed and recorded in the office of the clerk or register of the county where it has its principal place of business, or shall be given by vote at a special meeting of the stockholders called for that purpose." A certificate of such vote must be filed and recorded. The right may be given to the holders of the mortgage debt to exchange the same for the stock of the company. L. 1892, ch. 688, § 2. "No stock corporation, except a moneyed corporation, shall create any debt, if thereby its total indebtedness not secured by mortgage shall exceed the amount of its paid-up capital stock, and the directors creating or consenting to the creation of any such debt shall be personally liable therefor to the creditors of the corporation. If bouds or other obligations of the corporation, secured by mortgage, are issued in excess of the amount authorized by law, or in violation of law, the directors voting for such overissue or unlawful issue shall be personally liable to the holders of the bonds or other obligations illegally isued for the amount held by them, and to all persons sustaining damage by such illegal issues for any damage caused thereby." Id., § 24. Upon the foreclosure sale of corporate property and franchises a reorganization may be had. Id., §\$ 3-6. The relation of the receiver toward the property is prescribed by statute. Id., § 5. Stockholders assenting to the plan of reorganization within six months are entitled to take part therein. Id., § 6. "No stock corporation shall combine with any other corporation or person for the creation of a monopoly or the unlawful restraint of trade or for the preventing of competition in any necessary of life." Id., § 7. (See also ch. 716, L. 1893.) The directors must be stockholders, and are elected by a plurality of the votes. If a director ceases to be a stockholder his office thereby becomes vacant. Notice of elections must be given by publication for two weeks. At least one quarter of the directors must be elected annually. Id., § 20. Directors making dividends from the capital stock are personally liable to corporate creditors for the same, except such directors as have entered dissent upon the minutes of the meeting or were not present. Id., § 23. Directors making loans of the corporate funds to stockholders (except in moneyed corporations), or receiving notes in payment for stock, are personally liable therefor to corporate creditors. Id., § 25. A corporation may have a lien on stock for debts due from the stockholder to the corporation if a provision to that effect is printed on the certificates of stock. Id., § 26. The president must be a director. Id., § 27. Inspectors are appointed as prescribed by the by-laws. except that the inspectors of the first election are appointed by the directors

named in the certificate of incorporation. Directors shall not be inspectors. Id., \$28. The corporation must keep a book containing the names of its stockholders, their residence and holdings, and the dates when their holdings were acquired, which shall be open daily during business hours both to stockholders and judgment creditors. A transfer of a certificate of stock not recorded on the corporate books does not affect the corporation, its stockholders or creditors, except to render the transferee liable as a stockholder. The stockbook is presumptive evidence of stockholdership. A penalty is prescribed for violation of this section. Id., § 29. An annual report is required from all companies except railroad and moneyed companies, during the month of January, which shall state: 1. The amount of its capital stock, and the proportion actually issued. 2. The amount of its assets or an amount which they do not then exceed. 3. The amount of its assets or an amount which its assets at least equal. This report shall be signed by a majority of the directors, and sworn to by the president or vice-president and secretary or treasurer, and filed in the offices of the secretary of state and the county clerk. If the report is not made and filed, all the directors are jointly and severally liable "for all the debts of the corporation then existing, and for all contracted before such report shall be made," A director may avoid this liability by filing a statement that he endeavored to have the report made and giving the report so far as he is able. Id., § 30. "If any certificate or report made or public notice given by the officers or directors of a stock corporation shall be false in any material representation, the officers and directors signing the same shall jointly and severally be personally liable to any person who has become a creditor or stockholder of the corporation upon the faith of any such certificate, report, notice or any material representation therein to the amount of the debt contracted upon the faith thereof if not paid when due, or of the damage sustained by any purchaser of or subscriber to its stock upon the faith thereof. The liability imposed by this section shall exist in all cases where the contents of any such certificate, report or notice, or of any material representation therein, shall have been communicated either directly or indirectly to the person so becoming a creditor or stockholder, and he became such creditor or stockholder upon the faith thereof. No action can be maintained for a cause of action created by this section unless brought within two years from the time the certificate, report or public notice shall have been made or, given by the officers or directors of such corporation." Id., § 31. A corporation other than a railroad corporation may, on a two-thirds vote of its stock, sell all its property and franchises to any other domestic corporation, but dissenting stockholders must be paid the appraised value of their stock, the appraisal being by three persons appointed by the court. Id., § 33. (See ch. 638, L. 1893.) Stock cannot be transferred until previous calls thereon have been paid. One company may buy, hold and sell the stock, bonds and other evidences of indebtedness of any other companies if the certificate of incorporation so provides, or if such other company is engaged in a similar business, or in the manufacture, use or sale of property or works necessary or useful in the business of the former company, or if the two corporations may be consolidated according to law. The president or other officers of a corporation owning stock in another corporation are eligible to a directorship in the latter. Any corporation, upon the unanimous consent of its stockholders, may "guaranty the bonds of any other domestic corporation engaged in the same general line of business." Id., § 40. Ten per cent. of each subscription must be paid in cash at the time of subscribing. Id., § 41. "No corporation shall issue either stock or bonds except for money, labor done or property actually received for the use and lawful purposes of such corporation. No such stock shall be issued for less than its par value. No such bonds shall be issued for less than the fair market value thereof." Id., § 42. Preferred stock may be made exchangeable at the option of the holder into common stock. Id., § 47. "No corporation which shall have refused to pay any of its notes or other obligations when due in lawful money of the

United States, nor any of its officers or directors, shall transfer any of its property to any of its officers, directors, or stockholders, directly or indirectly, for the payment of any debt, or upon any other consideration than the full value of the property naid in cash. No conveyance, assignment or transfer of any property of any such corporation by it or by any officer, director or stockholder thereof, nor any payment made, judgment suffered, lien created or security given by it or by any officer, director or stockholder when the corporation is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid." Directors or officers concerned in violating the above provision are personally liable for any loss thereby sustained by creditors or stockholders. Id., § 48. "Whenever default shall be made by any corporation in the payment of principal or interest of any of its bonds secured by mortgage or deed of trust of its property, any stockholder may. at any time during the pendency of the foreclosure of such mortgage or deed of trust and before the sale thereunder, pay to the mortgagees or grantees in such mortgage or deed, for the use and benefit of the holders of such honds, a sum equal to such proportion of the amount due and secured to be paid by such mortgage or deed as his stock in such corporation shall bear to its whole capital stock. and on making such payment he shall to the extent thereof become and be interested in such mortgage or deed and protected thereby." Id., § 49. If a certificate of stock is lost a new one may be obtained by applying to the court and giving a bond. Id., §§ 50, 51. Stockholders owning five par cent. of the capital stock (except in a moneyed corporation) where the capital is one hundred thousand dollars or less, or three per cent. If it is more, may compel the treasurer or chief fiscal officer of the company to give "a statement of its affairs under oath, embracing a particular account of all its assets and liabilities," within thirty days, and to keep the same on file, but such statement cannot be required more than once a year. A penalty is incurred if the treasurer does not comply herewith. Id., § 52. Resident transfer agents of foreign corporations shall at all times during business hours exhibit to any stockholder the transfer book, and a list of the stockholders, if he is able so to do, and a penalty is prescribed for failure to comply herewith. Id., § 53. Stockholders are liable doubly on their stock for every debt of the company "until the whole amount of its capital stock issued and outstanding at the time such debt was incurred shall have been fully paid." Stockholders are liable for debts due to laborers, servants or employees of the company, other than contractors, provided that the remedy against the corporation has first been exhausted, and notice has been given to the stockholder within thirty days after the services were performed. Pledgees, executors, administrators, guardians and trustees holding stock'in which they have not voluntarily invested the trust funds are not personally liable as stockholders, but the pledgor is liable, and the estate represented by the executor, etc., is liable. Id., § 54. Before holding a stockholder liable the remedy against a corporation must have been exhausted. He is not liable if the debt was not payable within two years from the time it was contracted, nor unless an action was brought against the corporation upon the debt within two years after it became due, nor unless the action against the stockbolder is brought within two years after the time he ceased to be a stockholder.

Foreign corporations are prohibited from doing business in the state unless they have procured a certificate from the secretary of state authorizing them to carry on business in the state. In order to obtain this certificate they must file a copy of their charter or certificate of incorporation with the secretary of state, also a statement of the business of the company and the place where its principal office is to be, and designating a person upon whom service of papers may be made. Until the secretary of state has delivered a certificate to any foreign corporation to do business in the state, such corporation shall not maintain any action in the state "upon any contract made by it in this state until it shall have procured such certificate." L 1892, ch. 687, §§ 15, 16. Foreign corporations may acquire real

estate in this state. Id., § 17. No corporation except those formed under or subject to the banking laws shall discount bills, notes or other evidences of indebtedness or receive deposits or buy and sell bills of exchange. Id., § 19.

The penal code of New York makes it a penal offense to do any of the following acts, viz.: To subscribe for stock without authority, or to announce such subscription, or to subscribe in a fictitious name, or to subscribe for one who does not intend to fulfill: to issue or pledge knowingly certificates of stock without authority or in excess of the capital stock; to re-issue certificate surrendered for cancellation: to use false entries in dealing with public officers in order to obtain an organization or increase of stock; to act as agent for a mortgage or co-operative foreign corporation not authorized to act in the state; to make a dividend from the capital stock; to receive notes in payment of capital stock; to buy for a corporation shares of its stock unless payment therefor is from surplus profits; to receive stock of a corporation in payment of debts due to it: to exchange the stock, notes or bonds of a company for the stock, notes or bonds of another company engaged in another line of business unless such exchange is authorized by law; to make loans or discounts for a bank greater than that allowed by law or greater than three times the capital stock paid in and actually possessed; to make such loan to a director, or upon paper upon which a director is liable, to an amount exceeding the amount allowed by statute, or exceeding one-third of the capital stock paid in and actually possessed; to give or indorse paper making the company liable beyond the amount of loans and discounts allowed by law; for an officer, teller or clerk to knowingly overdraw his account with his bank; receiving deposits for an insolvent bank; participating in a fraudulent insolvency of a corporation; wilfully doing acts expressly forbidden by law or willingly omitting to perform legal duties; carrying on private banking without being subject to the supervision of the superintendent of banks, unless the party was engaged in such banking before May 23, 1885; issuing or concurring in any vote for the issue of stock in excess of the capital stock; for an officer or director to sell the stock of his corporation "short"; false entries in the corporate books; refusing to exhibit or allowing inspection and extracts to be taken from books open by statute to a person, or refusing or wilfully neglecting to make proper entries in the stock book; refusing or neglecting to make statements lawfully required by public officers; voting stock or issuing a proxy to vote where the possession and control and title of the stock are not in the party so voting or issuing a proxy; selling a vote by proxy. The above provisions apply also to foreign corporations carrying on business or having an office for business in the state. L. 1892, ch. 692 (ch. XI), and L. 1893, ch. 692, § 611, amending Penal Code, §\$ 590-614.

Taxation .- An incorporation fee of one-eighth of one per cent of the authorized capital stock must be paid to the state before a charter will be granted. The same fee must be paid upon any increase of the capital stock. Banking corporations are not subject to this law. A consolidated company pays the fee only on the capital stock in excess of the aggregate capital stock of the two companies which have been consolidated. L. 1892, ch. 668. "The owner or holder of stock in any incorporated company liable to taxation on its capital shall not be taxed as an individual for such stock." 1 R. S., ch. XIII, title 1, § 7. A corporate officer is required each year to deliver to the tax assessor and state comptroller a statement of the real estate owned by the company, the capital stock paid in or secured to be paid in, excepting the amount paid for real estate, and the place of the principal office or financial business of the company, or the place where it is liable to be taxed. 1 R. S., 414, §§ 2, 3. If the statement is not furnished, the company is liable in the sum of \$250. The president or treasurer shall report to the comptroller the dividends declared by the company during the past year. If such dividends were less than six per cent. the report shall state the estimated value of the capital stock of the company. If there is both common and preferred stock,

the report is to treat each as distinct from the other. L. 1881, ch. 361, Am'g L. 1880, ch. 542, § 1. For failure so to do ten per cent, is added to the tax. Id., § 2. Every domestic corporation and every foreign corporation doing business in the state, excepting savings banks and institutions, life insurance companies, banks, foreign insurance companies, manufacturing or mining corporations, and companies wholly engaged in manufacturing or mining ores within the state, but including gas companies, trust companies, electric and steam-heating companies, lighting and power companies, and other companies not excepted above, must pay annually to the state, as a tax upon its franchise or business, a quarter of a mill tax upon the par value of the capital stock for every one per cent. of dividends declared during the year, if such dividends amount to six per cent, or over: if such dividends are less than six per cent, then the tax shall be at the rate of one and a half mills upon the estimated value of the entire capital stock. If the company has both common and preferred stock, they are treated separately in levying the above tax. L. 1890, ch. 522. In addition thereto, every railroad, canal, steamboat, ferry, express, navigation, transportation and elevated railway company, and all domestic and foreign corporations doing business in the state and owning, operating or leasing to or from another company or association a railroad, canal, steamboat, ferry, express, navigation, transportation or elevated railway route or line, or any company transporting freight or passengers, and every telegraph and telephone company doing business in the state, and express, palace-car and sleeping-car companies doing business in the state, pay also a tax to the state, as a tax upon their business in the state, one-half of one per cent. of the gross earnings in the state. L. 1880, ch. 542, § 6, Am'd L. 1881, ch. 361. A statement of such earnings must be made annually. Id., § 7. No other state tax is levied upon the property of corporations except upon their real estate. Corporations are taxable as above only upon the amount of their capital stock employed in the state. Id., \$ 11, Am'd L. 1882, ch. 151, and L. 1885, ch. 501. The comptroller may examine the books of any company in connection with the above taxes. Id., § 12. An appeal lies from the action of the comptroller to the supreme court. Id., § 20; L. 1889, ch. 463. Town assessors shall apportion the valuation of the property of railroads, telegraphs, telephones and pipe-line companies among the school districts in the town in which any portion of the property is situated. L. 1867, ch. 694, § 1, Am'd L. 1884, ch. 414, § 1. The county tax upon railroads, excepting in New York and Kings county, may be paid with one per cent additional to the county treasurer. L. 1870, ch. 506, § 2. The amount is then credited to the various towns or cities. Id., § 4. Telegraph lines are assessed in the various towns as real estate. L. 1886, ch. 659, § 1. A county tax is levied upon the capital stock of every company liable to taxation, and the valuation is ascertained by deducting from its actual value and the actual value of its surplus funds in excess of ten per cent of the capital stock, the assessed value of its real estate and shares of stock owned by it in other corporations which are taxable upon their capital stock under the laws of this state. L. 1857, ch. 456, § 3. Shares of stock in both state and national banks in this state are taxed. The same deductions and exceptions are allowed, however, as are allowed in assessing the value of other personal property owned in the state. A deduction is also made for the value of the real estate of the bank. L. 1882, ch. 409, § 312. The tax is a lien upon the bank stock of nonresidents. L. 1892, ch. 714. The bank is required to retain from dividends the amount of the taxes and to pay the same to the collector, unless the taxes have been paid by the stockholder. Id. A tax is also levied on foreign corporations doing a hanking business in the state, the tax being based upon the average sums of money in the business. L. 1882, ch. 409, §§ 321 and 322; L. 1889, ch. 12. Every fire or marine insurance company, foreign or domestic, doing business in the state must pay to the state, as a tax on its business, one-half of one per cent. of the gross amount of premiums received by it during the year. L. 1886, ch. 679, § 1. No other tax is levied upon the personal property or franchise or shares of stock, but

the real estate is to be taxed the same as that of individuals, and the fire-department tax of two per cent. must also be paid. Id., § 4. Other insurance companies, foreign or domestic, excepting mutual beneficial insurance associations, must pay a tax of four-fifths of one per cent. upon the gross amount of premiums received. L. 1880. ch. 542. § 5. Am'd L. 1881. ch. 361.

§ 964. NORTH CAROLINA: Constitutional provisions.— Corporations may be formed under general laws, but shall not be created by special act, except when, "in the judgment of the legislature," the objects of the corporations cannot be attained under general laws. All general or special laws passed pursuant to this section may be altered or repealed. Art. VIII, § 1. "Dues from corporations shall be secured by such individual liabilities of the corporations and other means as may be prescribed by law." Id., § 2. "Laws shall be passed taxing, by uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies or otherwise." The legislature may tax franchises, incomes, etc., provided the income is not taxed when the property from which it is derived is taxed. Art. V. § 3.

Miscellaneous corporations. - Three or more may incorporate for any lawful business, "except building railroads, banking or insurance." Unless it shall appear that the object of the corporation cannot be attained under this law, the incorporation shall be in the following manner: The incorporators shall sign and present to the clerk of the superior court of the county articles of agreement specifying (1) the corporate name; (2) the business proposed; (3) the place of business: (4) the period of corporate existence: (5) the names of the subscribers: and (6) the amount of capital, the number of shares, and the amount of each (the same not to be less than \$2 each). The articles, duly acknowledged, must be recorded by the clerk in his office. The clerk shall have power, upon application, to "amend or change the act of incorporation," provided there be no change in the business. A company thus formed shall not have a greater capital than \$1,000,000, and no amendment or change shall be made by the clerk so as to increase the capital to more than \$1,000,000. The legislature shall have power at any time to revoke, repeal or amend the charter of any corporation formed under the above provisions. §§ 677, 678, Am'd Laws 1885, ch. 19; Laws 1889, ch. 170; Laws 1891, ch. 257, Am'd Laws 1893, ch. 244. The clerk shall then send a copy of the articles to the secretary of state, who shall record them and issue letters patent to the corporators, constituting them a corporation, which said letters shall be recorded with the clerk the same as the articles. The fees of the secretary of state for recording the articles and issuing the letters patent are nominal. Every bill of incorporation introduced in the legislature shall be accompanied by a receipt of the state treasurer for \$50. § 679, Am'd Laws 1893, ch. 318. Charters thus obtained may be amended. The amendment shall be certified to the clerk, so as to show that it has been previously authorized and adopted by a "majority of the stockholders" in meeting assembled, and the clerk shall give notice as provided in section 679. Laws 1893, ch. 380. Dividends shall not be declared by such company when its debts exceed two-thirds of its assets. § 681. Corporations may convey property by deed, but any conveyance of the corporate property, "whether absolutely or upon condition, in trust or by way of mortgage executed by any corporation, shall be void and of no effect as to creditors of said corporation, existing prior to or at the time of the execution of said deed, and as to torts committed by such corporation, its agents or employees, prior to or at the time of the execution of said deed: Provided, said creditors or persons injured, or their representatives, shall commence proceedings or actions to enforce their claims against said corporation within sixty days after the registration of said deed, as required by law," § 685, Am'd Laws 1893, ch. 95. All corporations may, by their by-laws, in the absence of special provision, determine the manner of calling and conduct-

 $^{^{1}}$ The acts of the legislature down to and including the laws of 1893 are included in this synopsis.

ing meetings; the number that shall constitute a quorum; "the number of shares that shall entitle the members to one or more votes:" the mode of voting by proxy: the mode of selling shares for non-payment of assessments; the tenure of office of the several officers, and the manner of filling vacancies. The by-laws may fix suitable penalties, not exceeding \$20 for any one offense. If any officer issues a certificate of stock "in any other way or to any other person" than the hy-laws allow, he shall be guilty of a misdemeanor, and shall be subject to fine or imprisonment, or both. § 664. Unless other provision is made in the act of incorporation, any original signer may call the first meeting by giving a ten days' published notice. \$ 665. Corporations may hold lands to an amount authorized by law, but only manufacturing and mining companies, and companies for supplying water to cities and towns, may hold at one time "more than three hundred acres of land in fee-simple, or for a longer term than thirty years." § 666. All corporations shall remain bodies corporate for three years after dissolution for the purpose of closing up the corporate business. § 667. When the corporation is dissolved, or becomes insolvent, or has forfeited its corporate rights, a judge of the superior court may, upon the application of any creditor or stockholder, appoint receivers or trustees to close up the affairs of the company. §\$ 668-70. All kinds of property belonging to any corporation, and the franchises, rights and privileges of any corporation receiving tolls and fares, may be taken and sold on execution. § 671. The title to personal property sold on execution passes independently of the franchise and real estate of the corporation. § 672. In the sale of a franchise, the highest bidder shall have conveyed to him by deed all the limmunities and privileges belonging to the corporation, so far as relates to the right of taking tolls and fares, and the officers making the sale shall place the purchaser in possession of all the corporate realty connected with the franchise. The purchaser shall therenpon, for the time limited by the terms of the sale, receive all tolls and fares which the corporation was allowed to take. § 675. Such purchaser shall have the same remedies for damages to the franchise as the corporation had. and may make any recovery which the corporation would have been entitled to make during the time limited in the purchase. § 675. The corporation shall in all other respects "retain the same powers and be bound to the discharge of the same duties and liable to the same penalties and forfeitures as before such sale." § 676. "It shall be the dnty of the attorney-general to bring an action in the superior court of the county, as in this code directed, to restrain by injunction any corporation from assuming or exercising any franchise or transacting any business not allowed by its charter; to restrain any person from exercising corporate franchises not granted: to bring directors, managers and officers of a corporation, or the trustees of funds given for a public or charitable purpose, to an account for the management and disposition of the property confided to their care; to remove such officers or trustees upon proof of gross misconduct; to secure for the benefit of all interested the property or funds aforesaid; to set aside and restrain improper alienations thereof, and generally to compel the faithful performance of duty, and prevent all malversation, peculation and waste. And in case of fraud by the president, directors, managers or stockholders in any corporation, the court shall render personally liable to creditors and others injured thereby such of the directors and stockholders as may have been concerned in the fraud." corporation shall exist more than sixty years unless otherwise provided in the act creating the same. But no dissolution by judgment or decree shall extinguish any debt due to or from the corporation. § 687. If any body of corporators shall neglect to organize a company, and carry ont the intent of the act of incorporation for two years after letters have been granted; or, when organized, the company shall cease for two years together to exercise the corporate powers, such disuse of the corporate privileges shall forfeit the charter. § 688. Shares of stock in all joint-stock companies are personal estate. § 689. "Any corporation may take a mortgage upon any quantity of land to secure a debt owing to the corpora-

tion, and may take a conveyance of any quantity of land in partial or total satisfaction of a debt due the corporation; and may purchase any quantity of land at a sale under execution against a debtor of the corporation or at any individual sale of the property of a debtor of the corporation; but the corporation purchasing such lands to a quantity exceeding, with its lands previously owned, three hundred acres, shall not be capable of holding the same for more than thirty years from the date of such purchase; and all land so purchased in excess of the limited quantity and held by any corporation shall at the end of thirty years from the date of such purchase be forfeited to the state," to be recovered in an action brought in the name of the state. The corporation purchasing such land may, within thirty years after the purchase, convey by deed to a bona fide purchaser for value "such estate in the said lands as it would have had under its purchase but for the limitation herein contained," \$ 690. "All corporations (except railroad, mining, manufacturing corporations, and companies to supply the cities and towns of the state with water) which shall be seized in fee, or for a longer time than three lives in being, or possessed for a longer time than thirty years, of any lands or tenements exceeding three hundred acres in quantity, are required, within said time, to disnose of such excess." \$ 693. All corporations formed under this chapter may be dissolved by special proceeding, "instituted by the company, or by any corporator, or by any judgment creditor, whose execution, issued to the county in which the corporation has its only or principal place of business, shall be returned unsatisfied," or by the attorney-general, for the following causes: (1) For any abuse of its corporate powers to the injury of the public or of the corporators, or of its creditors or debtors; (2) for non-user of the corporate powers for two or more years consecutively; (3) for insolvency manifested by the return of an execution unsatisfied: (4) upon any conviction of the company of a persistent criminal offense. § 694. "Every bill introduced in either house of the general assembly to incorporate any company, or for the benefit thereof, or to amend any act relating to such company or corporation, shall be accompanied by a receipt from the state treasurer for one hundred dollars." This section does not apply to railroad or turnpike companies, or companies for bridging non-navigable streams, nor to charitable, etc., associations. § 696. "If a sale be made under a deed of trust or mortgage executed by any corporation on all its works and property, and there be a conveyance pursuant thereto, such sale and conveyance shall pass to the purchasers at the sale not only the works and property of the corporation as they were at the time of making the deed of trust or mortgage, but any works which the corporation may after that time and before the sale have constructed, and all other property of which it may be possessed at the time of the sale other than debts due to it. Upon such conveyance to the purchaser the said corporation shall ipso facto be dissolved, and the said purchaser shall forthwith be a new corporation by any name which may be set forth in the said conveyance, or in any writing signed by him and recorded, in the same manner in which the conveyance shall be recorded." § 697. The new corporation shall succeed to all the franchises and privileges of the old corporation, and shall perform the same duties which the old corporation "would have," or "should have," performed but for the conveyance. But the corporation so created shall not be entitled to the debts due the first corporation, and shall not be liable for the debts of, or any claims against, the first corporation, not expressly assumed in the contractof purchase; "nor shall the property, franchise or profits of such uew corporations be exempt from taxation." "The whole profits of the business done by such corporation shall belong to the said purchaser and his assigns. His interest in the corporation shall be personal estate, and he or his assigns may create so many shares of stock therein as he or they may think proper, not exceeding the amount of stock in the first corporation at the time of the sale, and assign the same in a book kept for the purpose." Such shares shall be on the footing of shares in jointstock companies generally, except only that the first stockholders' meeting shall

be held at such time and place as shall be fixed by the purchaser, after a twoweeks' published notice. § 698. "This chapter, unless otherwise declared herein. or in the chapter entitled Railroads and Telegraphs, shall apply to all corporations. whether created by special act of assembly, by letters of agreement under this chapter or by the chapter entitled Railroads and Telegraphs; and this chapter and the chapter on Railroads and Telegraphs, so far as the same are applicable to railroad corporations, shall govern and control, anything in the special act of assembly to the contrary notwithstanding, unless, in the act of the general assembly creating the corporation, the section or sections of this chapter, and of the chapter entitled 'Railroad and Telegraph Companies,' intended to be repealed, shall be specially referred to by number, and as such specially repealed." § 701. (The reference in the last preceding section is to chapter 16, which contains all the above-mentioned provisions respecting miscellaneous corporations.) The railroad commission is required to make rates for express, telegraph and telephone companies, and the penalty for charging a higher rate than that fixed or approved by the commission is from \$50 to \$500 for each offense. Laws 1891, ch. 320, \$ 26; Am'd Laws 1893, ch. 512. Persons holding stock as executors, etc., or as collateral security are not personally liable as stockholders; but the pledger, and the estate or funds in the hands of such executor, etc., shall be liable. Laws 1893, ch. 471.

Railroads .-- Twenty-five or more may incorporate for "constructing, maintaining and operating" a public railroad, or for "maintaining and operating any unincorporated railroad already constructed for like public use." They must sign articles of association, stating (1) the corporate name; (2) the proposed period of corporate existence; (3) the termini of the road; (4) the length of the road, as near as may be; (5) the names of the counties into which the road will extend; (6) the amount of capital stock (the same to be not less than \$5,000 per mile): (7) the number of shares; (8) the names and residences of six directors to manage the affairs for the first year. Each subscriber must sign his name and residence, stating the number of shares he will take. Such articles may be filed with the secretary of state, and thereafter the subscribers and all who may become stockholders shall be a body corporate. § 1932. The articles of association shall not be filed until at least \$1,000 per mile of the road is subscribed and five per cent. thereon paid, in good faith, in cash, to the directors, nor until there is annexed thereto an affidavit by at least three of the directors that such amount has been subscribed, and the required payment has been made in cash, and that it is intended in good faith to construct and operate the road. The affidavit must be recorded with the articles. § 1933. After the filing of the said articles the directors may open books of subscription for the amount of capital stock not already subscribed "in such places and after giving such notice as they may deem expedient." At the time of subscribing each subscriber shall pay to the directors "five per cent. of the amount subscribed by him in money, and no subscription shall be received or taken without such payment." § 1935. There shall be six directors and a president, who shall be chosen annually "by a majority of the votes of the stockbolders voting at such election, in such mauner as may be prescribed in the bylaws." Each stockholder shall have one vote in person or by proxy, on every share "held" by him thirty days previous to any such election. Vacancies shall be filled in the manner prescribed by the by-laws. § 1936. The directors and president must own stock absolutely in their own right, and must be qualified to vote at the election at which they are chosen. Books and papers must be exhibited at any election, if a majority of the stockholders present demand it. Id. Any purchaser or purchasers of "real estate, track and fixtures of any railroad sold by virtue of any mortgage executed by the corporation, or execution issued upon any judgment or decree, may associate with him or them "any number of persons," and file articles of association as provided in this chapter, and thereupon such purchaser or purchasers and their associates shall be a new corporation subject to all the provisions of this chapter. Id. The directors may require subscriptions to be paid in such manner and in such instalments as they deem proper. § 1938. The capital stock may be increased to any necessary amount, with the concurrence of two-thirds in interest of all the stockholders of the company voting at a special meeting called for the purpose. \$ 1939. Each stockholder shall be "individually liable" to the creditors of the company, "to an amount equal to the amount unpaid on the stock held by him, for all the debts and liabilities of such company until the whole amount of the capital stock so held by him shall have been paid to the company, and all the stockholders of any such company shall be jointly and severally liable for the debts due or owing to any of its laborers and servants, other than contractors, for personal services for thirty days' service performed for such company, but shall not be liable to an action therefor before an execution shall be returned unsatisfied in whole or in part against the corporation, and the amount due on such executions shall be the amount recoverable with costs against such stockholders." Before a laborer or servant shall charge a stockholder for such thirty days' service he shall within twenty days after the performance of the service give him a written notice of his intention to hold him liable, and shall begin the action within thirty days from the return of the execution unsatisfied as aforesaid; and every stockholder against whom such recovery is had may recover the same in ratable proportion from the other stockholders. \$ 1940. No person holding stock as executor, etc., or as collateral security, shall be personally liable as a stockholder. \$1941. In proceedings to condemn land, the commissioners of appraisal shall report to the court, and any interested party may file exceptions to the report. If the company shall pay the appraised value to the court it may hold the land pending an appeal. If the final decision is in favor of the corporation, such corporation has full title to the lands in question during the corporate existence. The court may refuse to condemn the land, in which case the company shall have no rights in the land and shall receive back any money which may have been paid into court. Benefits which may be derived from the proposed construction may be considered in assessing damages to land, provided, "that in case the benefits to the land caused by the erection of such railroad be ascertained to exceed the damages to said land, then the said railroad company shall pay the costs of the proceeding and shall not have a judgment for the excess of benefits over the damages." § 1946, Am'd Laws 1891, ch. The directors may change the route by a two-thirds vote, if they think it best for the road. § 1953, Am'd Laws 1893, ch. 396. For limitation of actions for damages to the owners of land, see Laws 1893, ch. 152. The secretary of state may agree with the company upon the price of state lands to be conveyed for railroad purposes, or the company may have the same appraised. Towns or counties may grant town or county land needed by the company for such compensation as may be agreed upon. § 1955. The company may enter upon any lands to survey a proposed route. § 1957. Voluntary grants of laud for railroad ourposes shall be held for the purposes of the grant only. Id. Any property necessary for railroad purposes may be purchased and held. Id. The company may "cross, intersect, join and unite" its road with any other road before constructed, at any point, "and upon the grounds of such other company," with the necessary sidings, etc.; and every company whose road is already constructed shall unite with the owners of any new road in grauting the aforesaid facilities. Id. motive power may be steam or animals, or any mechanical power. Id. The company shall have power from time to time to "borrow such sums of mouey as may be necessary for completing or finishing or operating their railroad, and to issue and dispose of their bonds for any amount so borrowed, and to mortgage their corporate property and franchises to secure the payment of any debt contracted by the company for the purposes aforesaid; and the directors of the company may confer on any holder of any bond, issued for money borrowed as aforesaid, the right to convert the principal due or owing thereon into stock of said company at any time not exceeding ten years from the date of the bond, under such regulations as the directors may see fit to adopt." Id. Any railroad or other transportation company may aid in the construction of any railroad or branch railroad "in this or an adjoining state connected with it directly or indirectly." provided the building of such railroad or branch has been authorized by law. Any railroad or other transportation company "may acquire and hold or guaranty or indorse the bonds or stocks of, or may lease, any railroad or branch railroad, or other transportation line in this or an adjoining state connecting with it directly or indirectly." Municipal aid shall not be given for the construction of any railroad to a greater amount in the aggregate than ten per cent, of the assessed valuation of the real and personal property in the county, city, town or township so aiding any railroad. Laws 1889, ch. 486. A special act authorizes Macon and Swain counties to subscribe to specified amounts of the stocks of any railroad that may be chartered through those counties. Laws 1889, ch. 479, Am'd Laws 1891, ch. 214. A very complete annual report must be made to the governor or railroad commissioners. Am'd Laws 1893 ch. 124; Code, \$ 1959. The penalty for failure is a liability of \$500. § 1960. If any corporation shall not within two years begin the construction of its road and expend thereon ten per cent, of its capital, or shall not finish the road and put it in full operation within ten years, "its corporate existence and powers shall cease." § 1980. The assembly may at any time annul or dissolve any corporation. \$ 1981. A part of a proposed railroad may be constructed in an adjoining state, upon a two-thirds vote of the directors; and the directors may reduce the capital to an amount not less than \$5,000 per mile for the portion of the road to be constructed within the state. \$ 1984. "Any railroad corporation or its successors," being the lessee of any other railroad, may take a surrender or transfer of the stock of any of the stockholders in the corporation whose road is leased, and issue in exchange therefor "the like additional amount of its own capital stock at par, or on such other terms and conditions as may be agreed upon between the two corporations; and after such surrender or transfer of the "greater part of the capital stock, the directors of the corporation taking the same shall thereafter, "on a resolution electing so to do, to be entered on their minutes," become ex officio the directors of the corporation whose road is held under lease. When the whole capital stock has been so surrendered or transferred, and a certificate thereof filed with the secretary of state under the corporate seal, all the property, frauchises, etc., of the said lessor shall vest in and be held by the said lessee as fully and entirely and without change or diminution as the same were before held," etc., and shall be managed and controlled by the said directors under the corporate name of the corporation to whom the transfer is made. Neither the rights of any stockholder not transferring his stock, nor the existing liabilities, nor the rights of creditors, shall be affected by this section. § 1994. Railroad companies in the state are authorized to make agreements for the through transportation of freight and passengers, and for that purpose to use each other's roads and rolling-stock on such terms as may be agreed upon. § 1995. Pooling is declared a misdemeanor, and is punishable by a fine of not less than \$1,000, or by imprisonment for not less than one year. § 1968. The maximum passenger rate is fixed at five cents per mile. § 1957. The general assembly may from time to time alter or reduce "the rates of freight, fare or other profits" of any railroad. § 1961, Am'd Laws 1891, ch. 320. A railroad commissioner has general supervision of the roads of the state. Laws 1891, ch. 320. The penalty for charging unreasonable rates is a fine of from \$500 to \$5,000. Id., § 3. Discriminations in favor of or against any person or persons, or undue preference of, or prejudice against, any person, company or locality, are punished by a fine of from \$1,000 to \$5,000 for each offense. § 4. The commission shall make just and reasonable rates, or cause them to be made, and shall establish just and reasonable rules and regulations for carrying out the provisions of this chapter. § 5. Long and short haul tariffs are regulated under the direct on of the commission. The commission and the company conjointly may agree upon special rates for the purpose of developing manufactures, mining, milling and internal improvements. § 6. The commissioners must cause schedules of rates and charges to be prepared and posted in all the stations, and the commission may revise the schedules from time to time. An appeal from the determination of the commission regarding rates and charges may be had to the superior court, and thence to the supreme court. § 7. All contracts and agreements between railroads doing business in the state as to rates and charges shall be submitted to the commissioners for approval. Likewise all arrangements for the division of earnings by competing lines. § 9. If any officer or employee shall violate any lawful rule of the commission, and if, after due notice, reparation to the injured party is not made within thirty days, the company shall incur a penalty of from \$50 to \$5,000 for each offense. § 10. The remedies given by this chapter to injured parties are regarded as additional to the remedies already existing. § 12.

Taxation. - All existing exemptions of corporations or corporate property from taxation are repealed. Laws 1893, ch. 294, § 6. All domestic corporations, except insurance companies, shall, "in addition to the other property required by this act to be listed," deliver to the assessors a sworn statement of the amount of capital stock, giving the amount authorized and the number of shares, and amount paid up, the market value thereof, and the assessed value of all its real and personal property (which shall be listed and valued as other real and personal property), the aggregate amount thereof to be deducted from the aggregate value of the capital stock, and the remainder to be listed as the capital stock. Laws 1893, ch. 296, § 39. If any corporation is delinquent for six months in the payment of taxes, its charter shall be forfeited upon a suit brought in behalf of the state, or the charter be revoked upon affidavit of the sheriff that he cannot collect the taxes. § 75. Owners of shares, except in banks, are not required to list them, but they are listed and the tax paid by the company. § 14. Corporations are taxed on their personalty at their principal place of business. Id. Stockholders in all banks are assessed on the value of their shares where the bank is located. Such shares are listed by the corporation and the tax paid by the cashier directly to the state treasurer. Shareholders shall themselves list their shares for county and school taxation where they reside. The tax levied on shares in any bank shall not exceed that levied on the moneyed capital of individuals. § 40, and ch. 294, § 4. The bank may pay the county taxes and deduct the same from the dividends or funds belonging to the shareholder, and shall do so in the case of non-resident stockholders, the shares of such non-residents being taxed where the bank is located. Code, §§ 3676, 3684. The road-bed, depots, etc., of all railroads are deemed personal property for the purpose of taxation. Ch. 296, §§ 94, 95. Railroads are taxed by a state board, composed of the railroad commissioners. The board shall assess all the road-bed, right of way, structures thereon, rolling stock, etc., and all property used in the operation of the road. Machine and repair shops, office buildings, storehouses, and all real and personal property outside the right of way and depot grounds, shall be listed like other personalty and realty where the same is situated. §§ 42, 43. A list of all rolling stock (movable property) shall be returned to the board each year in June, with a schedule stating the amount of capital authorized, the number of shares, the amount paid up, the market value of the shares, the length of the road in each county and in the state, the total assessed valuation of all tangible property in the state, and all other information required by law to be reported. § 44. The commissioners shall determine the aggregate value of the railroad and apportion the same to the counties in proportion to the length of the line therein. The taxes for state purposes shall be paid by the company to the state treasurer; those for school and county purposes to the county commissioners. § 45, also ch. 121, § 1. When part of the road is without the state, "the commissioners shall ascertain the value of railroad track, rolling stock and shares of capital stock of such company, and divide it in the proportion the length of such

road in this state bears to the whole length of such road, and determine the value of such railroad track, rolling stock and shares of capital stock in this state accordingly." § 46. If the property of any railroad company be leased or operated by any other corporation, foreign or domestic, the property of the lessor or company whose property is operated shall be subject to taxation in the manner hereinafter directed, and if the lessee or operating company, being a foreign corporation, be the owner or possessor of any property in this state other than that which it derives from the lessor or company whose property is operated, it shall be assessed in respect of such property in like manner as any domestic railroad company. § 48. Any officer or agent refusing to attend before the board or submit any books or papers to the inspection of the same, or to answer any questions about the business or property of the company, shall be confined in jail for not more than thirty days, and be fined not more than \$500 and costs. § 49. Canal, steamboat and telegraph companies are assessed by the state board as nearly as can be in the manner provided for railroad taxation. § 50 and § 42; also ch. 12]. § 2. Stockholders in any corporation, "in valuing their shares, may deduct their ratable proportion of the value of taxable property, the tax whereof is paid by the corporation," Laws 1885, ch. 177, § 12. No officer shall allow the transfer of stock on which taxes are due and unpaid, nor pay dividends on such stock after notice of the non-payment of taxes. Code, § 3683. The license fee of insurance companies is \$100 per annum. Such company must also pay a tax of two per centum upon its gross receipts in the state. But if its investments in real estate in the state or loans secured by mortgage to citizens of the state shall equal one-half the gross receipts, the gross receipt tax shall be only one per centum. Laws 1893, ch. 294, § 29. Every bank must, in addition to the ad valorem tax provided for elsewhere, pay a graduated license tax of from \$100 for a capital of \$2,000,000 or more, to \$5 for a capital of less than \$5,000. § 30. Railroads and caual companies pay a gross receipt tax of one per centum if their property is not taxed. § 37. No bill to incorporate a railroad company, or amend the charter of such company, other than one in which the state is a stockholder, shall be introduced unless accompanied by a receipt of the state treasurer for \$25. Code, § 2004, Am'd Laws 1885. ch. 33. There must be paid the same sum before introducing an act to incorporate any corporation or amend a charter unless the business remains unchanged. § 696, Am'd Laws 1885, ch. 36, and ch. 93. A fee of \$25 is charged by the clerk before recording articles of association. § 678. This will be refunded if the charter is not granted. Laws 1893, p. 493. Also a fee of \$2, with the expense of publication, and \$1 for the certificate declaring the incorporation. § 680. A joint resolution instructs the United States senators from this state, and requests the representatives of the state in congress, to use all honorable means to secure the repeal of the federal tax on the state banks of issue. Laws 1891, p. 651.

§ 965. NORTH DAKOTA:¹ Constitutional provisions.—"No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly." Constitution of 1889, art. I, § 20. No special or local law shall be passed "granting to any corporation, association or individual the right to lay down railroad tracks, or any special or exclusive privilege, immunity or franchise whatever." Art. II, § 69. It is prescribed that the organization of corporations shall be provided for by general law only, and any such general law shall be subject to repeal or alteration. Art. VII, § 131. The legislature may always take the property and franchises of incorporated companies for public use. Id., § 134. "In all elections for directors or managers of a corporation, each shareholder may cast the whole number of his votes for one candidate, or distribute them upon two or more candidates." Id., § 135. No foreign corporation may do business in the state without having a place of business in the state and an agent upon whom process may be served. Id., § 136. No other business

¹The acts of the legislature down to and including the laws of 1893 are included in this synopsis.

than that expressly authorized in the charter can be engaged in. Id., § 137. "All fictitious increase of stock or indebtedness shall be void." No such increase shall be made except under general law, "nor without the consent of the persons holding the larger amount in value of the stock first obtained at a meeting to be held after sixty days' notice," Id., § 138. The legislature may authorize a street railroad, telegraph, telephone and electric light plant to be put into a town or city only after the local authorities controlling the streets assent thereto. Id., § 139. Domestic railroad corporations doing business in the state must keep in the state a public office for the transaction of its business, where transfers of its stock shall be made, and where books shall be kept open for public inspection, giving the amount of capital subscribed, the subscribers, the stockholders, the amount of stock owned by each, the amount of subscription paid in, transfers of stock, the amount of corporate assets and liabilities, and the names and residences of the officers. Annual reports must be made by the directors to the state. Id. 8 140. There shall be no consolidation of competing or parallel lines; and in no case shall a consolidation take place except upon sixty days' public notice to all the stockholders. Id., \$141. The legislature has power to regulate the rates charged by railroad, sleeping-car, telegraph, telephone and transportation companies, but an appeal may be had to the courts from the rates so fixed. Id., § 142. "Every railroad company shall have the right with its road to intersect connect with or cross any other; and shall receive and transport each other's passengers, tonnage and cars, loaded or empty, without delay or discrimination." Id., § 143. "Any combination between individuals, corporations, associations or either, having for its object or effect the controlling of the price of any product of the soil or any article of manufacture or commerce, or the cost of exchange or transportation, is prohibited and hereby declared unlawful and against public policy," and the charters of corporations entering iuto such combination "shall be deemed annulled and void." Id., § 146. The legislature may by law allow railroad companies to pay to the state a percentage of their "gross earnings" in lieu of all state, county, township and school taxes on their property, including their road-bed, right of way, shops, buildings, and other property used exclusively in common carrier business. Art. XI, § 176. Otherwise a state board is to assess the railroad and apportion it for taxation among the municipalities through which it runs. Id., § 179. The right of taxation shall not be surrendered or suspended by the state or any municipality. Id., § 178. Neither the state nor any political subdivision thereof "shall loan or give its credit or make donations to or in aid of any . . . corporation, . , . nor subscribe to or become the owner of the capital stock of any association or corporation, nor shall the state engage in any work of internal improvement, unless authorized by a two-thirds vote of the people." Art. XII, § 185. "The exchange of 'black lists' between corporations is prohibited." Art. XVIL § 212. By the constitution of 1889 the territorial statutes are continued in force until they may be changed by the new state.

The present statutory law affecting corporations is as follows:

Miscellaneous corporations.—One-third of the officers of a corporation shall be residents of the territory. Compiled Laws 1887, § 2897. An uncenditional acceptance by a majority of the corporators of the statutory grant of corporate power is necessary to constitute a corporation. § 2898. Three or more persons may incorporate for purposes named in the statute, including mining, manufacturing, transportation and other industrial pursuits, the construction and operation of railroads, conducting banks of discount and deposit (but not of issue) and trust companies; provided, that insurance companies must have at least seven incorporators. § 2900, Anr'd Laws 1893, ch. 39. The articles of incorporation must set forth the name of the corporation, the purpose for which it is formed, the place of its principal business, the term for which it is to exist, the number of directors or trustees, "and the names and residences of such of them who are to serve until the election of such officers, and their qualifications," and

if there is a capital stock, its amount and the number of shares into which it is to be divided. \$ 2902. The articles of incorporation of a railroad or wagon-road must also state the kind of road intended, the place from and to which it is to be rup, and all the intermediate branches, the counties through which it will run. and the estimated cost and length of the road. \$ 2903. The articles of incorporation must be subscribed by three or more persons, one-third of whom must be residents of the state, "and acknowledged by each before some officer authorized to take and certify acknowledgments of conveyances of real estate," \$ 2904. Upon the filing of the articles with the secretary of state, the secretary of state shall issue a certificate: "and thereupon the persons signing the articles, and their associates and successors, shall be a body politic and corporate." § 2905. The articles of incorporation may be changed or ameuded upon a vote of two-thirds of all the stock, at a special meeting, or upon the written assent of three-fourths of the stock. A certificate of the amendments shall be filed with the secretary of state. Laws 1893, ch. 40. The same proceedings and vote are necessary to change the corporate name, except that the written assent of two-thirds only of the capital stock is required where no meeting is called. Laws 1893, cl. 41. "A subscription to the stock of a corporation about to be formed is to be held for the benefit of the corporation when it is formed, and may be enforced by it." § 2912. "When a corporation is authorized by the terms of the subscription, or otherwise, to forfeit stock for the non-payment [of subscriptions], it may either forfeit the stock or recover the amount of subscription, but it cannot do both," \$ 2914. Shares of stock are personal property, "and may be transferred by indorsement by the signature of the proprietor or his attorney or legal representative, and delivery of the certificate;" but such transfer is only valid as between the parties thereto until duly entered on the company's books. Provision may be made in the by-laws for issuing certificates of stock prior to full payment. § 2915. less otherwise provided, a corporation may purchase shares of its own stock from its surplus profits in such manner and for such price as the stockholders may unanimously decide upon. § 2917. "A dividend belongs to the person in whose name it stands upon the books of the corporation on the day when it becomes payable." \$ 2918. When no period is limited a corporation shall have perpetual existence. Any corporation may hold real estate necessary for the legitimate purposes of the corporation, "not exceeding in any case any amount limited by law." § 2919. Every corporation formed under this chapter must adopt by-laws within one month. A majority of the stock must vote in favor of such by-laws at a meeting held after a two-weeks' published notice. A written assent of members representing two-thirds of the stock is sufficient to adopt the by-laws without a meeting for that purpose. § 2920. The mode of voting by proxy may be prescribed by the by-laws, when no other provision is specially made. § 2921. A vote of two-thirds of the stock may delegate to the directors the power to amend, repeal or renew the by-laws. § 2922. Each share of stock has one vote at all elections. § 2925. There shall be from three to eleven directors, all holders of stock, the amount held by each to be fixed by the by-laws. Unless otherwise provided by the by-laws, the board of directors may fill a vacancy in the office of director. \$ 2926. Every decision of a majority of the directors, made when the board is duly assembled, "is valid as a corporate act." § 2927. The directors must not make dividends excepting from surplus profits; "nor must they divide, withdraw or pay to the stockholders, or any of them, any part of the capital stock; nor must they create debts beyond their subscribed capital stock, or reduce or increase their capital stock, except as specially provided by law." For a violation of these provisions the directors present and not entering their dissent on the minutes are "jointly and severally liable to the corporation, or the creditors thereof, in the event of its dissolution," for any amount thus wrongfully appropriated, "and no statute of limitations is a bar to any suit against such directors" for any sum for which they are thus liable. § 2928. No director shall be removed from office except by a vote of two thirds of the stock at a meeting specially called for the purpose. In case of removal, the vacancy may be filled at the same meeting. § 2930. No person can vote stock, or take part in any meeting, unless he shall have had stock in his own name on the books for at least ten days. \$ 2931. Meetings of the board and of stockholders must be held at the principal office, except that railroad directors' meetings may be held in any place, in or out of the state, provided the railroad has one or more resident directors or a duly appointed resident agent; when not otherwise provided in the by-laws, all board meetings must be called by a special notice in writing to each director. A justice of the peace may call a general meeting on the written application of three stockholders, if there is no one authorized to call such meeting, and he may appoint a stockholder to preside. § 2932. Each stockholder is individually liable "for the debts of the corporation to the extent of the amount that is imposed upon the stock held by him, . . . and in no other case shall the stockholder be individually and personally liable for the debts of the corporation." Any creditor of the corporation may institute joint or several actions against any such delinquent stockholders. The liability is determined by the unpaid subscriptions at the time the action is brought, and such liability cannot be avoided by a subsequent transfer of stock. The term "stockholder" in this section includes any equitable owner of stock, though his name may not appear on the books. Trust funds in the hands of a guardian or trustee shall not be thus liable by reason of any investment in stocks in the name of a minor or trust estate, "nor shall the person for whose benefit the investment is made be responsible in respect to the stock until he becomes competent and able to control the same," but the personal responsibility of the guardian or trustee shall continue until that period. § 2933. The capital stock may be increased, or diminished to an amount not less than the indebtedness of the corporation, or the estimated cost of the works proposed to be constructed, by a vote of at least two-thirds of the stock at a meeting called for the purpose by the directors. The written assent of three-fourths of the subscribed stock has the same effect as a two-thirds vote at a meeting thus held. § 2936. Detailed records of all transactions and all meetings, acts, votes, protests, etc., and also a "stock and transfer book" shall be kept open for inspection. § 2937. If the corporation does not organize and begin business within one year its powers cease. § 2939. Upon the dissolution of a corporation the directors are trustees of the creditors and stockholders, having full power to settle up the affairs of the corporation. § 2940. Such trustees are jointly and severally liable to the extent of the corporate property in their hands. § 2941. After one-fourth of the capital stock has been subscribed the directors may levy and collect assessments thereon in order to pay expenses or debts and conduct business. § 2943. Assessments are levied and collected as provided in articles. §\$ 2944-63. If at a sale of stock to collect an assessment no bidder offers an amount sufficient to pay the assessment and costs, the corporation may bid in the stock at the amount of the assessment and charges due. The assessment and charges must then be credited as paid in full and entry of the transfer must be made. While the stock remains the property of the corporation it cannot be assessed, and no dividends may be declared thereon. The stockholders may make such disposition of such stock as they deem fit. Stock thus owned by the corporation must not be voted at any meeting. \$\ \frac{5}{3} \ 2955-56. The frauchise of any corporation authorized to receive tolls, "and all the rights and privileges thereof," may be sold under execution in the same manner as any other property, "but without any exemption." § 2964. The purchaser conducts the business on the basis of the corporation, receiving all the profits therefrom. §§ 2965-66. "The corporation whose franchise is sold, as in this article provided, in all other respects retains the same powers, is bound to discharge the same duties, and is liable to the same penalties and forfeitures as before such sale." § 2967. The franchise may be redeemed within a year by the payment of the purchase-price and twelve per cent. interest thereon. § 2938. The legislature may examine into the affairs of

all corporations at all times. \$ 2970. Manufacturing and mining companies may incorporate for a period not longer than twenty years. \$3108. The purposes of the proposed corporation must be definitely stated, its funds must not be used for any other purpose, and the corporation must not loan money to any stockholder therein, § 3109. Records are to be open to the inspection of stockholders and annual statements of accounts must be given them by the directors. \$ 3110. Stockholders are jointly and severally liable for labor done, after an execution against the corporation has been returned not satisfied, provided an action be commenced within four months. Any stockholder, compelled thus to pay the debts of a creditor, may recover from all the stockholders their ratable amount of the sum by him paid. § 3111. Annual reports are to be made and published. Willful neglect or falsity therein is a misdemeanor. \$3112. Upon the request of the persons owning twenty per cent of the stock the treasurer must issue a statement of the condition of the corporation. A copy of the statement must be kept in the office for six months to be exhibited to any stockholder. § 3113. Such corporations (manufacturing and mining) may have a business office outside of the state where any meeting may be held, but the main office for the transaction of business must, in that case, be located within the state. § 3114. "Any foreign or domestic corporation may, in its by-laws, empower any one or more of its officers, severally or jointly, to execute and acknowledge in its behalf conveyances, transfers, assignments, releases, satisfactions or other instruments affecting liens upon, titles to or interest in real estate;" and, in the absence of by-laws, the president or secretary shall have such power, when authorized by a resolution of the directors. Laws 1893, ch. 42,

Railroads.—Five or more persons "may form a corporation for the purpose of constructing and . . . operating a railroad for the transportation of passengers and freights," or for the purpose of maintaining any railroad already built for. this purpose. The articles of organization must state: (1) The corporate name (2) The termini of the road. (3) The estimated length and route. (4) The amount of capital stock, the number of shares, how much common and how much preferred stock. (5) The names and residences of the directors and their duties. There shall be not less than five nor more than thirteen directors. Each incorporator shall sign his name and place of residence, and the number of shares he agrees to take. The articles shall be filed in the office of the secretary of state, and a patent shall then be issued, whereupon the subscribers to the articles of incorporation shall be a corporation. Id. Directors shall be stockholders qualified to vote at the time of their election. In the election of directors each stockholder has one vote for every share of stock owned by him for thirty days before the election. § 2974. The stock of every such corporation is deemed personalty. § 2977. The capital stock may be increased to an amount deemed necessary for the purpose of constructing or operating the road by a vote of the owners of two-thirds of the stock, at an annual meeting, or at a meeting called by a notice in writing to each stockholder, served personally or by mail, twenty days prior to such meeting. \$ 2978. Persons holding stock as executors, guardians or trustees are not personally liable as stockholders for unpaid calls, but the estates are liable. § 2979. The railroad company may receive voluntary grants of real estate to aid in the construction and operation of the road, and may acquire by purchase such real estate as may be necessary for the accommodation of the road, and have power to lease or sell the same when no longer required for its railroad uses. The company may borrow money at any rate of interest and may execute trust deeds and mortgages. § 2981. Any company may extend its road, or build branch roads, in such manner as is provided in section 2884. The directors may, by a two-thirds vote, alter the route of the road, provided no injustice is done to any town, village or city which may have aided the road. § 2985. "Any railroad corporation may consolidate its stock, franchises and property with any other railroad corporation, whether within or without the state, when their respective

railroads can be lawfully connected and operated together to constitute one continuous main line, with or without branches, upon such terms as may be agreed upon, and become a corporation by any name selected." The consolidated company shall have all the rights, immunities, etc., including the right of further consolidation, and shall be subject to all obligations which either of them possessed, or was subject to, at the time of the consolidation. A majority of the stock must approve of the consolidation, and a certified record of such approval must be filed with the secretary of state before the consolidation is effective. "Any railroad corporation whose line is wholly or in part within this state, whether chartered by or organized under this state, or any other state or territory. or of the United States, may lease or purchase and operate the whole or any part of the railroad of any other railroad corporation, together with the franchises." etc., where the roads can be lawfully connected so as to form a continuous main or branch line: "provided, that in no case shall the capital stock of the company formed by such consolidation exceed the sum of the capital stock of the companies so consolidated at the par value thereof, nor shall any bonds or other evidences of debt be issued as a consideration for or in connection with such consolidation." § 2986. Rolling stock and fuel, rights of way, depot grounds, and other real property, "acquired subsequently to the execution of any trust deed or mortgage which shall have been described or provided for therein, shall be subject to the lien thereof to the same extent as the property therein described, which the corporation owned at the time of the execution." § 2990. The directors may annually, or oftener, set aside a sum not exceeding fifty per cent, of the net earnings of the road to pay off indebtedness. \$ 2992. No railroad corporation may plead usury. § 2993. Annual reports must be made to stockholders. § 2995. A foreign corporation whose road extends to the boundary line of the state may extend its line into the state, after designating the route as provided in section The company shall then, respecting the extension, stand in the same relation to the state as though articles of association had been filed. \$ 2997. Any railroad corporation "may take, purchase, hold, sell and dispose of, or guaranty the payment of the bonds and securities of any other railroad corporation whose line of road is continuous of, or by lease, traffic contract or otherwise connected with, its own line." L. 1890, ch. 129. All railroad companies in the state must file a map of the right of way with the county clerk of each county through which the road passes. Id., ch. 130. The term "railroad" is defined as including every road, ferry or bridge in use by a railroad corporation, whether owned or leased by the corporation. Id., ch. 122. For the general supervision of railroads thus defined, there is a board of commissioners maintained by the state. The commission may regulate rates, establish rules, and is given power to enforce the provisions of this act. Id. One railroad corporation cannot discriminate unreasonably in favor of or against any person or corporation or locality. Ch. 122, § 2. No common carrier shall combine to divide or pool the business of different or competing lines, or divide any proceeds or earnings of such lines. § 4. The "long and short haul" discrimination is prohibited. §§ 6, 7. The commissioners may, upon any complaint, compel the attendance of witnesses and the production of all books, papers and documents. Appeals to the courts are allowed to either party. § 15. The commission must require annual reports from all common carriers. § 17. Rebates, drawbacks, special rates, etc., are prohibited. § 5. Proper transfers and exchanges in passengers and freight must be made at connecting points and crossings, and no discrimination must be shown respecting connecting lines. § 3 (a). Charges must be equal and reasonable. § 2 (a). Schedules must be printed and kept for inspection. § 8 (a). Failing to publish schedules, the company is subject to a writ of mandamus, and failure to obey the writ is contempt of court. § 8 (g). For neglect to comply with the provisions of this act the company is liable to the parties aggrieved to the full amount of damages sustained with costs. § 11 (a). The officer of a corporation who wilfully violates

any of the provisions of this act shall pay a fine of from \$2,500 to \$5,000 for the first offense, and of \$5,000 to \$10,000 for the second offense. \$12. Any domestic or foreign railroad company, authorized to build and operate a railroad in the state, may take school or state lands for a right of way. But if the road is not completed on such lands within five years after the location of the right of way, the rights herein granted shall be forfeited, and if such land is abandoned for railroad purposes for a period of one year, the same shall revert to the state. Laws 1893. ch. 99. Every railroad shall have the right to cross, join and unite its railroad with any railroad before constructed, and any railroad previously constructed shall form connections with such new railroad. Laws 1893, ch. 100. See, also, as to connections, Laws 1893, ch. 101. An "anti-scalper's" act forhids "scalper's" tickets, and forbids discrimination in the sale of tickets. Laws 1893, ch. 104.

Foreign corporations.— No foreign corporation may transact any business or acquire any property within the state until a copy of its charter has been filed with the secretary of state. § 3190, Comp. Laws. An agent must be appointed upon whom process may be served. § 3192. Any failure to comply with the two preceding sections "shall render each and every officer, agent and stockholder of any such corporation so failing therein jointly and severally liable on any and all contracts of such corporation made within the state during the time such corporation is so in default." Laws 1890, ch. 198.

Taxation. - Personal property for the purpose of taxation includes "all stock in turnpikes, railroads, canals and other corporations except national banks out of the state owned by the inhabitants of this state, all personal estate of moneyed corporations whether the owners thereof reside in or out of the state. . . . all shares of stock in any bank, . . . and all improvements upon lands the title of which is still vested in any railroad company or any other corporation whose property is not subject to the same mode and rule of taxation as other property." L. 1890, ch. 132, § 4. The personal property of transportation companies shall be listed in the district where such property is usually kept. § 9. Gas and water mains and pipes laid in streets are personal property. § 10. The officers of every corporation, "except railroad companies and banking corporations whose taxation is specifically provided for in this act, shall make out and deliver to the assessor a sworn statement of the amount of its capital stock, . . . (and) the real and personal property of each company or association shall be listed and assessed the same as other personal property." § 22. The stockholders of every bank located in this state shall be taxed on the value of their shares therein in the county, town or district where the bank is located. The investments in real estate shall be deducted from the aggregate amount of capital and surplus, and the remainder shall be a basis for the valuation of the shares of stock in the hands of stockholders. The real estate shall be assessed and taxed as other real estate. § 24. In each banking office there shall be kept, for the convenience of the assessor, a complete list "of the names and residences of stockholders, owners or parties interested therein," showing the interest of each party named in the list. § 25. Taxes on bank stock shall be a lien on dividends, and any officer who shall pay a dividend to any stockholder on whose shares the tax has not been paid shall be liable for such tax. The county treasurer may sell any shares or interest therein upon which the taxes are delinquent. § 26. All the apparatus used in the business of telegraph or telephone companies shall be assessed in the county, town or district where it is situated. § 10. In lieu of "all other taxes upon any railroad, except railroads operated by horse-power, within this state, or upon the equipment, appurtenances or appendages thereof, or upon any other property situated in this state, belonging to the corporation owning or operating such railroads, and used exclusively in and about the prosecution of the business of such railroad companies as common carriers, including the road-bed and right of way, . . . and upon the capital stock or business transactions" of railroad companies, there may be paid an amount equal to a percentage of all the gross earnings of the corporation owning or operating any railroad "arising from the operation of such railroad as shall be situated within the state, both upon state and interstate traffic." Every railroad corporation which shall have accepted this act, or the act of which this is amendatory, must pay to the state treasurer "each year, for the first five years" after the approval of this act, an amount equal to three per centum of such gross earnings, 'aud for and in each and every year after the expiration of such five years, an amount equal to two per centum of said gross earnings," To secure this per centum, the state has a lien upon the railroad and upon all the property of the company, such lien to have the preference of all demands, decrees and judgments against the company. § 1, ch. 134, L. 1890, amending ch. 107, L. 1889. For failure to make proper returns for taxation or pay the tax there is, in each case, imposed a fine of ten per cent, of the tax required. \$\ 2.3. The state treasurer may, at the expiration of thirty days after the tax has become due, distrain sufficient property to pay the tax and penalties imposed, and may advertise the same for sale. The company may redeem the property by paying the taxes and penalties before the sale taxes place. § 4. One-half of the moneys received or collected under this act shall be paid into the state treasury for the use of the state, and the remainder shall be apportioned to the counties into which the railroad runs. § 5. The property of any railroad corporation not accepting the provisions of this act within thirty days from its passage shall be assessed and taxed in the same manner as the property of individuals. & 6. Or they shall be taxed as may be provided by law. § 7.

§ 966. OHIO: ¹ Constitutional provisions.— The state shall never give or loan its credit in aid of, nor take stock in, any corporation. Constitution of 1851, art. VIII, § 4. The legislature shall never authorize any municipality to take stock in, or in any manner aid, any corporation. Id., § 6. All bonds, stocks and "joint-stock companies, or otherwise," shall be taxed by a uniform rule. All real or personal property shall be taxed according to its true money value. Art. XII, § 2. The state shall never contract any debt for internal improvement. Id., § 5. Special acts of incorporation are prohibited. Art. XIII, § 1. Corporations may be formed under general laws, which shall be subject to amendment or repeal. Id., § 2. "Dues from corporations shall be secured by such individual liability of the stockholders and other means as may be prescribed by law; but in all cases each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a farther sum, at least equal in amount to such stock." Id., § 3. The property of corporations shall always be subject to taxation, the same as the property of individuals. Id., § 4.

Miscellaneous corporations. - Five or more, a majority of whom shall be citizens of the state, may incorporate "for any purpose for which individuals may lawfully associate themselves," except for dealing in real estate, or professional business. The stock may be common and preferred, or common only. If there is to be preferred stock, it may be provided in the articles of incorporation that the holders thereof shall be entitled to dividends not exceeding six per centum per annum out of the surplus profits, in preference to all other dividends, and that they may convert such preferred stock into common stock. Rev. Stat. 1890, §§ 3235, 3236, Am'd Laws 1893, p. 205. They shall subscribe and acknowledge articles, the form of which shall be prescribed by the secretary of state, which shall state (1) the corporate name and purpose; (2) the place of business; (3) the amount of capital stock, and the number of shares. Id. When the purpose of incorporation includes the construction of "an improvement which is not to be located at a single place," the articles must also set forth the kind of improvement intended, "the termini of the improvement," and the counties to be cut by it or its branches. § 3237. The articles shall be filed and recorded with the sec-

The acts of the legislature down to and including the laws of 1898 are included in this synopsis.

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retary of state. § 3238. Amendments may be made upon a vote of three-fifths of the stock, but not so as to change the amount of capital. The amendments shall be recorded with the secretary of state, \$ 3238 (a). The corporation may hold realty necessary for its business. § 3239. A majority of the persons named in the articles shall order subscription books to be opened at such times and places as they deem best, upon thirty days' published notice in a county paper. The notice may be waived in writing by all the corporators. 8 3242. Am'd Laws 1891, p. 280. Ten per cent. of each share shall be paid at the time of subscribing, and the remainder shall be paid in such instalments, and at such times and places, and to such persons, as the directors may require. § 3243. As soon as ten per cent, of the capital stock is subscribed at least five of the corporators shall so certify to the secretary of state, and call a stockholders' meeting to choose a board of directors, to consist of from five to fifteen members. The corporators shall be liable to any person affected thereby, "to the amount of any deficiency in the actual payment of said ten per cent, at the time of so certifying," § 3244. Directors shall be chosen "by the stockholders who attend for that purpose," either in person or by proxy. "Each share shall entitle the owner to as many votes as there are directors to be elected, and a plurality of votes shall be necessary for a choice," No share on which an instalment is due and unpaid shall be voted. The subscribers present shall be inspectors of the election, and shall appoint the time and place of holding the first directors' meeting. \$ 3245. The articles may provide "that each stockholder, irrespective of the amount of stock he may own, shall be entitled to one vote, and no more," at any election or upon any subject submitted at a stockholders' meeting, and if such provision is made, the corporation shall be governed thereby. § 3245 (a). If such a provision is contained in the articles no person shall hold stock in excess of \$1,000 face value, and a report, signed and sworn to by a majority of the directors, including the treasurer, setting forth in detail the financial condition of the corporation, shall annually be filed with the county recorder. For failure to make the report, or falsity therein, the directors shall be personally liable for all claims and demands against such corporation. The by-laws may provide for the government of the corporation, and for the distribution of its net earnings "among its workmen, patrons and shareholders," consistent with the constitution and laws of the state. § 3245 (b). Within fifteen days before any meeting of the stockholders, or of the subscribers, or of the creditors and stock holders for reorganization, for the election of directors, or to consider any question, any person or persons entitled to vote, and owning at least one-tenth interest in the stock, may, after notice to the corporation at its general office, apply to the court for the appointment of inspectors for such meeting. § 3245 (3). The officer having charge of the transfer books shan deliver to the inspectors at any meeting a sworn list of the stockholders, which list shall be prima facie evidence of ownership. § 3245 (5). If inspectors are not appointed by the court they are chosen by the meeting, § 3245 (6). "Unless the regulations of the corporation otherwise provide, one annual election for trustees or directors shall be held on the first Monday in January of each year." If directors are not elected at the annual meeting, "or other meeting called for that purpose," they may be chosen at a meeting at which all the stockholders are represented, or at a meeting called by the directors, or any two stockholders, after ten days' notice in a local paper. § 3246. A majority of the directors must be citizens of the state, and all directors and executive officers must be stockholders, in an amount to be fixed by the by-laws. Receivers must be resident citizens of the state. § 3248. The directors may make by-laws not inconsistent with the regulations of the corporation. § 3250. Regulations may be adopted or changed by the assent, in writing, of twothirds of the stockholders, or by a majority of the stockholders, at a meeting called for the purpose. § 3251. The corporation, by its regulations, when no other provision is made herein, may provide for the time, place and manner of calling and conducting its meetings; the number of stockholders constituting a quorum; the

time of the annual election, and the mode and manner of giving notice thereof; the manner of the election or appointment, and the tenure of office, of all officers except directors. The directors must choose one of their number president. Transfer books shall be kent, in which any assignee of stock shall be entitled to have the same transferred and have his name enrolled as a stock-The book and records shall be open to the inspection of stockholders. Shares are personalty, "and when fully paid up shall be subject to levy and sale upon execution against the owner." \$ 3255. "A cornoration may borrow money, not exceeding the amount of its capital stock, and issue its notes or coupon or registered bonds therefor," bearing any lawful interest, "and may secure the payment of the same by a mortgage of its real or personal property, or both." \$ 3256. Upon the written assent of three-fourths of the stockholders, representing three-fourths of the stock actually paid in, "any company may borrow money, \ \\ not exceeding one-half of the capital stock actually paid in, on such security, by way of mortgage or otherwise, as may be agreed upon," and at a rate of interest not exceeding the legal rate, "and may, in the instruments evidencing the contract, stipulate that the holders of such instruments shall have the right to convert the amount borrowed, or any part thereof, into either common or preferred stock, such stock having been provided for by the proper action and certificate of the company." Directors shall vote on money matters by a yea and nay vote, § 3257. Stockholders in all corporations are liable, "in addition to their stock, in an amount equal to the stock by them subscribed, or otherwise acquired, to the creditors of the corporation; to secure the payment of the debts and liabilities of the corporation." § 3258. The term "stockholder," as used in the preceding section, shall apply to any equitable owner, although the stock is recorded in the name of another. § 3259. An action to enforce this liability must be against all stockholders jointly, for the benefit of all the creditors. § 3260. After the original capital is fully subscribed, and an instalment of ten per cent. on each share has been paid in, "the capital stock or the number of shares" may be increased by the unanimous written consent of the original subscribers, if done before organization, or, if done after organization, by a majority stock vote at a receing called by a majority of the directors, by a thirty days' notice by publication or by letter. A certificate of such action shall be filed with the secretary of state. § 3262, Am'd Laws 1893, p. 141. Upon the assent, in writing, of threefourths of the stockholders, representing three-fourths of the stock, the company "may issue and dispose of preferred stock, and may stipulate that the holders of such stock shall be entitled to a dividend not exceeding six per centum per annum," out of the annual profits, in preference to all other stockholders, and that they may convert such stock into common stock at their option. "Upon any such increase of stock," a certificate shall be filed with the secretary of state. § 3263. The directors may, with the consent of a majority of the recorded shares, reduce the capital stock, but not so as to impair the rights of creditors, and a certificate shall be filed with the secretary of state. § 3264. Registered bonds may be changed to coupon bonds, or vice versa, "either by substitution or proper indorsement thereon." § 3265. Ultra vires acts are prohibited. § 3266. The number of directors may be increased or decreased, within the limits above specified, by a majority stock vote at any regular meeting. § 3267.* Every corporation shall make an annual statement of its financial condition, and shall furnish each stockholder a copy of the same, with a list of the stockholders and their residences. § 3268. The provisions of this chapter do not apply when special provision is made in subsequent chapters, but the special provision shall govern unless it clearly appears that the provisions are cumulative. § 3269. In order to ascertain the surplus profits, from which alone dividends may be made, there shall be deducted from the actual profits all the expenses paid or incurred in the management of the business, interest paid, or then due or accrued on corporate debts; and all losses, including debts due the corporation for more than one year, no interest having

been paid thereon for more than one year, or on which judgment shall have been recovered, and have remained for more than two years unsatisfied, and on which no interest shall have been paid for that period. Only the capital actually paid in, and the dividends actually earned and paid, shall be advertised. \$ 3269.

For the provisions concerning dissolution, see § 5651 et sea.

For surety companies, see Laws 1891, p. 14.

For telephone companies, see Laws 1891, p. 296, and Laws 1893, p. 315.

For building and loan associations, see Laws 1891, p. 469.

For insurance companies, see Laws 1893, p. 157, and p. 103.

Every manufacturing company shall keep a principal office in some county of the state in which it does business, and complete books of account shall be there kent subject to the inspection of the tax assessor. The principal accounting officer shall be a resident of the state. \$ 3855. A manufacturing company may extend its operations to articles not named in its articles of incorporation, upon a majority stock vote, after filing a certificate of such vote with the secretary of state. § 3856. Any domestic oil or other mining company, or any domestic manufacturing company, may hold and convey the real estate necessary for its corporate business, and may carry on its business, or any part thereof, in any part of the state, or without the state, and may there hold any necessary real estate, \$ 3862. The company may, with the consent of two-thirds of the stock, purchase or subscribe for stock in any railroad, or other transportation company, to an amount deemed necessary to procure proper transportation facilities. \$ 3863. Any two or more such companies may consolidate in the manner and to the effect provided in sections 3381 and 3382 below. § 3864. The property and rights of the consolidating companies shall be conveyed to the new company by deed. § 3865. Any company specified in section 3862 may construct a railroad, with branches, depots, etc., from any mine or manufactory "to any other railroad, or any canal, slack-water navigation, or other navigable water or place within or upon the borders of the state," and shall, in respect to such railroad, be governed by the provisions of the Revised Statutes respecting railroads (§ 3270 et sea.). § 3866.

Railroads.—Railroad companies are incorporated under the above provisions. The board of directors may, with the written assent of the stock, change its route and either proposed terminus, but not so as to abandon any part of the road constructed. § 3272. Mortgage bonds issued for the construction of the road are a lien on the changed line. § 3274. When the line is diverted from any county named in the articles, the company is liable for damages caused by such diversion to any person owning land in such county, and "all persons who subscribed t) the capital stock of the company on the line of that part of the road so changed" shall be released from all obligation to pay their subscriptions. But actions for damages must be commenced within six months from the filing of the certificate of such change. § 3276. Land may be condemned for the purpose of changing the route. §§ 3277, 3278. A road may be extended into or through an adjoining state, subject to the laws of that state, and the company shall have the same rights respecting such extension, in the construction and use of the same, "and in controlling the property and applying the money and assets thereon," as if the road were built wholly within the state. § 3279. Branches may be constructed to places within the limits of any county through which the road runs, or to connect with any railroad in the state, or to any mine, if approved by a majority stock vote, a certificate of the facts being filed with the secretary of state. § 3280. Construction materials, except timber, may be appropriated. § 3281. Gifts of lands for the right of way shall be void unless the road is completed on such lands within five years from the conveyance of the same. § 3282. and roads, "or ground of any kind," may be condemned and a track laid thereon, but the company shall be liable for damages to private or public property along such road, etc., if an action is commenced within two years from the completion of the track. § 3283. A railroad bridge may be constructed to accommodate all kinds of travel, and the company may collect toll for its use. \$ 3285. Bonds may be issued, convertible or otherwise, at a rate of interest not exceeding seven per cent, to an amount not exceeding two-thirds of the subscribed capital, for one or more of the following purposes: completing or extending the road, constructing branch roads, laying double or additional track, increasing the machinery or rolling stock, building depots or shops, making improvements, paying the funded debts, or redeeming the bonds. The bonds may be secured by "mortgage on its property, or otherwise," upon a vote of a majority of the paid-up stock. § 3286. A company may borrow money, at not exceeding seven per cent, interest, for any requirements of its business, and execute bonds or notes therefor, in sums of not less than one hundred dollars, and may secure the payment of such bonds or notes by a pledge of its "property and income;" but the aggregate indebtedness authorized by this and the preceding section shall not exceed the amount of the capital stock. \$ 3287. The mortgage may include the personal as well as the real property. § 3288. The directors may "sell, negotiate, mortgage or pledge" such bonds or notes, "as well as any notes, honds, scrip, or certificates for the payment of money or property which the company may have theretofore received, or shall hereafter receive, as donations, or in payment of subscriptions to the capital stock, or for other dues of the company," at such times and places, within or without the state, and at such rates and for such prices, at not less than seventyfive cents on the dollar, as the directors deem hest for the company. Sales at a discount, without fraud, are valid. § 3290. Transfer books may be opened in other states. § 3291. The number of directors may, by a majority stock vote, be increased to not more than fifteen, or diminished to not less than seven. The stockholders may by a majority stock vote direct the directors to classify the board so that one-third of the members shall terminate their office each year. § 3295. Or the stockholders may make such classification at any regular annual election, but "no person shall be allowed to vote for directors as aforesaid," unless he has been a registered stockholder for the preceding thirty days, \$ 3296. When ten per cent, of the authorized capital has been expended in constructing the road, and bona fide subscriptions to the amount of twenty per cent, of the capital have been received, the directors of the company may receive subscriptions, "payable in such instalments, dependent upon the completion of the whole or any part of its road so that cars may pass over the same, as its directors may deem expedient, and upon full payment thereof may issue certificates of stock therefor;" but no subscriber for such stock shall be entitled to any privilege of a stockholder until his subscription is fully paid, nor, for any purpose, be deemed a stockholder "until the happening of the contingency upon which the instalments on his subscription are made dependent." § 3298. A company which has partly built its road, but lacks the means to finish and operate the same, may take subscriptions "conditioned that the proceeds thereof shall not be used or applied upon the debts of the company; and all money or material collected upon such subscriptions, and all material or implements purchased with such money for the construction of the track, houses, depots and rolling stock of the company, shall be exempt from execution, or other process or proceedings for the payment of the debts of the company, so long as such money, material or implements are used or designed for the construction of such track, houses, depots and rolling \$ 3299. Any company may aid a non-competing company in the construction of its road, for the purpose of forming a connection with the same, by subscriptions to stock, or otherwise. Any company may lease or purchase any part or all of a non-competing connecting line, constructed or being constructed. on such terms as the companies may agree upon; and the purchasing company shall be "vested of" all the rights and powers in respect to the construction and operation of the purchased road and branches which the original owner had, and b. subject to the same duties and restrictions. Any two or more non-competing connecting lines "may enter into any arrangement for their common benefit,"

calculated to promote the objects for which the companies were created. § 3300. The powers given in the preceding section shall only be exercised upon a vote of two-thirds of the stock; and in case of the lease of any road wholly or partly within the state, the rental "reserved and secured" shall be equal, at least, to the net earnings of the same for the fiscal year next preceding the one in which the lease is made. \$ 3301. Dissenting stockholders must be bought out and paid the market value of their stock. § 3302. No company shall lease its road or any part thereof to any company, in or out of the state, unless the lessor receives adequate security for the payment of rent and preservation of the property of the lessor, and for failure to pay the rent when due the lease shall be void, at the option of the lessor; and a lessee, if a foreign corporation, shall be subject to the laws of the state the same as a domestic corporation, the lessor remaining liable as if it operated the road. The lessor and lessee are jointly liable upon all rights of action for negligence or default, growing out of the operation of the road. \$ 3305. iority stock vote may authorize an extension beyond either terminus, and a certificate of the facts must be filed with the secretary of state. § 3306. The capital stock may be increased when necessary upon a majority stock vote. §\$ 3307, 3308. The increased stock may be preferred with guarantied semi-annual or quarterly dividends, to an amount not exceeding six per cent, per annum: the stock may be sold within or without the state. The company shall reserve the privilege of redeeming and canceling such preferred stock at par, at any time after three years from the date of its issue; "and the preferred stock herein provided for may be convertible into bonds of the company, at the option of the parties." § 3309. Any domestic railroad company, or any such company which may be consolidated with other companies, as provided below (§ 3379 et sea.), in lieu of issuing such preferred stock, may borrow money "to locate, construct and equip its proposed line of railway, or for the purpose of leasing or purchasing and equipping branch or connecting roads constructed or in process of construction, not exceeding ten miles in length, or for redeeming or exchanging any part or all of its previously issued bonds, or for funding its floating debt, or for any or all of said purposes," in an amount deemed necessary not exceeding the authorized capital; but companies formed by consolidation with one or more companies of other states, as provided in section 3380 below, may issue bonds in excess of such capital stock at not exceeding seven per cent, interest per annum, payable semiannually or quarterly; and may issue securities therefor, and to secure the payment thereof may pledge its entire property and net income, by mortgage or otherwise, Any consolidated company "formed by the consolidation of a railroad company or companies created by or existing under the laws of this state and any other state or states, with a railroad company or companies of this state or any other state," may, from time to time, if authorized by the vote of "two-thirds of the full paid-up stock of such consolidated railroad company present and voting at meetings of stockholders, called as aforesaid," issue its bonds, "convertible or otherwise, into stock," bearing not more than six per cent. interest per annum, for any one or more of the following purposes: "Paying, redeening or funding debts or obligations assumed, incurred or created by it or either of its predecessors or constituent companies, compromising claims made against it or either of its predecessors or constituent companies; purchasing the whole or any part of any railroad held by it under lease to or operating contract with it or either of its predecessors or constituent companies; acquiring the whole or any part of the stock or bonds of any railroad company owning a railroad held by such consolidated railroad company under lease or operating contract: acquiring the whole or any part of the bonds, notes or other obligations of any other railroad company of this or any other state, the whole or a majority of whose capital stock shall be held by such consolidated railroad company; completing, extending, improving, maintaining or operating its road, branches or lines, held under lease or contract; double or additional track; buying rolling stock; building depots, and generally

"for any purpose needed in its business," and may, if the directors so determine, secure such issue or issues of bonds by mortgage or pledge of any or all of its "real or personal estate or franchises or income," The securities issued in accordance with this section may be disposed of at such prices and on such terms consistent with the laws of the state as may be agreed upon. Sections 3287 and 3288 above, apply to street railroads. § 3309 (a), Am'd Laws 1892, p. 82, Any railroad corporation hereafter formed may, in its articles, provide for the division of its capital stock into common and "classes of preferred" stock, by stating therein the amount of each kind and class of stock: the par value of the respective shares, and the vote which shares of each class shall have. And it may also provide in the articles the terms and conditions of the issue of such preferred stock in addition to and not inconsistent with the provisions of section 3309. § 3309 (b): Laws 1891, p. 267. A certificate of the above facts (\$\\$ 3309, 3309 a) must be filed with the secretary of state within ten days after the meeting. \$3310. A principal or general office shall be established on the line within the state, or on the line of some connecting company in another state. The office of the president, secretary and treasurer shall be kept within the state, and a record of proceedings shall there be kept open for the inspection of stockholders. § 3311. "All capital stock, bonds, notes or other securities of a company, purchased of the company by a director thereof, either directly or indirectly, for less than the par value thereof, shall be null and void." § 3313. "The directors shall be liable in their individual capacity to the stockholders for any damage sustained by the stockholders by reason of the negligence, mismanagement or unfaithfulness in the discharge of their duties," except those who enter their protest against any act done without their concurrence, from which injury is feared, and who publish the same for three weeks in a county paper. § 3314. No person having any interest in an express or other transportation company, whether incorporated or not, transporting freight or passengers over any railroad in the Union, shall hold any office in any railroad company. § 3315. Any person holding office contrary to the provisions of the preceding section shall forfeit \$50 per day, to be recovered by any stockholder. § 3316. Intersecting roads must furnish each other proper facilities for connecting, and for transporting cars or freight. §§ 3340, 3341, Am'd Laws 1892, p. 369. Any company which has existed for three years, and has not begun the construction of its road, or which, having commenced its road, has abandoned it for three years, may be dissolved by a vote of two-thirds of the stockholders, a notice of which must be published for thirty days in each county on the proposed route. § 3363. Rate schedules shall be published and posted. § 3367. No company whose line connects two points on another road shall contract with such road, nor with any person, not to carry freight or passengers between such points, but shall carry all freight or passengers offered to it. § 3368. A trunk line shall not discriminate between lines tributary to it at or near the same place, or between tributary lines which are competing roads, nor make a lease or other arrangement allowing such discrimination. \$ 3369. There shall be no greater charge for a short than a long haul, in the same direction, under a penalty of from \$100 to \$1,000. § 3373. Passenger rates shall not exceed three cents per mile, for a longer distance than eight miles. § 3374. Maximum freight rates are fixed at five cents per ton per mile for thirty miles or more. Rates for less distances shall be fixed by law. § 3375. Such provisions shall not apply to a railroad until it has been in operation five years, unless the gross earnings exceed \$4,000 per mile. § 3377. Maximum passenger rates on branch roads not more than ten miles in length are fixed at six cents per mile, and freight rates may be fixed by the company. § 3378. Conditional sales of rolling stock, or other personal property for railroad purposes, shall not be valid against insolvent purchasers, unless recorded with the secretary of state. § 3378 (a). The rental of such property may be applied as purchase-money if the contract is recorded or filed with the secretary of state. § 3378 (b).

When any two or more roads of the state are so built as to admit of the passage of cars over two or more of the lines without interruption, such roads may consolidate, \$ 3379. A domestic company may consolidate its capital stock with that of a foreign connecting company, if the two roads form a continuous line for the transportation of cars. But the two roads may be separated by a river, \$ 3380. Am'd Laws 1890, p. 219. The directors of the respective companies may make an agreement under the corporate seals, prescribing terms and conditions of the consolidation, the mode of carrying the same into effect, the corporate name, the number of directors, the amount of capital stock, the number of shares and the amount of each, and the manner of converting the capital stock of each company into that of the new company, with other necessary details. The agreement must be adopted by a two-thirds vote of the stock on which no instalments are due and be recorded with the secretary of state. \$ 3381. At the meeting called to consider the said agreement, the stockholders shall appoint a time and place for the election of directors and other officers, a notice of which shall be published for three weeks (unless all the stockholders of all the companies are present and waive such notice). § 3383. Upon the election of the first board of directors, all the property and rights of the old companies are vested in the new company, without any deed or other act, and the new company shall be subject to all the liabilities and duties of, and liable to pay all the debts of, the old companies. \$ 3384. Any company formed "by the consolidation of a railroad company or companies created by or existing under the laws of this state-and any other state or states, with a railroad company or companies of this state or of any other state," may take, and in any manner dispose of, the stock and bonds of any company acquired by consolidation "or received by virtue of any purchase or lease or operating contract heretofore or hereafter made or executed, and may maintain and operate any railroad purchased under authority of law," and may lease or contract to operate any domestic or foreign connecting road on such terms as may be agreed upon. § 3384 (a); Laws 1890, p. 183. Any such consolidated company operating any domestic or foreign connecting road, under conveyance, lease or other agreement, may take a surrender or transfer of any part of the stock of the company conveying, leasing, or owning such road, from any one or more stockholders, and may issue therefor its own stock at par, or on such terms as the directors of the consolidating company may agree upon. Where all of the stock has been so surrendered, and a certificate of the fact has been filed with the secretary of state, all the property and franchises of the company whose stock has been transferred shall vest in the said consolidated company, and the two companies shall be deemed consolidated without further formality. § 3384 (b); Laws of 1890, p. 183. A principal office shall be kept within the state on the line of the road, and two-thirds of the directors shall be residents of the state: but the consolidated companies specified in the two preceding sections need only keep a general office in the state, and may elect directors at the principal office, whether within or without the state. § 3385, Am'd Laws 1890, p. 184. Any stockholder who refuses to convert his stock into the stock of the consolidated company shall be paid "the highest market value of such stock at any time within two years next preceding the time of the making of such agreement for consolidation by the directors, if, previous to such consolidation, he so require." § 3388, Am'd Laws 1892, p. 88. In the case of consolidations provided for in section 3380 above, the provisions of section 3388 shall apply only to the stockholders of the domestic companies. Laws 1892, p. 88. When proceedings are pending for a foreclosure sale, and two-thirds in interest of the creditors and two-thirds in interest of the stockholders agree, in writing, upon a place "for the readjustment or recapitalization of the debt and stock of the company," the court shall render judgment against the company for the money due, which shall, from its rendition, become a lien on all property embraced in the securities, "and upon all the franchises and powers of the company, including its franchise to be and act as a corporation, conferred by the charter and amendments to the charter of the company; and upon a sale had under such judgments, and a frauchise at such sale by trustees, on behalf of the parties to such agreement, appointed by the agreement, all the property so bound by the judgment, including said franchises, shall vest in such trustees: but every such agreement shall provide that the unsecured debts of the company, incurred for repairs or running expenses, shall be paid in money, or bonds of the reorganized company of the highest class issued, as hereinafter provided." § 3393. The trustees shall call a meeting of the parties to the agreement, to be held on the line of the road. The said parties shall be eutitled to vote according to the provisions of the agreement, but not more than one vote shall be cast for each \$50 of the par value of the "debt or stock of such party." The meeting may, by a majority in interest of those present, retain or change the name of the company, "decide, for the time being, the amount of its capital," and the number of shares, fix the number of directors and their term of office, elect such directors, a majority of whom shall be residents of the "state or states in which such railroad is situate," and do all things proper for the reorganization of the company. Any creditor may become a party to the agreement aforesaid, either at or before the meeting above mentioned, and any stockholder may become a party at any time within one year after such meeting. § 3394. Thereupon, after a conveyance by the trustees, all the property, franchises and things purchased as aforesaid, and all the franchises, powers, privileges, etc., enjoyed by the original company, "or by any company with which it had been consolidated," shall pass to and be vested in the reorganized company. The property, franchises, etc., of such company shall be in nowise chargeable in respect to any debt, liability or claim of any creditor or stockholder which subsisted prior to the sale and reorganization herein provided for; but all property of the original company not embraced in the sale shall, upon the reorganization, he vested in the company as reorganized, in trust for all parties interested therein as creditors, stockholders, or otherwise. § 3396. Such company likewise has power, at any time within six months after the organization, to assume such debts or liabilities of the original company, and to make such "adjustments or exchanges" with any bondholder of the same, and within one year, with any stockholder, as it may deem expedient, "and may use for such purpose any bonds or stock which it may be authorized to issue or create;" and it may issue such bonds, payable at such times and places, and bearing such interest, not exceeding six per cent. per annum, as it may deem expedient, and may secure any bond "which it may issue or assume to pay" by mortgages or deeds of trust of any or all its property and franchises, including its right to be a corporation, all of which will pass to the purchasers at a foreclosure sale under such mortgage, etc., or at a sale by virtue of any judgment specified in section 3398, so as to enable them to organize in the manner hereinbefore provided; and such company may issue capital stock to such aggregate amount as may deem proper, not exceeding any limit which may be fixed by agreement with the trustees purchasing as aforesaid," and may issue preferred stock according to the agreement; and may, if authorized by the agreement, confer on the holders of any bonds which it may issue "or assume to pay" such rights to vote at all meetings of the stockholders, not exceeding one vote for each \$50 of the par amount of the bonds, as may have been provided for in the agreement, which rights shall attach to and pass with the bonds to successive holders under such regulations as the by-laws may prescribe, but shall not subject the holder to any assessment or liability for dobts, or entitle the holder to divi-§ 3397. All restrictions or limitations attaching to any class of stock in such company shall be plainly set forth on the face of the certificates. § 3397 (a). The lien of the mortgages and deeds of trust provided for in the preceding section shall be postponed in favor of the lien of judgments recovered against the company after organization, for labor, materials or supplies thereafter furnished, or for damages, losses or injuries thereafter sustained, or in any action founded

on its contracts or liability as a common carrier thereafter made or incurred. The provisions of section 3393 et sea, apply to railroads partly within and partly without the state. A company of this state having such a railroad may exercise its franchises without the state, and a foreign corporation having such a road (partly within the state) may exercise its franchise within the state in a manner consistent with the laws of the state; but the part within the state shall be subject to taxation, \$3399. When judicial proceedings are pending in the state for the sale of any railroad, and the same is in the hands of a receiver, twothirds in interest of each class of mortgagees, or bondholders under a mortgage, and of all other classes of creditors, and the owners of two-thirds of the stock, may agree in writing upon a plan for the readjustment of the indebtedness "by capitalization or otherwise." § 3401. The agreement shall be filed with the secretary of state and by him published, and a duplicate he kept at the principal office of the corporation; and any party in interest may, at any time during the period of four months from the date of the first publication, become a party to the said agreement by signing the same in person or by proxy "and thereby secure the benefits thereof." SS 3402, 3403. "All persons in interest who fail to become parties to the agreement within the time aforesaid shall thereafter be entitled to the same rights, interest and estate, remedy, liens and action, and none other, which parties in interest of like class and amount who signed the agreement" obtained thereby. But if any person in interest neglects for six years from the date of the publication aforesaid "to become a party in interest in the agreement," by signing the same in the manner aforesaid, he shall be barred of all interest claim, right or action under the agreement or otherwise, \$ 3404. The said agreement may be between each interest separately and the railroad company. § 3406. "If the railroad involved in such judicial proceedings is used in whole or in part by such company in common with any other railroad company on the same track, between any points on the line common to both, and within the limits of the termini established by the charters of both companies, the company owning the railroad, if the same can be done without impairing the usefulness thereof to it, may lease for a period of years for an annual rent, or sell for a fixed sum to the company to which the line of the road, in whole or in part, is common, an undivided interest in the same upon such terms and conditions as may be agreed upon: and such lease or sale shall be reported to and approved by the court, and when so made and approved, the lessee or vendee thereof shall hold the same free from any previous lien which had been put thereon.'

A company, owning in whole or in part any road-bed and right of way for a railroad within the state, "including those acquired by purchase at judicial sale," which, for any reason, cannot complete the proposed road, may "sell, assign and transfer" the same, or any part thereof, "t. any other company incorporated under the laws of this state, with authority to construct and operate a railroad over the same route, or any part thereof, which transfer shall include all work done upon such line of road, together with all material furnished therefor, not exempted by the terms of the grant, with all rights, privileges and easements, as fully as the same are or may be possessed by the company making the same, and shall, to the same extent, vest the title of and the right to enjoy the same in such grantee," § 3409. Such transfer shall be by deed, and for such consideration as the parties may agree upon. § 3410. Before such transfer is made, the president shall call a meeting of the stockholders at some place on the line of the road, at which meeting the stockholders may, by a two-thirds stock vote, prescribe the terms of the proposed transfer. § 3411. No transfer shall be made against the dissent of any stockholder, unless the grantee give him a guaranty that it will issue stock to him equal to his pro rata interest as a stockholder of the grantor. \$ 3412. Where a right of way remains unused for ten years, it shall be forfeited and revert to the owners, unless twenty miles of road shall have been built within that time. § 3414. Any receiver of a railroad, wholly or partly within the state, shall be a resident citizen of the state. \$ 3415. The nurchaser at a judicial sale of a railroad wholly or partly within the state may acquire the original "franchise to be a corporation," by grant of the original company, "under such terms and conditions as may be agreed upon by the directors of the company, with the consent of the stockholders owning two-thirds of the stock." The grant shall be the same in form as is required to convey real estate, "and shall pass such franchise to the persons or company becoming the owner, by purchase as aforesaid, of such railroad." But no such grant shall be made unless provision be made for granting to the stockholders in the criginal company stock in the reorganized company, upon equal terms with the stockholders thereof, and upon terms acceptable to the directors making the grant. § 3419. All the property and franchises of a company in the state which has not "completed, nor conveyed by deed of trust, or mortgage, any part of its road," and which is insolvent, and whose property is in the hands of a receiver, may be sold at a judicial sale; and the purchaser shall have all the title, rights and franchises of the original company. \$3420. A domestic company, or any five or more persous, may become the purchasers of such property and franchises, and such persons, upon filing a transcript of the decree of confirmation with the secretary of state, shall become a corporation, and shall hold the property and franchises discharged from all liability for the debts of the old corporation. § 3426. The purchaser or purchasers of the property and franchises of any railroad wholly or partly in the state, at any judicial sale, may sell the same or any part thereof, and all the property or franchises by them conveyed shall vest in the purchaser or purchasers as completely as in the original company. § 3426 (a). Any railroad company "organized or existing under the laws of this state" may become the purchasers, as provided in the preceding section, "and any number of persons may become the purchasers of such road, road-beds, rights of way, property and franchises, as provided herein, either directly at such judicial sale or by grant from the purchasers at such sale," and upon filing a copy of the deed or grant with the secretary of state, with articles executed in accordance with sections 3236 and 3237 above, they and their associates, not less than five in number, shall become a corporation, with authority to provide for the purchase price of the railroad and other property "by the issue of its capital stock, preferred or common, and bonds secured by mortgage or otherwise," bearing not more than seven per cent, interest per annum; "and stock and bonds heretofore or hereafter issued as such purchase price, in whatever amounts the incorporators. in good faith, may have agreed on, shall be valid and taken as fully paid for by the transfer to said corporation of such railroad and property, and also, by such issue of stock or bonds, to raise the necessary means suitable to improve such railroad property and equipment for the uses and purposes for which it is employed:" and the corporation shall be subject to the general laws of the state. § 3426 (b), Am'd Laws 1890, p. 270.

There is a railroad commissioner, to whom reports must be made, annually, after a form to be furnished the company. §§ 251, 252. Copies of all leases, contracts and agreements with any corporation doing business upon or in connection with a railroad shall be furnished the commission on request. § 256. A list of the officers and directors shall be sent to the commissioner within thirty days after an election. § 260.

Any company that is a common carrier may lease and operate any line of railway "and its appendages," either before or after its completion, owned by a municipal corporation of the state, and any railway connected therewith, lying without the state, "and such portion of any railway within this state as may be necessary for the convenient dispatch of its business;" and may construct and equip any railway and its appendages which it is authorized to lease. § 3838. Any corporation may subscribe for stock in such company. § 3839. A railroad corporation may take not exceeding one-third of the stock of an elevator company whose grain it carries. § 3842.

As to street railroads, see Laws 1892, p. 406.

Foreign corporations. - No foreign corporation, other than banking and insurance companies, shall do business in the state without a certificate from the secretary of state that it has complied with all the requirements of law in reference to such corporation, and that the business to be done in the state is such as may be lawfully carried on by a domestic corporation, or if more than one kind of business is to be conducted, such as may be carried on by two or more domestic corporations formed for such kinds of business exclusively. If business is done without such certificate, the corporation cannot maintain an action upon any contract made in the state until it shall have procured a certificate. Before granting the certificate, the secretary of state shall require a sworn copy of the charter to be filed in his office, together with a statement setting forth the amount of the capital stock, the business to be done, the principal place of business in the state, and designating an agent upon whom process may be served. For issuing the said certificate, the corporation shall pay the secretary of state the following fees, according to the amount of capital stock: For one hundred thousand dollars or less. \$15: for more than one hundred thousand and not exceeding three hundred thousand dollars, \$20; for from three hundred thousand to five hundred thousand dollars, \$25; for from five hundred thousand to one million dollars, \$30: for one million dollars or more, \$50. Laws 1893, p. 261.

Taxation.—The capital stock and shares of stock are taxed as personalty. \$ 2730. Manufacturers shall list all articles used in manufacturing or repairing. and all manufactured articles and all implements. \$ 2742. Investments in stocks or bonds shall be assessed at their actual money value. § 2739. All corporations, domestic or foreign, unless specially taxed, shall list all personalty, "which shall be held to include all such real estate as is necessary to the daily operations of the company," at the actual money value thereof. The returns shall be made to the county auditors. The value of all movable property shall be added to the fixed property and real estate, and apportioned, pro rata, to the cities, town, townships, etc., and property so listed shall be subject to the taxes paid on other like property. § 2744. Stock and bonds are taxed, "but no person shall be required to list for taxation any share or shares of the capital stock of any company the capital stock of which is taxed in the name of such company." § 2746. Insurance companies pay two and a half per cent. on their gross receipts, but no foreign company shall pay less taxes than are imposed upon companies of Ohio by the state in which such company was formed. § 2745.

Railroad personalty, for purposes of taxation, includes the "road-bed, water and wood stations, and such other realty as is necessary to the daily running operations of the road, moneys and credits of such company," at the actual money value thereof; also all locomotives and cars hired by the company, or run on its road by other companies. But such rolling-stock may be returned separately. The value of all such property shall be apportioned among the counties according to the amount of such property situate therein respectively, and the rolling-stock, main track, road-bed, supplies, moneys and credits shall be apportioned according to the length of the road in each county. If a railroad is partly in another state, it is taxed in proportion to the length of the road in the state. §§ 2770-2776. When part of a consolidated road is without the state, the portion in the state, "and all its real and personal property," shall be listed and taxed in the same manner as the road and property of other railroad companies of the state, and the company shall pay a tax on rolling-stock in proportiou to the length of the road in the state. § 3387. Express, telegraph and telephone companies must make annual reports to the state board, containing a statement in detail of all the real and personal property and where located, together with a statement of the par and market value of all their capital stock; and telegraph and telephone companies shall also report the number of miles of line operated within and without the state. In determining the value of the taxable property of such companies, the board shall "be guided by the value of said property as determined by the value of the entire capital stock of said companies," and such other rules as may enable it to determine the true money value of all the corporate property in the state. Express companies must also report their gross receipts in the state during the year. Any officer or agent refusing to give proper information may be confined in jail for thirty days and be fined \$500. The value thus determined of telegraph and telephone property shall be apportioned to the several counties and tax districts in proportion to the amount of the property in such districts respectively, and taxed at the same rate as other real and personal property. The value of express property shall thus be apportioned in the proportion which the gross receipts in such district bear to the entire gross receipts in the state, and be taxed like other real and personal property. The value of real estate on which taxes are paid shall be deducted by the board from the value of the whole property, before the apportionment is made. §§ 2777–2780, Am'd Laws 1893, p. 330.

Foreign insurance companies must report their gross premium receipts in the state, which shall be the basis of taxation, and be subject to the local rates for other personal property. But the state shall collect an additional tax which, added to the tax paid the county treasurer, shall amount to two and a half per cent of the gross premium receipts. § 2745, Am'd Laws 1893, p. 201. For filing the articles of incorporation of any corporation, the secretary of state shall receive from the corporation \$10, where the capital stock is not more than \$10,000, but shall receive one-tenth of one per cent, upon the authorized capital, if the same is more than \$10,000. Small fees are charged for filing consolidation agreements, certificates of increase or reduction of capital stock, etc., etc. § 148 (a).

§ 967. OREGON: 1 Constitutional provisions.—"The legislature shall not have the power to establish or incorporate any bank or banking company, or moneyed institution whatever; nor shall any bank of issue exist in the state. Art. XI, § 1. Corporations shall be formed under general laws only, and all such laws may be changed or repealed, but not so as to injure or destroy any vested corporate rights. Id., § 2. The stockholders of all corporations shall be liable for the corporate indebtedness only to the extent of their impaid subscriptions. Id., § 3. The state shall not be interested in the stock of any corporation. Id., § 6. The state shall never assume the debts of any corporation unless contracted to repel invasion, suppress insurrection, or defend the state in time of war. Id., § 8. No county, city, town, or other municipality, shall hold stock in any corporation, "or raise money for, or loan its credit to, or in aid of," any corporation. Id., § 9.

Miscellaneous corporations. -- Any three or more may incorporate for any lawful business. Compiled Laws 1887, § 3217. The incorporators shall make and sign written articles "in triplicate," one copy of which must be filed with the secretary of state and a record thereof made in his office. Another copy must be filed and recorded with the county clerk, and the third copy shall be kept by the corporation. § 3218, Am'd Laws 1891, p. 110. The articles shall specify (1) the name of the corporation, and its duration, "if limited;" (2) the purpose of the incorporation; (3) the location of the principal office or place of business; (4) the amount of capital stock, and the amount of each share; (5) if incorporated for railroad, etc., or navigation purposes, the termini of the route. § 3220. The corporation becomes a body corporate upon filing and recording the articles as provided in section 3218. The corporation may purchase and dispose of such real and personal property as may be necessary and convenient for its corporate purposes, and may take and dispose of any realty or personalty donated by the United States, or any state, or by any municipality, corporation, person or firm, for the purpose of aiding in the objects of the corporation. § 3221. The corporation may appoint subordinate officers and prescribe their duties and compensation. Id. The bylaws may provide for the sale of delinquent stock without execution or judgment,

The acts of the legislature down to and including the laws of 1893 are included in this synopsis.

provided a thirty days' notice be given by publication. Id. If the purpose of incorporating is "in whole or in part to construct, or construct and operate, a railroad." the corporation shall have power "to lease any part or all its road to any other company incorporated for the purpose of maintaining and operating a railroad, and to lease or purchase, maintain and operate any part or all of any other railroad constructed by any other company upon such terms and conditions as may be agreed upon between said companies respectively." Any two companies whose lines connect "may perfect any arrangement for their common benefit to assist and promote the object for which they were created." Id. Any portion of the corporators designated by a majority of the whole number may open subscription books, and as soon as one-half the stock is subscribed directors may be elected by the stockholders, at a meeting to be called by a notice to the subscribers. There shall be at least three directors. §§ 3222, 3226. The corporators present at the first election shall appoint the time and place of the first directors' meeting. Each share has one vote, but, after the first meeting, no share upon which any instalment is due and unpaid shall be voted. \$ 3223. Directors must be stockholders and residents of the state, and must take an oath; but corporations "incorporated for the purpose of constructing railroads, or military wagon roads. canals or flumes, or carrying on mining enterprises, within or without the state, or publishing newspapers, or conducting institutions of learning, or for the purpose of conducting any manufacturing business, may permit a minority of the board of directors to reside out of this state." § 3224, Am'd Laws 1893, p. 62. The directors elect a president from their number and appoint a secretary, § 3225. Less than a majority may constitute a quorum at all regular or stated meetings authorized by the by-laws, whenever either the directors or the corporators shall have filed with the secretary of state and the county clerk a written statement of the number that shall constitute a quorum. § 3227. Insurance companies may designate in their articles "what amount of per centum of the capital stock" shall be required to be paid in before commencing business. Id. A stock-book must be kept so as to show the original subscribers, their shares, the amount paid, and the amount due thereon, and all transfers. This book, or a certified copy thereof, as well as all other books of the company, must be open to the inspection of any interested person. § 3228. All stock is deemed personalty, and as such is subject to attachment, execution, levy and sale. In case of such sale the corporation must make the proper transfers. § 3229. All sales transfer to the purchaser all the rights of the original holder, or of the seller, and subject the transferee to the payment of unpaid subscriptions. But, if the sale be voluntary, the seller is still liable to existing creditors for such unpaid balance, unless the same be paid by the purchaser. § 3230. If the directors declare a dividend while the company is insolvent, or which makes it insolvent, or which diminishes the amount of capital, they shall be "jointly and severally liable for the debts of the corporation then existing or incurred while they remain in office." If they shall, by official act, fraudulently induce any person to become a creditor of the corporation, they shall be liable in like manner for any loss such person may sustain. "But if any director 'who voted against such dividend or such fraudulent act or conduct, if present, or who thereafter, as soon as the same came to his knowledge, filed his objections thereto, shall be exempt from such liability." § 3231. The corporate powers shall cease for failure to organize within one year, or for non-user for any period of six months after commencing business. § 3232. Corporations that expire by limitation, or are voluntarily dissolved, or are annulled for any cause, are continued bodies corporate for five years thereafter for the purpose of winding up their business. § 3233. Any corporation may, at a meeting called for the purpose, by a vote of the majority of all the stock, increase or diminish the capital, or the amount of the shares thereof, or authorize a dissolution. § 3235. Any navigation company may build a railway, or other road, to facilitate its transportation business across any "portage" on the line of navigation, occasioned by any obstruction in the stream or other water. § 3236. The stockholders may, by a majority vote of the stock, change the general place of business. § 3237. The directors may file supplementary articles, when a three-fourths vote of all the subscribed stock shall so determine, to change the corporate name, or to engage in any business cognate or germane to the original purposes, or, when authorized by a vote of seven-eighths of the stock, to engage in any new enterprise, "or for the purpose of changing any part of their road or canal or either terminus, or both, when not in violation of law, or any contract entered into by said corporation." The directors shail publish a notice of the filing of such articles. § 3238, Am'd Laws 1893, p. 112.

Railroads.—Railroads are incorporated under the general incorporating act given above. §\$ 3217-20. There is a state board of railroad commissioners with large powers. Ch. 73, Am'd Laws 1889, p. 22. The commission has the right to examine any books, papers or youthers of any railroad company, and to examine under oath any officers or agents. § 4012. Every railroad corporation shall, on request, furnish the board any information regarding the condition and management of the road, and especially "copies of all leases, contracts and agreements for transportation with express companies, firms, individuals or otherwise to which it is a party;" also as to the freight and passenger rates upon "its road and other roads with which its business is connected." § 4020. The company is required to make an annual statement to the secretary of state according to a form approved by the board. §§ 4021, 4026. For failure to comply with any of the above-named provisions the corporation shall forfeit to the state for every offense not less than \$100 nor more than \$500. § 4023. For wilful neglect to furnish the annual report the company shall forfeit not less than \$5,000 nor more than \$10,000. § 4027. Any person who purposely makes a false return, or verifies the same to be correct knowing it to be false, shall, upon conviction, be fined from \$5,000 to \$10,000, or be imprisoned from two to five years. § 4028. Discrimination in rates is declared unlawful, and rates must be reasonable. § 4029. The maximum passenger rate is fixed at four cents per mile. Id. Rebates, or other advantages, are forbidden. But this article does not apply to goods intended to be shipped to points outside of the state. § 4030. All combinations to prevent the continuous carriage of property are unlawful, Also all manner of pooling. § 4081. A greater charge for a shorter than a longer distance is prohibited. § 4032. Exhaustive schedules of rates and charges must be posted. § 4033. Any person who violates the provisions of this act shall pay to the injured person three times the damage sustained, and, if the violation was wilful, shall pay the costs of the suit. § 4035. Any officer or agent of a corporation who shall wilfully violate any provision of this act shall be fined not less than \$1,000. § 4036. If any warehouse shall be built within one hundred and fifty feet of a main track, with side-track graded and ties laid, without expense to the railroad company, and at least three hundred tons of freight are stored in said warehouse ready for transportation, then the railroad company shall lay down the track, with the necessary connections and switches, and shall furnish railable cars for removing the freight. § 4038. The refusal of the railroad company to comply with the provisions of the preceding section entitles the injured party to recover against such company a penalty of \$300 for each week of such neglect or refusal. § 4039. "In any contract of or for the sale of railroad equipment or rolling stock, it shall be lawful to agree that the title to the property sold or contracted to be sold, although deliverable immediately, or at any time or times subsequently, shall not vest in the purchaser until the purchase price shall be fully paid, or that the seller shall have and retain a lien thereon for the unpaid purchase-money. And in any contract of or for the leasing of such property, it shall be lawful to stipulate for a conditional sale thereof at the termination of such lease, and that the rentals received may, as paid, be applied and treated as purchasemoney, and that the title to the property shall not vest in the lessee or vendee until the purchase price shall be paid in full, notwithstanding delivery to and possession by such lessee or vendee." But no such contract shall be valid as against any subsequent judgment creditor, or any subsequent bong fide purchaser for value without notice, unless the same shall be evidenced by a duly acknowledged instrument filed for record with the county clerk, and unless each engine or car so sold or leased "shall have the name of the vendor or lessor plainly marked on each side thereof, followed by the words 'owner' or 'lessor.'" 8 4042. contracts shall be recorded with the county clerk. § 4043. Any railroad corporation may "cross, intersect, join and unite its railway" with any other railway at any point on its route, "and upon the grounds of such other railway corporation," with the necessary sidings, etc., "and may appropriate the right to make such crossing;" "and every railway which is or may be intersected by any new railway may unite with the owners of such new railway in forming such intersection and connection, and grant the facilities aforesaid." § 3240. If a railway company finds it necessary or convenient to use any part of a public road or street, an agreement may be made with the county clerk, unless such street or road be within the limits of a municipal corporation, when the agreement shall be made with the local authorities. If an agreement cannot be reached, the corporation may appropriate such road or street. §§ 3242, 3243. A railway company must charge reasonable rates, or such as the legislature may prescribe. § 3254. Any railroad company "may execute mortgages, deeds of trust or obligations" whereby its "road-bed, rolling stock, right of way, depots, lands, franchises and other property situated and being in more than one county in this state may be included in the same mortgage or deed of trust or obligation." § 2757, Am'd Laws 1889, p. 29. A right of way is granted for any proposed railway through any state lands, and lands for depots, etc., not exceeding ten acres in one place, for one dollar per acre. Laws 1891, p. 179. An act of February 20, 1891, increases the powers and further defines the duties of the commissioners. Laws 1891, p. 123. Every railroad corporation shall furnish the board with a schedule of rates, and the commissioners shall revise such schedule so that no discrimination shall be made therein, and so that the charges therein set forth shall be just and reasonable. The board may increase or reduce rates. Id., § 1. If a company charges a greater rate than that allowed by the commission, the board may bring suit in equity to compel a compliance with their orders, and the court shall have power to determine whether the tariff shall be enforced. § 2. Any person aggrieved may petition the commissioners for a redress of their wrongs. § 3. If the company refuses to comply with the findings and recommendations of the commission upon inquiry into the causes of any such complaint, the board must bring suit against the company. § 6. The board shall have the general supervision of all the roads in the state. § 7.

Foreign corporations. - No foreign corporation shall do any fire or marine insurance, brokerage or express business within the state until a deposit of \$50,000 has been made. §§ 3272, 3568, and Laws 1889, p. 64. Any person acting as agent for such corporation before compliance has been made with the preceding section shall be punished by a fine of not more than \$1,000, or by inprisonment for not more than one year, or by both. § 1988. An insurance company not incorporated in the United States must also have deposited in some state \$200,000 in gold in excess of its liabilities. § 3575. Such companies must give a six months' published notice of any intention to cease business before the deposit can be withdrawn. § 3273. A foreign corporation, before transacting business in the state, must duly execute and acknowledge a power of attorney, and have the same recorded with the county clerk of each county where the company has a resident agent. § 3276. Such power of attorney shall appoint some resident citizen as attorney for the company, who shall be an authorized agent upon whom process may be served. § 3277. Any surety company with a paid-up capital of \$500,000, incorporated in the United States, may do business in the state by complying with the provisions of this act, and not otherwise. § 3279. Such company must appoint the secretary of state its attorney, upon whom any process may be served. \$ 3280. The owners of vessels propelled wholly or partly by steam, navigating the waters of the state, are a foreign corporation within the meaning of this chapter, and the resident agent is the attorney of such company. Such agent shall pay to the county treasurer a license fee of \$25 quarterly. § 3285. Any person who shall act as agent for a steamboat company in violation of the preceding section shall pay to the state \$100. S 3288. Foreign insurance companies shall pay to the state \$100 annually. \$ 3290. The state treasurer shall receive one-eighth per cent. per annum on all deposits required by this chapter. § 3291. The secretary of state shall receive \$25 "for recording each certificate of deposit and issuing such certificate to depositors;" and \$10 for issuing any license to life insurance agents or solicitors. \$ 3292. All foreign railroad corporations shall, "on compliance with the laws of this state for the regulation of foreign corporations transacting business therein," have the same "rights, powers and privileges in the exercise of the rights of eminent domain, collection of tolls, and other prerogative functions, and in the control, management and disposition of their business, franchises and property," as are possessed by domestic corporations organized under general laws, provided that, in case of the leasing of a domestic line by a foreign corporation, such foreign corporation shall execute an agreement with the state to the effect that all suits or actions by and between the lessor and citizens of Oregon during the continuation of the lease shall be prosecuted and defended to a final determination in the courts of the state, unless such suit or action shall be commenced in, or removed to, the federal courts by a citizen of the state. Upon the failure of the corporation to comply with the terms of the agreement, its lease shall determine and be rendered null and void at the option of the legislature. The state reserves the right to prescribe the rates on such leased lines. and to make proper police regulations for the government of such road. § 3293. This act shall be construed to give to foreign corporations complying with its provisions the same, and no greater, powers and rights than are possessed by domestic corporations organized under general laws. \$ 3294.

Taxation.—The personal property of all private corporations is liable to assessment and taxation "unless otherwise specially provided," and shall be assessed in the name of the corporation in the county where the principal office is located. But the water-craft of navigation or railroad companies is assessed at the home port, and the rolling stock of a railway is assessed where the principal terminus or depot is, provided that if any terminus or depot shall be in the county in which the principal office is located the rolling stock shall be taxed in that county. The personal property of any corporation may be sold for taxes. § 2744. Personal property subject to taxation includes all "stocks or shares in all incorporated companies, and such portion of the capital of incorporated companies liable to taxation on their capital as shall not be invested in real estate." § 2731. Stock in any corporation which is taxed on its capital shall not be taxed to the owner or holder thereof. § 2750. The real estate of corporations is taxed in the county where it lies, like that of individuals. § 2739. All personal property shall be taxed upon its true cash value. § 2758. Railroad companies must have a principal office within the state. § 2745. Such rolling stock as may be subject to taxation within the state shall be apportioned out between the several counties through which the road runs, and the secretary or managing agent of the corporation shall make an annual statement to the several county clerks of the whole number of miles of track within the state with a particular description of all the rolling stock used thereon. § 2746. "The total amount of such rolling stock of roads operated wholly within the state, and of roads which are operated also beyond the limits of the state, an amount proportioned to the number of miles of road within the state, shall be subject to assessment and taxation within this state." Taxes on such rolling stock shall be collected in each tax district for the same purposes for which other property is taxed. § 2747. Any secretary or manager who shall make a false statement respecting such rolling stock shall be deemed guilty of perjury, and for failure to make the required statement he shall nay a penalty of \$50. \$\$ 2748, 2749. "A debt secured by land or real property situated in no more than one county in this state shall for the purposes of taxation be deemed and considered as indebtedness within this state." \$ 2753. "Any corporation owning or operating a railroad within this state may execute mortgages, deeds of trust or obligations whereby its road-hed, rolling stock, right of way, denots, lands, franchises and property situate and being in more than one county in this state through which the said railroad passes, may be included in the same mortgage, deed of trust or obligation. And the provisions of this act declaring void all mortgages, deeds of trust, contracts or other obligations whereby land situated in more than one county in this state is made security for the payment of a debt shall not apply to mortgages or deeds of trust hereafter executed by the corporations mentioned in this section for the purpose aforesaid." § 2757. All shares of stock of banks located within the state shall be taxed at their value to the owners thereof where they reside. All shares of non-residents shall be taxed to such persons where the bank is located, and such tax shall be a lien upon the shares, § 2734. The cashier of every bank in the state shall send to the assessors of the counties in which shareholders reside, the names of all the shareholders. the number of shares held by each, and the par value of a share, and to the assessors of the county where the bank is located a list of the non-resident stockholders, the number of their shares and the par value thereof; also to any assessor requesting the same, a like list of resident and non-resident stockholders. §\$ 2764, 2765, 2766. The proper officer of a bank or express company must furnish the assessors, upon request, a sworn statement of deposits of money or valuables, and for refusal so to do such officer shall be fined \$500. §\$ 2767, 1998. The fee of the secretary of state for filing articles of incorporation is \$2.50. § 2337.

§ 968. PENNSYLVANIA: 1 Constitutional provisions.—No local or special law shall be passed creating corporations, or amending, renewing or extending the charters thereof; granting to any corporation or individual any special or exclusive privilege or immunity, or the right to lay down a railroad track; nor exempting property from taxation. But companies may be formed by special act for bridging boundary streams. Constitution of 1874, art. III. § 7. The legislature shall not delegate to any private corporation any power "to make, supervise or interfere with" any municipal improvement. Id., § 20. The legislature shall not authorize guardians, executors, trustees, etc., to invest trust funds in the bonds or stocks of private corporations. Id., § 22. "The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the state shall be a party." Art. IX, § 3. The credit of the state shall not be pledged or loaned to any individual or corporation; nor shall the state become a stockholder in any corporation. Id., § 6. The legislature shall not authorize any political division of the state to become a stockholder in, or obtain or appropriate money for, or loan its credit to, any corporation or individual. Id., § 7. The right of eminent domain shall always be construed to allow the appropriation of the property of corporations the same as that of individuals. The police power of the state shall never be abridged so as to permit corporations to infringe upon the rights of individuals or the general well-being of the state. Art. XVI, § 3. In all elections for directors or managers, each shareholder may cast all his votes for one candidate, or distribute them upon two or more candidates. Id., § 4. Foreign corporations shall not do business within the state, "without having one or more known places of business, and an authorized agent or agents in the same, upon whom process may be served." Id., § 5. "No corporation shall engage in any business other than that expressly authorized in its charter; nor shall it take or hold any real estate, except such as may be necessary and proper for its legiti-

 $^{^{1}}$ The acts of the legislature down to and including the laws of 1893 are included in this synopsis.

mate business." Id., § 6. "No corporation shall issue stocks or bonds except for money, labor done, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void. The stock and indebtedness of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock, first obtained, at a meeting to be held, after sixty days' notice, given in pursuance of law." Id., § 7. The legislature shall have the power to alter, revoke or annul any charter whenever it seems to be injurious to the citizens of the state, but so as to do no injustice to the "corporators." No law shall "create, renew or extend the charter of more than one corporation." Id., § 10. Telegraph corporations shall not consolidate with, own or control a competing line. Id., § 12. Any corporation organized for the purpose shall have the right to construct and operate a railroad "between any points within this state, and to connect, at the state line, with railroads of other states." Every railroad company shall have the right with its road "to intersect, connect with or cross any other railroad; and shall receive and transport each the other's passengers, tounage and cars, loaded or empty. without delay or discrimination." Art. XVII, § 1. Every railroad and canal corporation organized in the state shall maintain an office therein, where transfers shall be made, and where stock books shall be kept for the inspection of stockholders or creditors. Id., § 2. No discriminations shall be made in rates or facilities. Id., § 3. "No railroad, canal or other corporation, or the lessees, purchasers or managers of any railroad or canal corporation, shall consolidate the stock. property or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control, any other railroad or canal corporation, owning, or having under its control, a parallel or competing line; nor shall any officer of such railroad or canal corporation act as an officer of any other railroad or canal corporation, owning or having the control of a parallel or competing line: and the question whether railroads or canals are parallel or competing lines shall. when demanded by the party complainant, be decided by a jury, as in other civil issues." Id., § 4. Common carriers shall not engage in mining or manufacturing articles for transportation over their works, nor engage in any other business than that of common carriers. They shall not "hold or acquire lands, freehold or leasehold, directly or indirectly," except such as shall be necessary for carrying on their business. But any mining or manufacturing company may carry its products on its own railroad or canal, not exceeding fifty miles in length. Id., § 5. "No president, director, officers, agent or employee of any railroad or canal company shall be interested, directly or indirectly, in the furnishing of material or supplies to such company, or in the business of transportation as a common carrier of freight or passengers over the works owned, leased, controlled or worked by such company." Id., § 6. No discriminations shall be made in favor of transportation companies or individuals, by means of rebates or otherwise. Id., § 7, Free passes, or passes at a discount, shall not be granted to any person, except officers or employees of the company. Id., § 8. Street railways shall not be constructed without the consent of the local authorities. Id., § 9.

Miscellaneous corporations.— Five or more, three of whom must be residents of the state, may incorporate for various purposes, including any insurance, manufacturing or mining business; the construction and maintenance of telegraph lines, ferries, roads (except railroads), and bridges, and the buying and selling real estate. Corporations may also be organized hereunder by executors or trustees, acting under the authority of a will, for the purpose of winding up the business of the testator, whenever a charter could have been obtained by the testator. Brightly's Purdon's Digest, p. 335, §§ 1–6; Am'd Suppm't 1891, p. 2462. The charter shall set forth (1) the corporate name and purpose; (2) the place of business and the time of existence; (3) the names and residences of the subscribers, and the number of shares taken by each; (4) the number of directors, and the names and residences of those chosen for the first year; (5) the amount of

capital stock, and the number and par value of the shares. § 6. Notice of the intention to apply for a charter shall be published for three weeks in a county paper, stating briefly the character and object of the proposed corporation. § 7. The certificate shall state that ten per cent, of the capital stock has been paid in cash to the treasurer, whose name and residence must be given therein. The certificate must be submitted to the governor, who, if he finds the same to be correct. shall issue letters patent incorporating the subscribers and their associates and successors. The certificate shall be recorded with the secretary of state and the county recorder of deeds. § 9. The charter may be perpetual, or for any length of time subject to be repealed or annulled. \$10. Before beginning business, the corporate name, the date of incorporation, the place of business, the capital paid in, and the names of the president and treasurer, shall be registered with the auditor-general, under penalty for failure of \$500. \$ 12. Renewals of the charters are provided for. § 14. If business is not begun within two years from the date of the letters patent, and one-fourth of the capital paid in, the charter may be declared forfeited upon the application of any citizen. § 16. Notice of proposed amendments shall be published as above (\$7). \$19. For securing any amendment the proceedings are identical with the methods of securing the original charter. § 20. The by-laws shall be made by the stockholders at a special meeting, unless the charter provides otherwise, and shall prescribe the "time and place of meeting of the corporation," the powers and duties of the officials, and other necessary or pertinent matters. § 22. Am'd Suppm't 1891, p. 2463. Any officer may also be a director. The directors shall be chosen in the manner prescribed by the by-laws. The number shall be at least three. The stockholders may, at a special meeting, determine the number of directors, § 23, Am'd Id, The by-laws may determine what number of stockholders shall attend, or what amount of stock shall be represented at any meeting to make a quorum. § 24. "Certificates or evidences of stock shall be transferable at the pleasure of the holder, in person or by attorney duly authorized, as the by-laws may prescribe, subject, however, to all payments due or to become due thereon; and the assignee or party to whom the same shall have been so transferred shall be a member of said corporation," with all the privileges and subject to all the liabilities of the original holder. No stock shall be transferred while the holder is indebted to the company, without the consent of the directors. § 25. A vacancy in any office is filled by the directors. § 27. Every share shall have one vote, and cumulative voting is provided for. § 28. Invalid elections shall be set aside by the court, upon the petition of five stockholders. § 26. For further provisions respecting elections, see Suppm't 1891, p. 2464. The capital stock is limited to \$1,000,000, to be divided into shares of not more than \$100 each. Subscriptions shall be paid in such instalments and at such times as the directors may require. Stock on which instalments have been due for thirty days cannot be voted. § 29. The stock of such corporations is personal property. No shares shall be transferable until all previous calls are paid. No vote or obligation of a stockholder shall be taken as payment of any part of the capital stock, and no such corporation may use the corporate funds to purchase stock in any other corporation, nor hold the same, except as collateral security for prior indebtedness. § 30. Any corporation of the state, or elsewhere, may take stock in any corporation formed under this act for the manufacture of iron, steel, or any other metal, or for the manufacture of any article of commerce from wood or metal, or both, or may purchase the bonds or stock of such company, or guaranty the payment of said bonds and the interest thereon, or the principal or interest; and such manufacturing company shall have the same powers, respecting the bonds or stock of any such other corporation. But this provision shall not be construed to allow such manufacturing company to hold a majority of the stock of any railroad or other common carrier company. Suppm't 1887, p. 2173. Any corporation formed under the general act may, with the consent of a majority in interest, issue preferred stock, upon which such dividends shall be

paid out of the net earnings as the directors may prescribe. \$31. Any such corporation may take such real and personal estate, "mineral rights, patent-rights, and other property," as is necessary for its business, and issue stock in payment thereof, which shall be declared and taken to be full-paid; and in the charter. certificates and statements the facts respecting the issue of such stock shall be given. Fictitious issue of stock or indebtedness in any form shall be void. Deferred stock may be issued in payment of such "real or personal estate or mineral rights," the facts being stated in the charter or certificate to be recorded. The said stock "may be made to await payments of dividends thereon, until out of the net earnings at least five per centum has been declared and paid upon the other full-paid stock," § 32. Capital stock or indebtedness can only be increased with the consent of a majority of the stock, and such increase shall only be made for money, labor done, or money or property actually received. \$\$ 33-37. The president or treasurer shall certify such increase to the secretary of state, or be fined \$5,000. The capital stock may be reduced by a like vote, or the corporation may, in the same manner, by a like vote, "sell, assign, dispose of and convey to any corporation created under or accepting the provisions of this act, its franchises and all its property, real, personal and mixed; and thereafter such cornoration shall cease to exist, and the said property and franchises, not inconsistent with this act, shall thereafter be vested in the corporation so purchasing as aforesaid." § 38. It shall be lawful for "all corporations" to borrow money or "to secure any indebtedness created by them," by issuing bonds, with or without coupons, and to secure the same by a mortgage or mortgages to trustees, for the use of the bondholders, upon their real estate and machinery, or upon the real estate alone, to an amount not exceeding one-half the capital stock paid in, at a rate of interest not exceeding six per cent, per annum. But telegraph ferry and steamboat companies may borrow money and "so secure the payment of the same" by a mortgage or mortgages of the corporate property and franchises to double the amount of the paid-in capital. The provisions of this section shall not limit the power given by any charter or special act to special classes of cor-§ 39, Am'd Suppm't 1891, p. 2464. Petroleum mining companies may subscribe for and deal in the stock and bonds of other like companies of any state and natural-gas companies. Id., p. 2465. The stockholders of corporations formed under the general law specified above are liable, individually, "to the amount of stock held by each of them," for all work or labor done for the corporation. \$ 45. An action or bill in equity to enforce a liability may be brought. against one or more stockholders. § 46. "No stockholder shall be personally liable for the payment of any debt contracted by such corporation." unless suit is brought within six months after the debt becomes due. Id. The capital stock of real-estate companies shall not exceed \$600,000, to be divided into shares of \$50 each. \$52. No corporation shall increase its indebtedness "beyond the amount of its capital stock subscribed, until the amount of its capital stock subscribed shall be fully paid in." § 55. If any company formed under this act, or any supplement thereto, shall not proceed in good faith to carry on its work and acquire the necessary buildings, property and improvements within two years from the date of its letters-patent, and shall not "within the space of five years thereafter" complete the same, its privileges shall "revert to the commonwealth." But an extension of time may be obtained by application to the court. § 69, Am'd Suppm't Navigation companies may increase their capital to \$5,000,000. Suppm't 1891, p. 2465. Any corporation created by special or general law shall, notwithstanding any limitation in any special or general law, have authority, with the consent of a majority of the stock, to increase its capital stock "to accomplish and enlarge the objects and purposes of its incorporation to the amount of ten millions of dollars in the aggregate; said increase to be at once, or from time to time, as its stockholders aforesaid shall determine." Id., p. 2466. "No general or special law shall be passed, conferring a benefit upon any corporation,

unless such corporation shall have previously filed in the office of the auditorgeneral the acceptance of the provisions of the constitution," § 70. The location of the principal office of any corporation may be changed to any place within the same county, upon a majority stock vote, at a called meeting. §§ 75, 76. Where a majority of the directors, "corporators or stockholders" of any corporation founded under the laws of the state are citizens of any other state, "said corporation may be organized, and all the meetings of such corporators, directors or stockholders held in such place, whether in this state or elsewhere as such majority may from time to time appoint;" provided, that the annual election of officers shall be held in Pennsylvania. § 78. It shall be lawful for all companies "incorporated or organized" under the laws of the state, "including those authorized thereby to transport merchandise or other property," and "also for the directors, managers or trustees thereof, with the approval of the stockholders, to invest the surplus or other funds or earnings" of such companies in mortgages on improved real estate, in ground-rents, "in the purchase from holders thereof of any (of) the shares of the capital stock of the respective company," or "in other good stocks or securities," and to sell and transfer the same, and re-invest the proceeds in stocks or securities of like kind. \$85. Any company in the state may. by a vote of the stockholders, determine the number of directors that shall thereafter govern its affairs, but such number shall not be more than fifteen, nor less than five. \$ 86. A majority of the directors and other officers shall be residents of the state "during the discharge of their duties," Id. Whenever corporate realty is sold at a sheriff's sale, the purchasers shall take the titles discharged from any right of forfeiture to the state, by reason of misnomer, limitation or defect of power in the said corporation to purchase and hold said lands, § 117. Whenever the "material, rolling stock, property and franchises" of any corporation. created by or under the laws of the state, shall be sold by judicial process or decree, or by virtue of any power of sale in any mortgage or deed of trust, the person or persons for or on whose account the purchase is made shall be a body corporate, with all the rights, powers, etc., of the old company, and subject to all restrictions imposed upon such original company. The purchasers shall meet, after a two weeks' notice in a county paper, and organize by electing a president and six directors (to hold office until the first Monday of the next May, when, and annually thereafter on said day, a president and six directors shall be elected), adopting a corporate name, and determining the amount of capital stock (not exceeding that authorized in the original charter). The shares shall be of the value of \$50 each. Preferred stock may be issued at any time to such amount and on such terms as they deem necessary; and also, from time to time, bonds, at a rate of interest not exceeding six per cent, per annum, to an amount not exceeding the capital stock, which may be secured by one or more mortgages "upon the real and personal property and corporate rights and franchises, or either, or any part or parts thereof;" provided, that no mining, manufacturing, transportation or telegraph company shall have the benefit of this act, "unless it shall have previously filed," with the secretary of state, its acceptance of the constitution. § 120, Am'd Suppm't 1887, p. 2175. A certificate, specifying the date of organization, amount of capital stock, the names of the president and directors, etc., shall be filed with the secretary of state within one month after the organization. § 121. Such purchasers of the property and franchises of a corporation shall have power to "determine the amount of the capital stock and bonds to be issued therefor, and to issue therefor certificates for the said capital stock, and also bonds, and secure the same by mortgage or mortgages on the real and personal property, corporate rights and franchises purchased. Such stock or bonds, or both, shall be issued to purchaser or purchasers for their respective interests, in such amounts and proportions as may be determined by themselves, and shall be deemed and taken to have been issued for and in consideration of the property and franchises so purchased and received; " provided, that no railroad, canal or other transportation company, and no telegraph company shall have the benefit of this act, "unless it shall have previously filed," with the secretary of the state, an acceptance of the constitution. § 123, Am'd Suppm't 1887, p. 2175. The above provisions apply to sales by assignees or trustees, as such, constituted for the benefit of creditors. § 126.

Iron manufacturing companies shall not, at any one time, hold more than ten thousand acres of land in the state, including leased lands, except companies organized to manufacture iron with charcoal, which companies may hold any lands necessary to furnish coal timber, said lands to be located in not exceeding four contiguous counties. Suppm't 1887, p. 2225. If the person in whose name stock stands on the books is not allowed to vote the same, the beneficial owner may vote it. Suppm't 1891, p. 2464.

Companies formed under the general act, for the manufacture of metals, or any article of commerce from wood or metal, or both, may increase their capital stock to not more than \$5,000,000, but shall not hold more than ten thousand acres of land. Digest, p. 935, § 1. They may issue bonds to an amount not exceeding three times the paid-in capital stock. § 2. A majority of the stock of such corporations may be held by aliens, and a majority of the directors may be aliens. § 7. The stockholders shall be individually liable only for debts due to laborers, mechanics or clerks, and in that case "for no period exceeding six months." § 8.

Mining, quarrying and manufacturing companies may have a capital stock not exceeding \$5,000,000, and may, "by a vote of three-fourths of the general stockholders," at a called meeting, issue special stock, not to exceed three-fifths of the "actual" capital, and to be subject to redemption at par after a fixed period. The holders of such stock shall be entitled to a special dividend, not exceeding four per cent., and shall "in no event be liable for the debts of the corporation beyond their stock." Digest, p. 1143, § 1. After the payment of the last instalment a certificate of the paid-up capital stock shall be filed with the county recorder of deeds. § 3. The stockholders shall be jointly and severally liable for all debts due when any of the capital stock is refunded to the said stockholders. the directors declare a dividend while the company is insolvent, or which would render it so, those assenting thereto shall be liable, to the extent of such dividend. for all debts then due or thereafter contracted while they respectively remain in office. § 5. The debts shall not exceed the paid-up capital, unless the debt is for unpaid purchase-money for lands bought, which debt shall only be a lien on the The directors are liable for any such excess. § 6. The business may be carried on without the state, and necessary lands may be held within or without the state. § 7. Annual statements of the condition of the company shall be made to the county recorder of deeds. § 8.

For further provisions respecting mining companies, see Digest, p. 1192 et seq., Au'd Suppm't 1891, p. 2569.

For telegraph companies, see Suppm't 1887, p. 2400, and Suppm't 1891, p. 2670. For street railways, see Suppm't 1891, p. 2637.

The general corporation laws do not provide for mercantile corporations, but these are practically incorporated by means of "partnership associations" under the act of June 2, 1874. They are a kind of joint-stock companies, and have been so developed by use and later acts that they are now essentially corporations. Three or more persons may form an association to conduct any lawful business within the United States or elsewhere. The principal office shall be in this state. The capital shall alone be liable for debts of such associations. A statement of certain essential facts is to be signed, acknowledged and recorded in the county. The duration may be twenty years. The liability of members is for unpaid subscriptions only, unless the word "limited" is omitted from the association name, in which case they are individually liable. There shall be from three to seven managers elected at annual meetings. The association is not bound by any liability over \$500, unless it is reduced to writing and signed by two managers. The

credit and capital are not to be loaned to any member nor to any other person or association, without the written consent of a majority of its members in number and value. The capital may be paid in real or personal property. Digest, pp. 937, 939, Am'd Suppm't 1891, p, 2531; and see Van Horn v. Corcoran, 18 Atl. Rep. 16 (Pa., 1889). By act of June 25, 1885, stock in such partnership associations (which must be distinguished from limited partnerships proper provided for in act of 1836, see Digest p. 1070 et seq.) are declared personal property capable of transfer, but not entitling the transferee to membership except upon the consent of a majority of the members in number and value. When not accepted, the transferee is paid the value of his interest at the time of the transfer. Suppm't 1887, p. 2228. The salaries of the president, secretary and treasurer, after five years, shall not exceed the profits of the preceding year unless two-thirds of the stockholders consent. Snppm't 1891, p. 2531.

Railroads.—Nine or more citizens of the state may incorporate. The articles shall state (1) the corporate name: (2) the period of duration; (3) the termini and the length of the road; (4) the name of each county to be traversed; (5) the amount of the capital stock (not less than \$10,000 per mile), and the number of shares; (6) the names and residences of a president and from six to twelve directors, who shall hold office for the first year. Three of the directors must acknowledge the articles, which must then be filed with the secretary of state. The incorporation is then complete. Digest, p. 1414, § 1. The corporation may hold real estate for necessary use, "not exceeding the amount limited in the articles of association." Id. The articles shall not be filed until \$9,000 per mile is subscribed, and ten per cent, thereon paid bona fide in cash to the directors, which subscription and payment shall be affirmed by at least three of the directors, whose affidavit shall be recorded with the articles. § 2. If the whole of the capital stock is not subscribed at the time of filing the articles, the directors shall open subscription books at the general office, and at such other places as they think best. Every subscriber shall pay ten per cent. of his subscription, in money, at the time of subscribing. § 4. The road, if not more than fifty miles in length, shall be commenced within two years and be completed in five years from the date of the organization. An additional year shall be allowed for each twenty-five miles more than the fifty miles aforesaid. The road shall be open for use in all cases when fifty miles of track are laid. \$ 5, and note. The directors may, if authorized by "a majority of the stockholders," at a special meeting, file with the secretary of state a certificate, setting forth the fact that an increase of stock is necessary, and thereupon such increase shall be granted; provided, that the original stock shall, in no case, exceed \$150,000 per mile, and the amount of lands shall never exceed \$150,000 per mile. § 6. There shall be a president and from six to twelve directors (the number to be fixed at the first meeting of the corporators), a majority of whom shall be citizens of the state. § 7. The president and directors shall have power to borrow money, "not exceeding the amount of the capital stock subscribed, and issue the bonds of the company therefor, in such amounts as shall not exceed double the amount actually paid up of the capital stock subscribed, the proceeds whereof shall be actually expended in the construction and equipment of their road." The bonds shall not run more than fifty years, nor bear more than seven per cent. interest, and may be secured by a mortgage on the "road and franchise." § 8. Any necessary or convenient branches may be built. § 9. If companies whose roads intersect cannot agree upon terms for connections, either company may apply to the court. § 11. Three or more may incorporate, if the road is to be not more than five miles long. § 14. For a narrow gauge road the capital shall be at least \$6,000 per mile, and \$3,000 per mile must be subscribed and ten per cent. paid in money before filing the articles. § 17. Railroad corporations created under the above general law are declared to be entitled to all the rights, powers and privileges, and subject to all the liabilities and restrictions, of the act of February 19, 1849 (\$\\$ 18-31, 47-55 below), which was originally only

applicable to companies formed by special charter. § 5. "The said subscribersshall have perpetual succession, with all the privileges, franchises and immunities incident to a corporation, and be able to sue and be sued, plead and be impleaded, in all courts of record and elsewhere, and to purchase receive, have, hold and enjoy, to them and their successors, goods, chattels and estate, real and personal, of what kind or nature soever, and the same from time to time to sell. exchange. mortgage, grant, alien or otherwise dispose of, and to make dividends of such portion of the profits as they may deem proper:" but the above provision shall confer only the powers and privileges necessary for conducting the corporate business. and only the real estate requisite for the corporate uses shall be purchased or held. A president and twelve directors, "the president and a majority of whom must be resident citizens of this commonwealth, and shall be owners of at least three shares in the stock of such company," shall be chosen by the stockholders. \$ 20. The stockholders shall meet annually in January to choose a president and twelve directors, and to make by-laws or change the same. Other meetings shall be called by the president and directors, upon such notice as the by-laws prescribe. Special meetings shall be called by the president upon the request of one-tenth of the stock, § 23, Am'd Suppm't 1887, p. 2377. Vacancies shall be filled by the directors. §§ 20, 25. At all general meetings or elections, each share shall have one vote; but shares transferred within the preceding sixty days shall not be voted. Proxies must have been executed at least three months before the meeting. § 25. Directors' meetings may be held at such times and places as the board may determine. § 26, Am'd Suppm't 1887, p. 2377. Shares shall be transferable, in the presence of the president or treasurer, in a transfer book, subject, however, to all payments due or to become due thereon; and the assignee shall become a member of the corporation, in all respects taking the place of the original holder. No certificate shall be transferred while the holder is indebted to the corporation, without the consent of the directors. No such transfer shall relieve the transferrer from any liabilities or penalties previously incurred. § 27. The capital stock shall be divided into shares of \$50 each, payable in such instalments, not exceeding \$5 per share in any period of thirty days, as the directors may require by proper notice. No stock on which instalments or arrearages have been due for more than thirty days shall be voted: but no forfeiture of stock shall relieve the owner from any liabilities or penalties previously incurred. § 28. The directors who do not protest against any dividend which impairs the capital stock shall be individually liable for the capital dividend. § 29. The president and directors shall furnish a full statement to the annual meeting, and, when requested, to the legislature. The legislature reserves the power of "resuming, altering or repealing" any charter granted under this act, and take for public use any road constructed in pursuance of such charter, provided no injustice be done to the stockholders. § 31. The number of directors may be increased to not more than thirteen. § 32. Stockholders, "who shall act as vice-president or additional vice-president," may be elected members of the board by the directors, provided the number of directors is not thereby increased beyond seventeen. § 35. The general office shall be within the state. § 36. Complete stock-books shall be kept at an office within the state. open for the inspection of any interested party. § 37. A railroad sold by virtue of a mortgage or deed of trust, or under a judicial decree, may be purchased by a connecting company, and it shall be lawful for such company "to purchase and pay for the same to issue their own stock for such amount as the purchasers may deem the full and fair value thereof, and to hold and enjoy the railroad so purchased, with all the rights, privileges and franchises, . . . and subject to the same restrictions as were held, enjoyed and limited by and in respect to the company of which the road may be sold." § 40. Any railroad company of the state may secure the payment of any of its bonds by a mortgage, bearing not more than seven per cent. per annum interest, upon the whole or any part of its property and franchises; provided, that this section shall not authorize the issue

of bonds in excess of the paid-in capital. § 41. No officer or employee of a rail-road corporation shall be interested in furnishing supplies to the same. § 44. Nor be interested in any freight or passenger transportation business carried on over the road of his company by another corporation. § 45. But such officer or employee shall not be hereby prohibited from being a shareholder in any corporation; provided, that no director shall vote upon any contract for furnishing supplies entered into with any other corporation in which he is also a shareholder; and that no officer or employee shall make such a contract without the consent of the board of directors, or of a disinterested superior officer. The extreme penalty for violating this section is a fine of \$500. § 46.

For proceedings to condemn land, see § 47 et seq. Adjoining land may be entered upon and any stone, wood, gravel, or other material suitable for constructing or repairing the road, may be taken therefrom. When streets are taken, the owners of lots thereon shall be paid for any damage caused by reason of any excavations or embankments. § 47. Any portion of a public road may be taken, provided the company shall reconstruct the same in the best location possible. § 52. Such rates may be established as the president and directors think reasonable; but if the cars are owned by others the passenger rates shall not exceed two and a half cents per mile, the freight rates three cents per ton per mile, the rates for passenger or baggage cars three cents per mile, and two cents per mile for freight cars. No rate shall exceed three cents per mile for through passengers or three and a half cents per mile for way passengers. § 54. If the construction is not begun within three years, and if, after the completion of the road, the same is abandoned and impassable for two successive years, the charter shall be null, except for compelling the company to pay damages. § 55.

Any domestic railroad may consolidate with a connecting domestic road so that all the property, rights and franchises of the former company shall be merged and vested in the latter company. The directors shall make an agreement which must be approved by a majority stock vote of the stockholders of the respective companies. A copy of the agreement and a certificate of the vote shall be filed with the secretary of state. §§ 73, 74. No further act or deed is necessary to vest the property and rights in the new company, and it shall assume all the debts and liabilities of both companies. If there are any inconsistencies in the laws governing the two corporations, the regulations affecting the company into which merger is made shall govern the consolidated corporation. Any dissenting stockholder may, within thirty days after the execution of the said agreement, apply to the court to have the value of his stock estimated, and the same shall be transferred to the corporation upon the payment of the values so appraised. § 75. The capital stock of the new corporation may be increased to an amount necessary to carry the merger or consolidation into effect; provided, that "such increase shall not be more than the amount of the capital stock and shares of the company or companies so merged or consolidated." § 76. In case of the merger or consolidation of two or more railroad companies, the company into which merger is made shall have power to issue bonds, with interest coupons, at a rate of interest not exceeding seven per cent. per annum, to an amount not exceeding in all the debts of the consolidated companies, and secure the same by a mortgage of all its property, rights and franchises. Such bonds may be exchanged for the debts of the respective companies so merged or consolidated. § 77. Any railroad corporation organized under the laws of the state, and operating a railroad wholly or partly within the state, shall have power to merge and consolidate its capital stock, franchises and property into any other railroad company or companies, organized and operated under the laws of this or any state, if the consolidating companies, either directly or by means of an intervening road, form a continuous line. § 79. The directors shall make an agreement, prescribing the name of the new corporation, "the number and names of the directors and other officers thereof, and who shall be the first directors and officers," the

number of shares, the amount of each, and the manner of converting the stock of the old companies into that of the new, how and when directors and officers shall be chosen, and other necessary details. The agreement must be ratified by a two-thirds stock vote of the respective companies, and, with a certificate of such vote, be filed with the secretary of state. \$ 80. The new company shall have all the rights, franchises and privileges, and be subject to all the restrictions and liabilities, of the old corporations, and all property passes to the new company without further act or deed. §§ 81, 82. Dissenting stockholders are paid Any railroad company being the in the manner noted above (§ 75). § 86. lessor of a connecting railroad in the state, which railroad may be or may become subject to an incumbrance given by the lessee to secure its bonds or other obligations, may indorse, or otherwise assume the payment of, such bonds or evidences of indebtedness in such manner as may be agreed upon. When any merger or consolidation takes place under the provisions of sections 73 to 75 above, the companies may specify in their agreement what rights, powers, obligations, duties and franchises shall be transferred to or become vested in, "or shall continue in the company into which said merger is made;" and the said consolidated company "shall be subject to and be regulated and governed only by the corporate rights, powers, duties, obligations and franchises so specified in and vested by said agreement," provided no new privileges shall be acquired. § 89. Canal and navigation companies of the state may purchase and hold the stock and bonds, lease the road and property of, or become consolidated with, any domestic railroad company, under any law relative to such transactions between railroad companies; and, vice versa, railroad companies of the state shall have like privileges respecting canal and navigation companies. \$ 90. Further provision is made for the consolidation of a domestic railroad company with a foreign company, making connections directly or by means of an intervening road; "and such consolidation may be effected in accordance with the laws of this commonwealth, either under special or general statutes of other states," § 91. Persons holding in a fiduciary capacity, the stock or honds of consolidating companies may exchange the same for the stock or bonds of the consolidated corporation. § 92. Purchasers at a foreclosure sale in another state of a railroad partly in Pennsylvania, duly mortgaged by a corporation organized in another state, such purchaser being a corporation formed under the laws of the same state with the mortgagor, shall have the ownership of the road within Pennsylvania, discharged from all incumbrances subsequent in lien to the mortgage under which the sale was made, except where otherwise provided in the decree of the court. § 103. For actions by and against railroad companies, see § 93 et seq. The penalty for issuing free passes, or passes at a discount, except to officers or employees, is a fine of not more than \$100. Companies incorporated under the laws of the state, whose principal works and property are within the state, shall hold all elections and have a principal office within the state, and a majority of the directors, including the president, shall be resident citizens of Pennsylvania. § 113. If the company refuse to make such elections in the manner prescribed, the governor may nominate a board of directors from the stockholders of the corporation. § 114. Annual reports shall be made according to a form to be prescribed by the auditor-general. § 116. The penalty for neglect to report is a fine of \$5,000. § 117. Connecting roads may enter into leases and contracts with each other, respecting the use, management and working of their several railroads. §§ 118, 119. Any domestic company may, from time to time, purchase and hold the stock and bonds of any company chartered by or extending into the state. Such companies, whose roads are connected by an intervening road, may make contracts or leases for the use of each other's roads. § 121. In order to build branch roads or diverging lines, such branch or line may be mortgaged to secure "plain or coupon" bonds, which may be negotiated on such terms, as to interest, price and place of payment, as may be deemed best; pronided, that such mortgage shall not exceed \$15,000 for each mile of road which it covers, and that no such bond shall be for a less amount than \$100. \$ 129. Any citizen of the United States, though a non-resident of Pennsylvania, shall be eligible as director of a domestic company, provided he is a stockholder in such company; but a majority of the board shall always be citizens of Pennsylvania. \$ 130. The directors may, by a resolution, determine in what manner and by whom an increase in the capital stock may be subscribed, "or to whom the same shall be issued or sold, and the amounts of the several instalments to be paid thereon, and the times and manner in which the same shall be paid." § 131, Domestic companies may hold or guaranty each other's stock and bonds or the stock and bonds of foreign companies, or of corporations "anthorized to develop the coal iron, lumber and other railroad interests" of the state, except in the county of Schuylkill. §§ 131, 132. Domestic connecting companies may lease. "or become the lessees, by assignment or otherwise," of any railroad or railroads, "or enter into any contract with any other railroad company or companies, individuals or corporations, on such terms and conditions as may be agreed upon, whether the road or roads embraced in such lease, assignment or contract may be within the limits of this state, or created by or existing under the laws of any other state or states; and any railroad company or companies of this commonwealth may agree to guaranty, in whole or in part, the payments and covenants of any such lease, assigned lease or contract." This section applies to roads connected by an intervening line, but shall not apply to the Pittsburgh & Connellsville Railroad Company. § 134. Domestic railroad companies may jointly indorse or guaranty the bonds or other obligations of any other railroad company, for the payment of money. § 138. Section 134, supra, shall apply to leases or other contracts by railroads of any canal or navigation company's works, excepting the Susquehanna Canal Company. § 139. Railroad companies must make returns to the auditor-general of coal shipped, purchased or produced. \$\$ 139-141. Discriminations of every kind regarding passengers or shippers are prohibited, under penalty of liability for treble the amount of damages suffered by the injured party, and, in certain cases, of a fine of \$2,000 and imprisonment for two years, §§ 152, 153. Contracts for the lease or conditional sale of rolling stock and equipment are provided for. They must be in writing and be recorded. \$ 154. The owners of coal-mines, mills, gnarries, "or other real estate," in the vicinity of any railroad, canal or slack-water navigation, and not more than three miles distant therefrom, may condemn lands to build a railroad thereto. The public may use the road on payment of toll. §§ 156-186,

No railroad company of the state shall issue capital stock for money for less than the par value of each share, which par value in money shall be paid before the issue of any full-paid certificate. Suppm't 1887, p. 2378. Stock shall not be issued for labor or property until the president has filed with the secretary of state a verified statement in detail of the prices paid, and that the labor and property were received at their cash value. Id. Corporate bonds or other certificates of indebtedness shall not be issued until the full amount of the subscribed capital has been paid for, nor shall such honds or other certificates be issued in excess of the capital stock actually paid for; nor shall they be issued for less than their fair market value. Any stock or bonds issued in violation of this act shall be void. Any stockholder or any two reputable citizens resident along the line of the road may complain of such issue or proposed issue. Any officer signing such illegal stock certificates or bonds, or any director assenting to such issue, or any officer falsifying the statement herein required, shall pay a fine of not more than \$5,000 and costs. Id. Purchasers at a judicial sale shall have five years from their organization as a corporation to complete their road. Id. The amount of stock and bonds, or either, issued by a consolidated company to the stock and bondholders, or either, of any one or more of the constituent companies, "may, when necessary to equalize the interests of the parties to the said joint agreement or otherwise, be in excess of the amount of the authorized and outstanding issues of such company or companies, but shall not be in excess of the actual value of the corporate property and franchises of such constituent company or companies vested in the consolidated corporation pursuant to such merger and consolidation;" nor shall the aggregate amount of stock issued exceed \$150,000 per mile, nor the aggregate issue of bonds exceed a like sum. Suppm't 1891, p. 2636. Any road which has been in operation ten years may, if its corporate existence is about to terminate, have its period of existence extended. Id., p. 2637. Annual reports must be made to the secretary of internal affairs under a penalty of \$5,000. Id. Where a railroad is sold under a power of sale in a mortgage and is transferred to a new corporation, such new corporation shall have five years in which to complete the road. L. 1893, p. 463.

Foreign corporations.—Such corporations shall not do business in the state until they have an office and an agent in the state. Digest, p. 361, § 128. They must file a sworn statement of the corporate name, the location of their offices and the name of such agent. § 129. Real estate shall not be held directly or by any device without special authority under the laws of the state. § 131. No foreign corporation shall employ more capital in the state than domestic companies are authorized to employ. \$ 132. Foreign corporations for the purposes specified in the general act noted above (see "Miscellaneous Corporations"), three of whose stockholders are citizens of the state, may become corporations of the state under the provisions of said act by recording a certificate, stating the corporate name and purpose; the names and residences of the stockholders and the number of shares held by each; the number and names of the directors; the amount of the capital stock and the number and par value of the shares; the legislation under which the corporation was formed; and the financial condition of the company. Another certificate shall show the consent of a majority in interest of the corporation to the application for a charter, and to a renunciation of the original charter and of all privileges not enjoyed by corporations of the same class in the state. § 133. Foreign manufacturing companies may erect suitable buildings in the state, and for that purpose may hold one hundred acres of land. Suppm't 1891, p. 2504. A foreign corporation doing business in the state may buy at a judicial sale land upon which it bas a lien, but must dispose of the same within ten years. Suppm't 1887, p. 2174.

Miscellaneous provisions.—Any corporation may increase its capital stock to \$30,000,000 in the aggregate. L. 1893, p. 417. The par value of the shares of stock may be changed from \$50 to \$100, or from \$100 to \$50. Id., p. 331. The principal office of the company may be changed, but this act shall not authorize the locating of the principal office or the holding of stockholders' meetings outside of the state. Id., p. 355. Courts of equity shall have jurisdiction of suits between stockholders and parties claiming to be stockholders, also between creditors and stockholders and creditors and the corporation. Id., p. 29. The act of May 7, 1889, in reference to voting is amended so that the certificate of stock and transfer book, or either, shall be prima facie evidence of the right to vote. A challenge is made by a statement under oath that the party trying to vote the stock is not the owner or trustee thereof. If the vote is rejected, the beneficial owner of the stock may vote it. Where stock is pledged it may be voted as agreed between the pledgor and pledgee, and if there is no agreement the pledgor shall have the right to vote it. Id., p. 141.

Taxation.—All the personal property of corporations, liable to taxation in the state, whether domestic or foreign, is taxed annually for state purposes at the rate of four mills on the dollar. Such personalty includes "all loans issued by or shares of stock in" any domestic or foreign corporation, "including car-trust securities and loans secured by bonds or any other form of certificate or evidence of indebtedness," except shares in any corporation liable to the capital stock tax imposed by sections 21 and 22 of this act. Suppm't 1891, p. 2656, §§ 1, 2 (Act of 1891).

Sworn returns must be made on blanks to be furnished by the assessors. The returns are required to be made only in the county in which the principal office is situated, and shall not include "the obligations of public or private corporations. the tax upon which is required by law to be collected from the holder of such obligations and paid iuto the state treasury by the corporation" (see below). 84 All contracts for the payment of taxes by the borrowers of money at interest are usurious. § 19. No domestic or foreign corporation shall go into operation until the corporate name, the date of organization and the authority under which the same took effect, the place of business, the names of officers, and the amount of canital authorized and the amount paid in are registered with the auditor-general. The penalty for neglect to do so is \$500. S 20. Every domestic or foreign corporation, except banks and foreign insurance companies, doing business and liable to taxation in the state, or having capital or property employed in the state in the name of any corporation or persons, shall make a report in detail of the capital stock, earnings, dividends, surplus, price of stock, etc.; and upon the cash value of the whole capital stock of all kinds a tax of five mills on the dollar shall be paid to the state treasurer. Corporations paying such tax shall not be required. "to make report or pay any further tax on the mortgages, bonds and other securities owned by them in their own right," but corporations holding such securities. in a fiduciary capacity "shall return and pay the tax imposed by this act upon all securities so held by them as in the case of individuals;" provided, that this section shall not apply to companies organized exclusively for manufacturing purposes, excepting those for distilling liquors and those which enjoy and exercise the right of eminent domain. §\$ 21, 22.

Every railroad, pipe line, navigation, transportation, canal and street railway company, and every corporation leasing or operating the property or husiness of any such company, and every telegraph, telephone, palace or sleeping-car company shall pay to the state treasurer, semi-annually, a tax of eight mills per dollar upon the gross receipts of the company from passengers and freight transported wholly within the state, and from telegraph, telephone or express business done wholly within the state. Where the business is leased and operated by another corporation the said tax shall be apportioned according to the agreement between the lessor and lessee, but the state shall first look to the lessee, and the lessor shall not be held liable for any tax upon "the proportion of said receipts received by it as rental for the use of said works." § 24. Domestic stock insurance companies shall pay, semi-annually, in addition to any other tax to which it is liable under sections 21 and 22, a tax of eight mills per dollar upon the gross premium receipts from business done in the state. Foreign insurance companies shall pay an annual tax of two per centum upon the gross premiums received from business done within the state. § 25. Corporations not subject to taxation under sections 22 and 25 pay, besides the tax imposed by sections 1 and 2, a tax of three per centum on their "net earnings or income;" but this section shall not apply to corporations organized for manufacturing purposes. § 29. The treasurer of any corporation doing business in the state, "upon the payment of any interest on any scrip, bond or certificate of indebtedness, issued by said corporation to residents of this commonwealth, and held by them," shall assess the tax imposed for state purposes upon the nominal value of each and every said evidence of debt, and furnish a sworn statement of the amount of such indebtedness; "and it shall be his further duty to deduct three mills on every dollar of the interest paid as aforesaid and return the same into the state treasury." Suppm't 1887, p. 2399, § 4 (see section 4 above). Manufacturing companies, except those manufacturing malt, spirituous or vinous liquois, or gas, are exempted from taxation. § 23. The law imposing a license tax on foreign corporations is repealed. § 27. The offices, depots, car-houses and other real property of railroad corporations situated in Philadelphia, "the superstructure of the road and water-stations only excepted," are subject to city taxes. Digest, p. 1601, § 128. All loans and stocks issued by

any domestic corporation, any part of the interest whereon is guarantied by the state, shall pay a tax of half a mill on every dollar "of the par value thereof on which one per centum per annum of interest shall or may be paid by the commonwealth," and an additional half a mill "on every dollar of the par value thereof, for every additional one per centum per annum of interest which shall or may be paid by the said commonwealth;" provided, such tax shall be deducted by the state treasurer "from and out of any payment or payments of such interest," and that "in those companies in which the guaranty is pledged on the capital stock, the tax imposed by this section shall, during the continuance of the guaranty, be in lieu of the tax on the capital stock subscribed under the faith of the guaranty." § 178 (Act of 1846). Taxes on capital stock are paid by the corporation from the dividends or profits, or, if there are no dividends or profits, assessments may be made on the stockholders and the stock be sold if necessary. If the tax is not duly paid the directors are jointly and severally liable for said tax. § 181. Any committee appointed by the state treasurer or auditor may examine the books and accounts. § 185. That portion of a consolidated railroad within the state is taxed the same as any other road in the state. Digest, p. 1432, § 85. Foreign manufacturing corporations are subject to the taxation statutes governing domestic manufacturing corporations. Their real estate is taxed like other real estate. Suppm't 1891, p. 2504. The secretary of state shall receive \$5 for filing or recording any paper relating to corporations. Digest, p. 338, § 9. Before a charter will be granted an incorporation a fee of one-quarter of one per cent, upon the authorized capital stock must be paid to the state treasurer. Id., \$74. All domestic corporations, except railroad, canal and some other companies, shall pay a state tax of one-quarter of one per centum upon the amount of any authorized increase of capital stock. Suppm't 1891, p. 2466.

The exemption from taxation of manufacturing corporations shall apply only to so much of the capital stock as "is invested in and actually and exclusively employed in carrying on manufacturing within the state." L. 1893, p. 353.

§ 969. RHODE ISLAND: ¹ Constitutional provisions.— Any special act creating a corporation other than one for religious, literary, charitable, military or fire purposes must be introduced into the legislature and then wait until a subsequent election of members takes place before it is passed, public notice being given of its pendency. Constitution of 1842, art. 4, § 17.

Miscellaneous corporations.—There is no general incorporating act.

Manufacturing corporations. - The members shall be "jointly and severally liable for all debts and contracts made and entered into by such company. except as hereinafter provided, until the whole amount of the capital stock fixed and limited by the charter of said company, or by vote of the company in pursuance of the charter or of law, shall have been paid in" and a certificate thereof recorded with the town clcrk, "and no longer, except as hereinafter provided." Pub. Stat. 1882, ch. 155, § 1. The president and directors, with the treasurer and clerk, shall, within ten days after the payment of the last instalment, make a certificate stating the amount of capital fixed and the amount paid in, said certificate to be recorded as above required. In case of an increase of capital, like action shall be taken respecting the amount added and paid in. § 2. Any officers who shall refuse or neglect to comply with the aforesaid provisions shall be "jointly and severally liable for all debts of the company contracted after the expiration of said ten days and before such certificate shall be recorded as aforesaid." § 3. Every such company may, by a vote at a special meeting, reduce its capital stock within the authorized limits, and in default of recording, within ten days, as aforesaid, a certified copy of such vote, the directors shall be "jointly and severally liable for all debts of the company contracted after said ten days, and before the recording of the copy of the vote as aforesaid." § 4. If any of the capital

¹The acts of the legislature down to and including the laws of 1892 are included in this synopsis.

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shall be refunded to the stockholders' before the payment of all the debts of the company "contracted previously to the recording of the copy of the vote reducing the capital stock," all the stockholders of the company shall be "jointly and severally liable for the payment of said last mentioned debts." \$ 5. If the directors shall declare and pay any dividend while the company is insolvent, or which would render it insolvent, they shall be "jointly and severally liable for all the debts of the company then existing, and for all that shall be thereafter contracted so long as they shall respectively remain in office," but such liability shall not exceed the amount of such dividend, and absent and objecting directors shall be relieved from liability by filing their objection. \$ 6. Stock shall not be paid for by any stockholder's note or obligation, and the company shall make no loan to a stockholder. The officers making or assenting to such a loan shall be "jointly and severally liable to the extent of such loan and interest for all the debts of the company contracted before repayment of the sum so loaned." § 7. The debts of the corporation shall not at any one time exceed the capital stock actually paid in. In case of any excess the directors under whom it shall happen shall be "jointly and severally liable, to the extent of such excess," for all existing debts and for all that shall be contracted during their respective terms of office, and until the debts are reduced to the amount of capital paid in. \$ 15. Any director who is absent at the time of contracting such debt, or objects thereto, may avoid liability by giving notice of his absence or objection at a meeting of the stockholders, which he may call for the purpose. § 16. When any manufacturing company owning a manufacturing establishment obtains a charter of incorporation, if all the members of the corporation are members of the company, or if the members of the corporation who are not members of the partnership shall own less than onethird of the stock of the corporation, the said establishment, including the real estate and machinery conveyed by the company to the corporation, shall be appraised by the town tax assessors, and the amount of the capital stock represented by such real estate and machinery shall not exceed the sum at which the same may be appraised, "either in the whole under the provisions of this chapter, or in any part which may be exchanged by any member of the company for shares in the stock of such corporation, or in which he may pay assessments laid on his shares in the same." § 8. A certificate of such appraisement, made and sworn to by the assessors, must be recorded as aforesaid, besides the certificate required by section 2, "before the liability of the members of such corporation for the debts and contracts of the same shall cease." § 10. An annual report must be filed with the town clerk, § 11. See, also, for foreign manufacturing company, Laws 1892 (January session), ch. 1038, and ch. 1089. For failure of the company to file such report the stockholders shall be "jointly and severally liable for all the debts of the company then existing and for all that shall be contracted before such notice shall be given, except as hereinafter provided," unless the company shall have made an assignment, in which case such report is not required. § 12. The liability of shareholders is "limited to the shares of such members in such corporation paid up to the par value thereof," and if the corporation fails to file the report as required in section 11, the members shall be liable "for said debts and obligations in an additional amount up to but not exceeding the said par value of their said shares." § 13. But if a certificate is not made and filed as required by section 11, any stockholder may exempt himself from liability by filing, in the manner above required, a true return, giving the condition of the corporation as far as he can ascertain the same; or by filing a statement under oath that he has requested the directors, and they have refused, to make the required report, and that he is not able to make the same. Such statement by a stockholder must be published in a county paper. § 14. The realty and personalty of any manufacturing corporation may be attached and sold on execution. § 19. All the officers who shall knowingly sign any false certificate or notice required by this chapter shall be "jointly and severally liable for all the debts of the company contracted while

they were stockholders or officers thereof." § 20. A stockholder who has paid any debt for which he is made liable by this chapter may recover the amount paid in an action against the company, or by a proceeding in the supreme court in equity against any of the stockholders who were likewise liable. §§ 23, 24. No person shall be imprisoned, or his property attached, "upon an execution issued upon a judgment obtained against a corporation of which such person is or was a stockholder." § 25. Persons holding stock as guardians, etc., are not personally liable as stockholders. § 26.

Railroads.—There is no general incorporating act. There is a railroad commissioner appointed by the governor. Ch. 158, § 1. Every railroad built without a license or charter from the legislature is declared a public nuisance. \$ 25. No company shall abandon any station established for a year without permission from the legislature. \$ 19. Connected railroads shall receive each other's freight for transportation, and shall be liable for any injury to the same. § 21. An account of the toll, freight and passenger money received shall at all times be kept in readiness for an examination by the legislature or the commissioner. § 23. Every stockholder may "at all reasonable times" examine the books, papers and accounts, and if any officer shall refuse to allow such examination he shall forfeit \$100. § 24. The commissioner shall, when he thinks best, examine into the proceedings of any railroad company, and make recommendations to the legislature. \$ 27. Annual reports must be sent to the commissioner. \$ 41. Land can be entered upon only for surveys until security is given for the payment of damages. § 43. Every railroad must make suitable and reasonable rates and accommodations for the transportation of the passengers, freight and cars of connecting roads. Laws 1888, ch. 695. The franchise and property of a railroad corporation "may be redeemed by it, or any mortgage thereof, from sale on execution," by tendering to the purchaser the sum paid therefor, with interest, at any time within sixty days after the final determination of any writ of error to reverse the judgment upon which the execution issued, or of any suit to test the validity of such sale, brought before the sale or within sixty days thereafter. "But nothing herein shall be construed as authorizing such a sale." Id., ch. 716. The duties and powers of the railroad commissioner are further extended in chapter 758, Laws 1889.

General provisions.—If no special provision is made, all corporations may take, hold, transmit and convey any real and personal property. Ch. 152, § 1. Shares of stock are personalty, unless otherwise specially provided, and shall be transferable in the manner prescribed by the by-laws. § 2. In the absence of a special provision, the by-laws may determine the manner of calling and conducting meetings, the number of shares necessary for a quorum, the number of shares that shall entitle a member to one or more votes, the mode of voting by proxy, the mode of selling delinquent shares, and the tenure of office. Suitable penalties may be annexed, not exceeding in any one case \$25 for one offense. § 3. The first meeting of corporations, excepting banks, shall, unless specially provided for in the act of incorporation, be called by a notice signed by one or more of the corporators, and published for seven days. § 4. When there is no person authorized to call, or preside at, a legal meeting, a justice of the peace, upon the application of three or more members, may issue a warrant to either of said members, directing him to call a meeting, after lawful notice, and to preside at the meeting. § 5. Corporations whose charters expire or are annulled shall continue to exist for three years to settle up their business. § 8. The franchise of any corporation anthorized to receive tolls, with all the rights and privileges thereof, so far as relates to tolls, "and also all other corporate property," may be sold on execution in the same manner as the real estate of corporations. § 9. The purchaser shall have all the privileges which belonged to said corporation, "so far as relates to the right of demanding toll," and the officer making the sale shall deliver to the purchaser possession of all toll-houses, etc. The purchaser shall conduct the corporate business of receiving tolls, and the corporation shall have no right of action

for the non-payment thereof. § 11. The purchaser of the franchise has power to prosecute all actions for tells, and to recover penalties for injury to the same. but in all other respects the corporation retains the same powers and must discharge the same duties as before the sale. §§ 12, 13. The franchise may be redeemed within three months by payment of the sum for which the same was sold. with twelve per centum interest thereon. § 14. Records of transfers of the stock of domestic corporations shall be made and kept within the state, and the officer making the transfer shall be a resident of the state. § 15. "The delivery of a certificate of stock of a corporation transferable only on the books of the corporation on surrender of the certificate to a bona fide purchaser or pledgee for value, together with a written transfer of the same or a written power of attorney to sell. assign and transfer the same signed by the owner of the certificate shall be a sufficient delivery to transfer the title against all parties; but no such transfer shall affect the right of the corporation to pay any dividend due upon the stock. or to treat the holder of record as the holder in fact, until such transfer is recorded upon the books of the corporation, or a new certificate is issued to the person to whom it has been transferred." Laws 1888, ch. 690. Every domestic corporation must have a place of business and an agent within the state. § 16. All acts of incorporation may be amended or repealed at the will of the legislature, unless otherwise provided therein. § 17. "Corporations hereafter created by charter, if no time is limited therein, shall be organized within two years from the passage of their respective acts of incorporation. The charters of all corporations failing to comply with the provisions of this section shall become void." § 18. corporation is organized, or its capital stock is increased, such corporation shall, within thirty days after organization or after such increase, file with the secretary of state a sworn statement setting forth (1) the corporate name; (2) the date of organization: (3) the amount of capital paid in upon organization: (4) "the amount of increase of capital stock paid in, with the date thereof;" (5) the location, and the address of the treasurer. § 19. Shares of stock and franchises may be attached or sold under levy of execution. pp. 369, 572, 616. Provision is made for the appointment of a receiver upon the petition of any stockholder or creditor. Laws 1888, ch. 686. All foreign express or transportation companies must appoint some resident citizen their attorney, upou whom service may be made. A copy of such power of attorney must be filed with the secretary of state together with a copy of the charter. For failure to comply with any of these provisions the corporation shall forfeit \$500. Pub. Stat., ch. 138. Every foreign corporation doing business in the state "shall be subject to suit hereafter, and to trustee precess by garnishment," like domestic corporations. Laws 1891, ch. 929. No foreign insurance company shall do business in the state until it has appointed the insurance commissioner of the state its attorney, upon whom process may be served. Laws 1884, ch. 432, § 2. No person shall act as agent of such foreign company unless the capital stock of the company amounts to \$100,000, paid in and invested exclusively of any stockholders' obligations, nor unless such company, if other than a life insurance company, is restricted by its charter or otherwise so that it cannot incur a greater hazard in any one risk than one-tenth of the amount of its capital. § 5. In the case of life insurance companies, the auditor or treasurer of the state where the company was organized must certify that the company has on deposit there good securities worth \$100,000. § 6. Every agent of a foreign insurance company must deposit a copy of the charter of his company. He must also file a complete statement of the condition of the company. §§ 9, 10. Every company must return an annual statement of its condition. § 12. And an abstract thereof must be published. § 13. Contracts made without complying with this chapter shall be valid, but the agent making the same shall be fined from \$300 to \$1,000. § 14. A person acting as agent contrary to the provision. of this act shall be fined \$1,000. § 15. The penalty for a refusal of the agent to answer questions put by the commissioner is \$1,000. § 17. No such agent shall

establish any branch agency. § 19. The commissioner shall examine the affairs of the company, and may revoke the authority of an agent. The expenses of the examination shall be borne by the company. § 20.

Taxation. - Property exempted from taxation includes "property specially exempt by charter, unless such exemption shall have been waived in whole or in part." Pnb. Stat., ch. 41. Personal property for the purpose of taxation includes all shares in any domestic or foreign corporation, except such as are exempted by law. But no shareholder shall be taxed for shares "held in any corporation within this state which in its corporate capacity is taxed within this state for an amount equal to the value of its property, or in any corporation without this state which is, or the shares in which are, liable to taxation in the state where such corporation is located." Ch. 42, 8 10. Non-resident stockholders in national banks located in the state are taxed where the bank is located. § 15. The cashier of every bank shall furnish to the town assessors a list of all the non-resident stockholders, with the amount of stock held by them respectively. Ch. 43, § 5. The tax on non-resident stockholders in national banks is a lien upon their shares, and no officer shall transfer such shares, or pay any dividend thereon, while the taxes are due and unpaid. § 9. Any officer of a national bank who shall fail to comply with the provisions of this chapter shall be fiued not more than \$500 for each offense. § 10. Any town may require a report concerning the stockholders residing in that town, and for neglect to furnish such return demanded by the town assessors any corporation shall forfeit \$100. § 11. Returns to town assessors shall give the par value and the cash market value of shares, and the stockholders "shall be taxed only for the difference between the cash market value of each share by them held, and the proportionate amount per share at which its real estate and machinery, if any, were last assessed." § 12. Savings banks shall pay twenty-five cents on each \$100 of deposits, and on each \$100 of reserved profits. Ch. 27, § 3. Trust companies pay twenty-five cents on each \$100 of deposits. § 4. Every insurance company, domestic or foreign, must pay two per centum on their gross premiums and assessments. §§ 5, 6. An agent of a foreign insurance company who refuses to make proper returns for taxation shall be fined not more than \$1,000, and be subjected to a suit on his bond. § 7. Telegraph, telephone and express companies pay a tax of one per cent. on their gross receipts in lieu of all other taxes. §§ 10, 11. An agent who refuses or neglects to make the proper returns necessary for the levy of the tax specified in the two preceding sections shall be fined from \$1,000 to \$5,000. \$ 12. A charter fee of \$100 is required, and, iu addition, one-tenth of one per cent, upon the capital stock exceeding \$100,000 authorized by the charter. Upon every increase of the capital stock there shall be paid one-tenth of one per cent. upon such increase. § 14. Every foreign insurance company, before doing business in the state, shall pay \$30 for filing a copy of its charter or "deed of settlement;" \$20 for filing the statement preliminary to admission, and for filing each annual statement after admission; and \$2 for each agent's annual certificate. Laws 1884, ch. 432, § 22. The electors of a town or city may, by vote, exempt from taxation for not more than ten years any manufacturing property which may be located therein in consequence of such exemption, and the land on which such property stands. Laws 1892 (January Session), ch. 1088.

§ 970. SOUTH CAROLINA: Constitutional provisions.—"The general assembly shall grant no charter for banking purposes, nor renew any banking corporations now in existence, except upon the condition that stockholders shall be liable to the amount of their respective share or shares of stock in any such banking institution for all its debts and liabilities," and upon the further condition that no director or officer shall borrow from the corporation. The penalty for violating this section is fine or imprisonment. Books, papers and accounts shall be open

 $^{^1}$ The acts of the legislature down to and including the laws of 1892 are included in this synopsis. 1862

to inspection. Constitution of 1882, art. XII, § 6 (a). Mines and mining property shall be taxed only upon their proceeds. Art. IX, § 1. Corporations may be formed under general laws, but all such laws may from time to time be repealed or altered. All corporation property is taxable, "except in cases otherwise provided for in this constitution." Art. XII, §§ 1, 2 (b). No corporation shall have a right of way until full compensation shall be secured to the owner. "irrespective of any benefit from any improvement proposed by such corporation, which comnensation shall be ascertained by a jury of twelve men, in a court of record, or shall be prescribed by law," Art. XII, S.3. "Dues from corporations shall be secured by such individual liability of the stockholders and other means as may be prescribed by law." Art. XII. "All general laws and special acts passed pursuant to this section shall make provisions therein for fixing the personal liability of stockholders under proper limitations; and shall prevent and punish fraudulent misrepresentations as to capital, property and resources," etc.; and shall regulate the public use of all frauchises which have been, or may be, granted under the authority of the state, "and shall limit all tolls, imposts or other charges and demands under such laws." Art. XII, §§ 4, 5.

Miscellaneous corporations.—Two or more persons desiring to form themselves into a private corporation for carrying on "any manufacturing, mining, industrial, labor, immigration or other business, except for railroad purposes," may file with the secretary of state a written declaration, signed by themselves, setting forth the names and residences of the petitioners, the proposed principal place of business, the general purposes of the corporation, the amount of the capital stock, the number of shares and the par value of each, "and any other matters which it may be desirable to set forth in the organic law." Act No. 288, L. 1886, § 1. All subscriptions are payable "in money, or in labor, or in property at its money value, to be named in the list of subscription." If the labor is not performed, or the property delivered, according to the terms of the subscription, the money value named in the list must be paid. Id., § 3. After a bona fide subscription of fifty per cent, of the proposed stock has been made the company may organize. A majority in value of the stockholders being present in person or by proxy shall elect a board of directors from among themselves of not less than three nor more than nine. The directors elect the president and secretary from their own number. Id., § 4. A board of incorporators, appointed by the secretary of state, receive the subscriptions, call the subscribers together for organization, certify the completion of the organization to the secretary of state, and upon issuance of the certificate of incorporation turn over to the company all the money, books and papers. Id., §§ 2, 4, 5, 6. The charter shall issue upon the filing of the certificate that there has been paid in twenty per cent. of the capital subscribed, to be paid in money, and that the remainder of the capital so subscribed for payable in money has been secured; also that twenty per cent of the property subscribed has been delivered and the remainder secured. Id., § 5. In all charters heretofore or hereafter granted under this act, no irregularity in complying with the provisions of this act shall be held to vitiate said incorporation until a direct proceeding to set aside and annul said incorporation is instituted by the proper authorities of the state; and all acts done and contracts entered into shall have the same force and effect as if said irregularity had not existed. Id., Amended Acts 1889, No. 190. The capital stock may be increased to an amount not exceeding \$1,000,000 "by giving each stockholder the preference of taking the increase in proportion to the amount of the original stock he may own, by a vote of twothirds of the stock in value, held at a meeting for the purpose," a notice of which meeting shall have been published for thirty days in a newspaper of the county where the principal office is located. A certified copy of the resolutions increasing the stock must be filed with the secretary of state. No. 288, L. 1886, § 9. Each share is entitled to one vote. Id., § 10. The directors shall elect and may discharge the president and all other officers, agents and servants, and shall fill any

vacancy in the board. Id., \$12. The corporation has a lien upon the stock of each shareholder for all dues upon his subscription for stock. Transfers of stock are not valid except as between the parties thereto until such transfers are regularly entered upon the books of the company. Id., \$ 14. Mining and manufacturing corporations may construct a railroad, tramway, turnpike or canal, for their own use and purposes, and may condemn the right of way in lands over which such road may pass. Id., § 15. The books must be open to the stockholders. and the keeping of false books is a misdemeanor \$17. Five years non-user forfeits the charter. § 18. Unless otherwise provided in the charter each stockholder is jointly and severally liable to the creditors "in an amount, besides the value of his share or shares therein, not exceeding five per cent, of the par value of the share or shares held by such stockholders at the time the demand of the creditor was created, provided that such demand shall be payable within one year," and that proceedings shall be commenced within two years from the time the debt is due, and within two years after he, she or it ceases to be a stockholder. Persons holding stock as trustees, executors or administrators, or by way of collateral security, are not liable personally, but the estates and funds in their hands are liable. Fraudulent representations as to the capital, property or resources by any officer or stockholder shall constitute a misdemeanor, unless special provision be made in the charter for the prevention and punishment of such fraudulent representations. Corporations may hold and dispose of real estate necessary for the purposes of their business, and in settlement of any debts due them shares in the capital stock are deemed personal estate, and no part of the capital stock can be used in any banking operation. The above provisions do not apply to railroad or banking corporations formed under any act of assembly. Id., § 22. The treasurer of the corporation must give a bond. Id., § 23. Any absent stockholder may vote by proxy, authorized in writing, and, unless by its by-laws the company determines otherwise, a majority in interest of the stockholders shall constitute a quorum. §24. If no period of time is limited in the charter the charter is deemed perpetual. The amount of property, real and personal, which a corporation may hold may be limited in the charter. Id., § 26. The company must organize and commence business within two years from the date of its incorporation or its corporate powers shall cease. Id., § 28. This meeting cannot be held until a thirty days' notice has been given by publication in the county newspaper, a copy of which must be sent to each stockholder. Id., § 31. The increase may be less but shall not be more than that stated in the published notice for such meeting. Id., § 32. No stock shall be issued until fully paid according to the terms of the subscription, "except in cases of building and loan associations and other corporations, when by the terms of the charter the capital stock is to be paid in instalments." Id., Amended Acts 1888, No. 17.

Railroads .-- No general incorporating act exists. A line wholly within, or partly within, the state may consolidate with any other railroad, under the authority of this or any state, when the lines of the companies thus consolidating will make a continuous line with each other, or by means of an intervening road, provided no consolidation be made with a road of another state contrary to the laws of that state. Gen. Stat. 1882, § 1425. The consummation of the act of consolidation invests the new company with all the rights and privileges of the old corporations without any further act or deed, and imposes upon it all obligations which were incumbent upon the old companies. Id., § 1428. Dissenting stockholders must be bought out at an appraised valuation. § 1432. Railroads may lease or purchase the stock or bonds of any connecting line chartered by the state, or extending into the state, and may guaranty the bouds or stock of any connecting line. § 1434. Railroads may aid in the construction of any branch or connecting railroad within the state, "whether connecting by railroad or steamboat lines, by subscribing for shares of stock, or of a steamboat company connecting the terminus of such road with any port of the United States, or by taking its notes or

bonds," and may vote on all such shares of stock. § 1435. A proxy more than six months old is not valid. "No person shall as proxy or attorney cast more than one hundred votes, unless all the shares so represented by him are held by one person." "No salaried officer of the corporation shall vote as proxy or attornev." \$ 1437. Stockholders are jointly and severally liable to the creditors in an amount, besides the value of their shares, not exceeding five per cent, of the par value of their shares at the time the demand of the creditor was created. vided, such demand shall have been payable within one year. Provided, also, that proceedings shall be begun against such stockholder "before the end of two vears from the time when he ceased to be a stockholder; but persons holding stock as executors or administrators, or as collateral security, are not liable personally. Act No. 96, L. 1885. The "company has full power and authority to connect with or cross any other railroad, . . . purchase, lease or consolidate with any other railroad within or without the state," on such terms as may be agreed upon between the two companies. Id., § 5. When a railroad wholly or partly within the state is sold by virtue of a mortgage or deed of trust, the purchaser shall not name in the certificate to be presented to the secretary of state a greater capital stock than the amount specified in the original charter or in any amendment thereto; provided, "nothing herein contained shall be construed to prevent an increase of capital stock to such an additional amount as may be needed to convert any bonds or other indebtedness of the original corporation into stock, and the corporation so formed may divide its capital stock into common and preferred stock upon such terms and with such conditions as may be prescribed." Gen. Stat. 1882, § 1420, Amended Acts 1889, No. 234. There is a railroad commission, whose salary and expenses shall be borne by the corporations operating railroads in the state. The powers to fix passenger and freight rates. "joint and several," are delegated to the commission as fully as the general assembly itself could exercise them. All contracts and agreements in reference to rates shall be submitted to the commissioners for approval; also all arrangements for the dividing of earnings by competing lines, so far as such arrangements af-The commission may also make rules to prevent discrimination. Discrimination in transportation or rates, or unreasonable charges, shall be punished by a fine of from \$100 to \$1,000. All contracts not approved by the commission, or fixing higher rates than the rates fixed by the commission, shall be void. For violating, by its agents or employees, any of the rules and regulations of the commission, and refusing to recompense the injured party, any corporation shall be fined from \$1,000 to \$5,000. The provisions of this act apply to all common carriers doing business over a railroad, excepting express companies. It shall not apply to rates on freight which comes from or goes beyond the state line, on which less than local rates is charged. Laws 1892, p. 8.

Taxation.—"All moneys, credits, investments in bonds, stocks, joint-stock companies or otherwise, of parties resident within this state, shall be subject to taxation." Gen. Stat. 1882, § 164. Shares of stock are exempt from taxation if the company or corporation is required to list its capital and property for taxation in the state. § 169 (19th). "All moneys, credits, investment in bonds, stocks, jointstock companies or otherwise," whether in or out of the state, shall be listed for taration by owners resident within the state. § 173 (4th), § 176 (15th). The roadbed, right of way, all buildings, fixtures, vessels and real estate, "owned and necessarily in daily use by any railroad, turnpike, plank-road, bridge, telegraph, canal or slack-water navigation company, in the prosecution of its business, shall, for the purposes of this chapter, if the company be organized in this state, be treated as personal property. But the lien for taxes shall attach to the property as if the same were real property," and the value thereof shall be included in the return of the other personal assets of the company for taxation. § 179. The president and secretary of every railroad, any part of which is within the state, are required to make to the comptroller-general a return of all their property for taxation between

June 1 and July 20 of each year, according to the provisions of sections 180-188. A state board shall equalize the valuations returned to the comptroller-general, and the comptroller-general shall certify to the county auditor of each county in which any part of the railroad may be situated the corrected valuations of the railroad property in his county. The county auditor shall charge the railroad company in the several cities, towns and incorporated villages of his county for taxation with the corrected valuations. §§ 186, 187, Am'd Laws 1892, p. 105. If any railroad company fail to make the return as required by law, the state board shall ascertain the value of the said company's road and property, and add thereto fifty per centum as penalty, and apportion the same to the several counties, towns, cities and incorporated villages in which any part of said road may be located. § 188, Am'd Laws 1892, p. 105. A corporation "organized under the laws of this state, and owning property in any other state or county as well as in this state, shall not be required to return its capital for taxation in this state, but shall return such property as it owns in this state, and such proportion of the value of its other property as, if owned by individual residents of this state, would be taxable in this state; and if such return be made by such company, the shareholders therein shall not be required to return their shares for taxation." § 194. If the whole property of a domestic corporation is out of the state no tax is levied on its capital. \$ 195. Domestic or foreign corporations, "the manner of listing whose personal property is not otherwise specially provided for by law, shall list for taxation all their personal and real property and effects" as individuals, \$ 196. The shares of the stockholders in any bank located in the state are taxed only in the city, town, ward or incorporated village where the bank is located. § 198. The real estate of any bank shall be taxed where the real estate is located, the same as the real estate of individuals. § 199. The president and cashier "shall return for taxatiou to the county auditor a full statement of the names and residences of the stockholders, with the number of shares held by each, and the actual value in money of such shares, together with a description of the real estate owned by the bank." § 201. The county auditor shall deduct from the total value of the shares of such bank the appraised value of the real estate owned by the bank, and the remainder of the total value of such shares shall be charged with taxes in the names of the owners thereof, "at the same rate as charged upon the value of other personal property at the place where such bank is located." § 202. Any tax on any shares shall be a lien on such shares, and if the taxes are not paid as prescribed by law the officers of the bank may transfer the stock upon which the taxes are delinquent. § 203. The bank may pay the taxes so delinquent and deduct the amount thus paid from the dividends which may be due, or may become due, on such shares as aforesaid. § 204. Foreign insurance companies and building and loan companies pay a license fee of \$100. Laws 1892, p. 89. Mines and mining claims are taxed like other property, but where the mine is actually worked the gross proceeds only are taxed. Laws 1892, p. 45.

§ 971. SOUTH DAKOTA: 1 Constitutional provisions.— The legislature is prohibited from "granting to an individual, association or corporation any special or exclusive privilege, immunity or franchise whatever." Constitution of 1889, art. III, § 23. The legislature shall not delegate to any private corporation any power to make or supervise any municipal improvement. Id., § 26. No law shall be passed "making any irrevocable grant of privilege, frauchise or immunity." Art. VI, § 12. No benefit which may accrue to the owner as the result of an improvement made by any private corporation shall be considered in fixing the compensation for property taken or damaged. Compensation for property "taken for public use or damaged" shall be determined by a jury and paid before possession is taken. Id., § 13. No law shall grant to any citizen or corporation "privileges or immunities which upon the same terms shall not equally belong to

¹ The acts of the legislature down to and including the laws of 1893 are included in this synopsis.

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all citizens or corporations." Id., § 18. All taxes shall be according to the money value of the property taxed, and taxes on all corporation property shall be levied. "as near as may be, by the same methods as are provided" for taxing individual property. Art. XI, § 2. "The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the state shall be a party." Id., § 3. Investments in stocks and joint-stock companies shall be taxed. All effects or dues of all banks or bankers shall be "subject to a taxation equal to that imposed on the property of individuals." Id., \$ 4. "All laws exempting property from taxation other than that enumerated in sections 5 and 6 of this article shall be void." The exemptions do not include any private corporation organized for profit. Id., § 7. "Neither the state, nor any county, township or municipality, shall loan or give its credit or make donations to or in aid of any individual, association or corporation. . . . nor subscribe to or become the owner of the capital stock of any association or corporation, nor pay or become responsible for the debt or liability of any individual, association or corporation," except to "pay a debt or liability incurred in time of war in defense of the state." "Nor shall the state engage in any work of internal improvement." Art. XIII, § 1. "No corporation shall have its charter extended changed or amended by special laws, . . . but the legislature shall provide by general laws for the organization of all corporations hereafter to be created." Art. XVII, § 1. All existing charters, under which there has been no bona fide organization and commencement of business in good faith at the adoption of the constitution. shall be invalid. Id., § 2. No general or special act shall be passed relating to existing corporations "except upon the condition that such corporation shall thereafter hold its charter subject to the provisions of this constitution." Id. § 3. Under the right of eminent domain the legislature shall always have power to take the property and franchises of incorporated companies for public use. Id., § 4. In voting for officers of a corporation, "each member or shareholder may cast the whole number of his votes for one candidate or distribute them upon two or more candidates, as he may prefer." Id., § 5. Foreign corporations doing business in the state must have one or more known places of business in the state and an agent upon whom process may be served. Id., § 6. Corporations shall do only the business expressly authorized in the charter, and shall hold only such real estate as is necessary and proper for their legitimate busi-"No corporation shall issue stock or bonds except for money. labor done, or money or property actually received; and all fictitions increase of stock or indebtedness shall be void." An increase of the stock or indebtedness of corporations is to be allowed only in pursuance of general law, and only when the consent of those persons holding the larger amount in value of the stock shall have been obtained at a meeting after sixty days' notice. Id., § 8. "The legislature may alter, revise or annul any charter of any corporation now existing and revocable at the taking effect of this constitution, or any that may be created," whenever it may seem injurious to the citizens of the state, without, however, doing injustice to the corporators. "No law hereafter enacted shall create, renew or extend the charter of more than one corporation." Id., § 9. The legislature shall grant the right to construct and operate street railroads only upon the consent of the local authorities. Id., § 10. No telegraph company shall consolidate with or obtain a controlling interest in the stock or bonds of a competing line, nor acquire such line by purchase or otherwise. Id., § 11. All railroad corporations doing business in the state shall keep an office in the state where transfers of stock may be made, and shall keep open to public inspection books stating the capital stock subscribed and by whom, the names of the owners and the amounts owned, the amount of stock paid in and by whom, transfers, the amount of corporate assets and liabilities, and the names and residences of their officers. Annual reports shall be made to the state. Id., § 12. The provisions of section 12 are enforced by chapter 62 of the laws of 1890. Each year of non-

compliance is punished by a fine of \$500. The rolling stock and all other movable property of any railroad company shall be personal property and liable to execution and sale. Id., § 13. Competing or parallel railroads shall not consolidate: and in no case shall a consolidation take place until after a sixty days' public notice to all stockholders. Id., § 14. All railroads and transportation companies are declared to be common carriers and the legislature is given power to regulate the freight and passenger rates of such common carriers from one point to another in the state. Id., § 15. "Every railroad company shall have the right with its road to intersect, connect with or cross any other railroad, and shall receive and transport each the other's passengers, tonnage and cars, loaded or empty, without delay or discrimination." Id., § 16. Every banking company shall promptly close its business at the expiration of twenty years from the date of its organization. but shall have corporate capacity to sue and be sued until its business is fully closed. "The legislature may provide by a general law for the reorganization of such banks." Art. XVIII, \$2. The shareholders and stockholders of any banking corporation are individually liable for all obligations of such corporation "to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares or stock." The liability continues for one year after the transfer or sale of the stock. Id., § 3.

The enabling act passed by congress, and approved February 22, 1889, provides that "all laws in force made by said territories, at the time of their admission into the Union, shall be in force in said states, except as modified or changed by this act, or by the constitutions of the states, respectively."

The present statutory law of Dakota affecting corporations is as follows:

Miscellaneous corporations.— One-third of the officers of a corporation shall be residents of the state. Compiled L. 1887, § 2897. An unconditional acceptance by a majority of the corporators of the statutory grant of corporate power is necessary to constitute a corporation. Id., § 2898. Three or more persons may incorporate for purposes named in the statute, including mining, manufacturing and other industrial pursuits, or any other lawful business, and the construction or operation of railroads. But insurance companies can only be formed by the voluntary association of seven or more. Id., § 2900, Am'd Laws 1893, ch. 42. The articles of incorporation must set forth the name of the corporation, the purpose for which it is formed, the place of its principal business, the term for which it is to exist. the number of its directors or trustees, "and the names and residences of such of them who are to serve until the election of such officers, and their qualifications." and if there is a capital stock, its amount and the number of shares into which it is to be divided. Id., § 2902. The articles of incorporation of a railroad or wagon road must also state the kind of road intended, the place from and to which it is to be run, and all the intermediate branches, the counties through which it will run, and the estimated length and cost of the road. Id., § 2903. The articles of incorporation must be subscribed by three or more persons, one-third of whom must be residents of the state, "and acknowledged by each before some officer authorized to take and certify acknowledgments of conveyances of real property." Id., § 2904. Upon the filing of the articles with the secretary of state he shall issue a certificate; "and thereupon the persons signing the articles, and their associates and successors, shall be a body politic and corporate." Id., § 2905. "A subscription to the stock of a corporation about to be formed is to be held for the benefit of the corporation when it is formed, and may be enforced by it." Id., § 2912. "When a corporation is authorized by the terms of subscription, or otherwise, to forfeit stock for non-payment [of subscriptions], it may either forfeit the stock or recover the amount of the subscription, but it cannot do both." Id., § 2914. Shares of stock are personal property, "and may be transferred by indorsement by the signature of the proprietor, or his attorney or legal representative, and delivery of the certificate; "but such transfer is only valid as between the parties thereto until entered on the company's books. Provision may be made in the by-laws for issu-

ing certificates of stock prior to full payment. Id., § 2915. Unless otherwise provided, a corporation may purchase shares of its own stock from its surplus profits. in such manner and for such price as the stockholders may unanimously decide upon. Id., § 2917. "A dividend belongs to the person in whose name it stands upon the books of the corporation on the day when it becomes payable." Id., 8 2918. When no period is limited a corporation shall have perpetual existence. Any cornoration may hold real estate requisite for the legitimate purposes of the corporation, "not exceeding, in any case, any amount limited by law," Id. § 2919. Every corporation formed under this chapter must adopt by-laws within one month. A majority of the stock must vote in favor of such by-laws, at a meeting held after a two-weeks' published notice. A written assent of two-thirds of the stock is sufficient to adopt the by-laws without a meeting for that purpose. Id., § 2920. The mode of voting by proxy may be prescribed by the by-laws, when no other provision is specially made, Id., \$ 2921. A vote of two-thirds of the stock may delegate to the directors the power to amend, repeal or renew the bylaws. Id., § 2922. Each share of stock has one vote at all elections. Id., § 2925. There shall be from three to eleven directors, all holders of stock, the amount held by each to be fixed by the by-laws. Unless otherwise provided in the by-laws, the beard of directors may fill a vacancy in the office of director. Id., § 2926. Every decision of a majority of the directors, made when the board is duly assembled, "is valid as a corporate act." Id., § 2927. "The directors of corporations must net make dividends except from the surplus profit arising from the business thereof: nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock; nor must they create debts beyond their subscribed capital stock, or reduce or increase their capital stock, except as specially provided by law." For a violation of these provisions the directors present and not entering their dissent on the minutes are "jointly and severally liable to the corporation, or to the creditors thereof in the event of its dissolution," for any amount thus wrongfully appropriated; "and no statute of limitations is a bar to any suit against such directors" for any sum for which they are thus liable. Id., § 2928. No director shall be removed from office except by a vote of two-thirds of the stock at a meeting specially called for the purpose. In case of removal, the vacaucy may be filled at the same meeting. Id., § 2930. No person can vote stock, or take part in any meeting, unless he shall have had stock in his own name on the books for at least ten days. Id., § 2931.

Meetings of stockholders and of the board must be held at the principal office. except that railroad directors' meetings may be held in any place in or out of the state, provided the railroad has one or more resident directors or a duly appointed resident agent; when not otherwise provided in the by-laws, all board meetings must be called by a special notice in writing to each director. A justice of the peace may call a general meeting on the written application of three stockholders. if there is no one authorized to call such meeting, and he may appoint a stockholder to preside. Each stockholder is individually liable "for the debts of the corporation to the extent of the amount that is unpaid upon the stock held by him, . . . and in no other case shall the stockholders be individually and personally liable for the debts of the corporation." Any creditor of the corporation may institute joint or several actions against any such delinquent stockholders. The liability is determined by the unpaid subscriptions at the time the action is brought, and such liability cannot be avoided by a subsequent transfer of stock. The term "stockholder" in this section includes any equitable owner of stock, though his name may not appear on the books. Trust funds in the hands of a guardian or trustee shall not be thus liable by reason of any investment in stocks in the name of a minor or of a trust estate, "nor shall the person for whose benefit the investment is made be responsible in respect to the stock until he becomes competent and able to control the same;" but the personal responsibility of the guardian or trustee shall continue until that period. Id., § 2933. The capital

stock may be increased, or diminished to an amount not less than the indebtedness of the corporation, or the estimated cost of the works proposed to be constructed, by a vote of at least two-thirds of the stock at a meeting called for the purpose by the directors. The written assent of three-fourths of the subscribed stock has the same effect as a two-thirds vote at a meeting thus held. Id., § 2936. Detailed records of all transactions and all meetings, acts, votes, protests, etc., and also a "stock and transfer" book, shall be kept open for inspection. § 2937. If the corporation does not organize and begin operations within one year its powers cease, \$ 2939. Upon the dissolution of a corporation the directors are trustees of the creditors and stockholders, having full power to settle up the affairs of the corporation. Id., § 2940. Such trustees are jointly and severally liable to the extent of the corporate property in their hands. Id., § 2941. After one-fourth of the capital stock has been subscribed the directors may levy and collect assessments thereon, in order to pay expenses or debts and conduct business. Id., § 2943. Assessments are levied and collected as provided in articles 2944-2963. If at a sale of stock to collect an assessment no bidder offers an amount sufficient to pay the assessment and costs, the corporation may bid in the stock at the amount of the assessment and charges due. The assessment and charges must then be credited as paid in full, and entry of the transfer must be made. While the stock remains the property of the corporation it cannot be assessed, and no dividends may be declared thereon. The stockholders may make such disposition of such stock as they deem fit. Stock thus owned by the corporation must not be voted at any meeting. \$\$ 2955-56. The franchise of any corporation authorized to receive tolls, "and all the rights and privileges thereof," may be sold under execution, in the same manner as any other property, "but without any exemption." Id., § 2964. The purchaser conducts the business on the basis of the corporation. receiving all the profits therefrom. Id., §§ 2965-66. "The corporation whose franchise is sold as in this article provided, in all other respects retains the same powers, is bound to the discharge of the same duties, and liable to the same penalties and forfeitures as before such sale." Id., § 2967. The franchise may be redeemed within one year by payment of the purchase price and twelve per cent. interest thereon. Id., § 2938. The legislature may examine into the affairs of all corporations at all times. Id., § 2970. "Any corporation for profit, organized under any general law, may amend its certificate or articles of incorporation, so as to modify or enlarge its business or purposes, change the number of its directors, change its name or location within the state, increase or diminish its capital stock, or provide anything which might have been provided originally in such certificate or articles of incorporation in the manner bereinafter provided." The amendments may be made "by a vote of those stockholders representing a three-fourths majority of all outstanding stock," at any annual meeting, or at a special meeting called after thirty days' notice in writing given to each stockholder. The amendment thus voted must be properly signed and filed in the office of the secretary of state. Ch. 55. Laws 1890. "Any corporation incorporated under the laws of the territory of Dakota, or that may be reafter be incorporated under the laws of the state of Dakota, may change the corporate name, the corporate seal, the principal place of business and the place of holding meetings, as provided in chapter 56, Laws of 1890."

Manufacturing and mining companies may incorporate for a period not longer than twenty years. § 3108. The purposes of the proposed corporation must be definitely stated, its funds must not be used for any other purpose, and the corporation must not loan money to any stockholder therein. § 3109. Records are to be open to the inspection of stockholders, and an annual statement of accounts must be given them by the directors. § 3110. Stockholders are jointly and severally liable for labor done, after an execution against the corporation has been returned not satisfied, provided an action be commenced within four months. Any stockholder compelled thus to pay the debts of a creditor may recover from

all the stockholders their ratable amount of the sum by him paid. § 3111. Annual reports are to be made and published. Wilful neglect or falsity therein is a misdemeanor. § 3112. Upon the request of persons owning twenty per cent. of the stock the treasurer must issue a statement of the condition of the corporation. A copy of the statement must be kept in the office for six months to be exhibited to any stockholder. § 3118. Such corporations (manufacturing and mining) may have a business office outside of the state where any meeting may be held, but the main office for the transaction of business must in that case be located within the state. § 3114. An elaborate law provides for the organization and operation of building and loan associations. Laws 1893, ch. 40.

[\$ 971.

Railroads. - Five or more persons "may form a corporation for the purpose of constructing and . . . operating a railroad for the transportation of passengers and freight," or for the purpose of maintaining any railroad already constructed for that purpose. The articles of organization must state: (1) The corporate name. (2) The termini of the road. (3) The estimated length and the ronte. (4) The amount of capital stock, the number of shares, how much common and how much preferred stock. (5) The names and residences of the directors and their dutics. § 2972. There shall be not less than five nor more than thirteen directors. Each incorporator shall sign his name and place of residence. and the number of shares he agrees to take. The articles shall be filed in the office of the secretary of state, and a patent shall then be issued, whereupon the subscribers to the articles shall be a corporation. Id. Directors shall be stockholders qualified to vote at the time of their election. In the election of directors each stockholder has one vote for every share owned by him for thirty days before the election. § 2974. The stock of every such corporation is deemed personalty. \$ 2977. The capital stock may be increased to an amount deemed necessary for the purpose of constructing or operating the road by a vote of the owners of two-thirds of the stock, at an annual meeting, or at a meeting called by a notice in writing to each stockholder, served personally or by mail, twenty days nrior to such meeting. § 2978. Persons holding stock as executors, guardians or trustees are not personally liable as stockholders for unpaid calls, but the estates are liable. § 2979. The railroad company may receive voluntary grants of real estate to aid in the construction and operation of the road, and may acquire by purchase such real estate as may be necessary for the accommodation of the road. having power to lease or sell the same when no longer required for railroad uses, Railroads are bound to make necessary connections with other railroads. § 2980. The company may borrow money at any rate of interest and may execute trust deeds and mortgages. § 2981. Any railroad corporation may extend its road, or build branch roads, in such manner as provided in section 2994. The directors of a road may, by a two-thirds vote, alter the route of the road, provided no injustice be done to any town, village or city which may have aided the road. \$ 2985. "Any railroad corporation may consolidate its stock, franchises and property with any other railroad corporation, whether within or without the etate, when their respective railroads can be lawfully connected and operated together to constitute one continuous main line, with or without hranches, upon such terms as may be agreed upon, and become one corporation by any name selected." The consoli dated corporation shall have all the rights, immunities, etc., including the right of further consolidation, and shall be subject to all obligations, which either of them possessed, or was subject to, at the time of consolidation. A majority of the stock must approve of the consolidation, and a certified record of such approval must be filed with the secretary of state before the consolidation is effective. "Any railroad corporation whose line is wholly or in part within this state, whether chartered by or organized under the laws of this state, or any other state or territory, or of the United States, may lease or purchase and operate the whole or any part of the railroad of any other railroad corporation together with the franchises," etc., when the roads can be lawfully connected so as to constitute a con-

tinuous main or branch line: provided, that in no case shall the capital stock of the company formed by such consolidation exceed the sum of the capital stock of the companies so consolidated at the par value thereof, nor shall any bonds or other evidences of debt be issued as a consideration for or in connection with such consolidation. \$ 2986. Rolling stock and fuel, rights of way, depot grounds, and other real property, "acquired subsequently to the execution of any trust deed or mortgage which shall have been described or provided for therein. shall be subject to the lien thereof to the same extent as the property therein described, which the corporation owned at the time of the execution." § 2990. The directors may, annually or oftener, set aside a sum not exceeding fifty per cent. of the net earnings of the road to pay off indebtedness. \$ 2992. No railroad corporation may plead usury. \$ 2993. Annual reports must be made to the stockholders. \$ 2995. A foreign corporation whose line extends to the boundary line of the state may extend its line into the state, after designating the route as provided in section 2972. The company shall then, respecting the extension, stand in the same relation to the state as though articles of association had been filed. \$ 2997. A railroad commission has general supervision of the roads of the state. with power to inquire into the conduct and management of any road, compel reports to be made to themselves, examine any of the books, etc. §§ 137-152, Am. ch. 110, L. 1889. A township, incorporated town or city, upon the petition of a majority of the freehold tax-payers, may hold an election to determine the question of raising a tax to aid in the construction of a railroad. Cb. 109. L. 1889. Railroads must ship without discrimination. The "long and short haul" tariff abuse is corrected and prohibited. Unreasonable charges are prohibited. Pooling is declared unlawful. Schedules of rates must be printed and kept for public inspection. Returns must be made annually to the commissioners showing the condition of the company. The penalty for the violation of any of these provisions is a fine of from \$1,000 to \$10,000, with costs, imposed upon the company. and each day's commission of any act prohibited, or neglect of anything required to be done, is a separate offense. Such fine is not a bar to individual action for damage. Laws of 1889, ch. 110. The railroad commissioners shall order all railreads to make connections at junction points. Laws 1893, ch. 137.

Foreign corporations.—No foreign corporation may transact any business or acquire any property within the territory until a copy of its charter bas been filed. § 3190. An agent must be appointed upon whom process may be served. § 3192.

Taxation. -- All investments by residents in the stock of domestic corporations and banks or of foreign corporations are taxed. All property of such corporations for profit is taxed. §\$ 1541-1544. Depreciated stocks may be listed at their current value and rate. § 1561. All corporations, excepting banking, railroad or telegraph companies, for whose taxation special provision is made in this chapter, shall make a full return of all property, and are taxed thereon where the property is situated. § 1565. All railroad property necessarily used in the operation of the road within the state shall be assessed for taxation by the state board of assessment and equalization. Property not necessarily used in the operation and maintenance of the road is subject to local assessment and taxation. Laws 1890, ch. 21, § 1. On or before June 1 in each year the officers of the corporation must furnish to the board a statement of the number of miles of track owned or leased in the state and in each county of the state, the number and character of the buildings in each county, the actual amount of rolling stock owned and used in the state during the year, and the gross and net earnings of the lines within the state during the year. § 3. The valuation of such railroad property "shall be in the same ratio as that of the property of individuals," taking into consideration the gross and net earnings of the company. § 4. There shall be a "pro rata distribution per mile of the assessed value of the whole property named in section 4," and the number of miles in any city, town or township will determine the amount of property to be

taxed in such city, town or township. The tax shall be levied in each tax district at the same rate as the tax on the property of individuals in that district. §§ 5, 6, 7. The county treasurer shall collect such railroad taxes in the manner provided by law for the collection of the taxes of individuals; "and the amount due each city, incorporated town or township, or lesser taxing district, shall be paid over when collected by the county treasurer, to such city, town, township or lesser taxing district." § 8. All general laws in force are applicable in the collection of taxes levied under this act, except that no process is necessary to authorize the county treasurer to sell rolling stock for the collection of said taxes. § 9. If the company fails to make the required return, the state board shall assess the property on the best obtainable information, and "add twenty-five per cent, to the assessable value thereof." § 11. Telegraph and telephone companies, under the supervision of the state board, must pay to the state treasurer a tax, in lieu of all other taxes, "equal to the average amount of state, county, school and municipal taxes levied upon the property for the preceding year." The state treasurer shall remit to each county treasurer the proportionate share due the county, and the county treasurer shall apportion it as in other cases. § 11. See, also, Laws 1893, ch. 163. The fee of the secretary of the state for issuing a certificate of incorporation is five dollars. Compiled Statutes of 1887, § 1403.

§ 972. TENNESSEE: Constitutional provisions.—"No corporation shall be created, or its powers increased or diminished, by special laws," but general incorporation laws shall be passed, and the same may be repealed or altered at any time. No alteration or repeal shall interfere with vested rights. Constitution of 1870. art XI, § 8. The credit of the state shall not be given in aid of any corporation: nor shall the state become an owner in any bank, or a stockholder in any corporation. Id., art. II, § 31. No county, city or town shall give or loan its credit in aid of any corporation, unless authorized by three-fourths of the votes cast at an election held to vote upon the question. And no such municipality shall become a stockholder in any corporation except upon a like vote. Id., art. II. § 29.

Miscellaneous corporations.—Five or more persons of age may incorporate for the purposes mentioned in this chapter. They shall "copy the form of charter adapted to the purpose," filling the blanks and appending an application in words prescribed by this section. Code of 1884, ch. 3, § 1692. The incorporation is completed by registering the same instrument with the county clerk and the secretary of state, after the same has been probated. § 1693. The same registration must be made in each county where an agency is established. § 1694. There is a prescribed form of application to be copied by the directors when it is desired to change the corporate name, increase the capital stock or obtain any of the powers granted herein. § 1695. The powers conferred upon any corporation under the provisions of this chapter may be amended or repealed at the will of the legislature. § 1699. The number of directors may be increased or diminished to any number not less than five upon a vote of three-fourths of the capital stock, § 1702. All corporations for profit may "hold or receive by gift, in addition to the personal property owned by said corporation," any real estate necessary for the corporate business, and may "purchase or accept" any realty for any debt due it, and may "sell realty for corporation purposes." Such corporation has power to "borrow money, and issue notes or bonds upon the faith of the corporate property, and also to execute a mortgage or mortgages as further security for repayment of money thus borrowed." § 1704. The terms of all officers may be fixed by the bylaws, but shall not exceed two years. § 1705. The corporation may, by by-laws, regulate the subscription for or transfer of stock; determine the amount of capital, and the division of the same into shares; "the time required for payment thereof by the subscribers for stock," and the amount to be called at any one time. Id. Each share has one vote, in person or by proxy. A record of all the proceed-

¹ The acts of the legislature down to and including the laws of 1893 are included in this synopsis. (118)

ings of the board and an annual statement shall be copied on the minutes, subject at all times to the inspection of stockholders. The board shall fill all vacancies. The first board shall be composed of original corporators, § 1706. The books of the company shall show all transactions in which a stockholder or creditor is presumed to have an interest. § 1707. Unpaid subscriptions are a fund for the payment of the corporate debts. The transfer of stock by a subscriber does not relieve him from payment, unless his transferee has paid up "all or any" of the balance due on the original subscription. § 1708. No powers shall be possessed unless expressly given or necessarily implied, and no such corporation shall discount notes or bills, deal in gold or silver coin, issue any evidences of debts as currency. or engage in any business outside the purpose of the charter. § 1709. The right of legislative control is reserved. § 1711. If any charter is repealed, or if fundamental amendments are rejected by a vote of more than half the stock, the corporation shall continue to exist only to wind up its affairs. If such fundamental amendments are accepted, all persons under disability and all dissenting stockholders shall cease to be stockholders and shall be paid the par value of their stock, or, if the same is below par, the market value thereof. All creditors' claims shall have the preference over those of said withdrawing stockholders. § 1711. All stocks are personal property, and subject to levy and sale, the company, in such case, being required to make the proper entries on the transfer book: "but such sale will not relieve a stockholder from liabilities which had attached to bim as such, previous to the sale; neither will a voluntary sale." § 1715. To meet contingencies, or for the purpose of a sinking fund, a fund may be established, which may be loaned, and in relation to which securities may be taken. § 1711 (a). Fraud in failing to comply substantially with the articles of incorporation, or in deceiving the public or individuals in relation to liabilities, subjects all officers and stockholders guilty thereof to penalties for a misdemeaner, and also to suits for damage. § 1716. It is also a misdemeanor to divert the corporate funds to other objects than those mentioned in the act of incorporation, to pay dividends which will impair the ability to meet obligations, to keep false books or accounts, whereby any one is injured, and to make false reports. § 1717. The participation of the board of directors, as a board, in such acts forfeits the charter, whether done officially or by the tacit acquiescence of a majority. § 1718. Non-user, or an assignment to others, in whole or in part, does not dissolve the corporation unless all the property has been used to pay debts. § 1719. Shares of stock may be \$100, or less. Laws 1889, ch. 102. Any domestic company having, by charter, the right to receive moneys in trust or otherwise, shall have the power "to receive deposits and loan the same and its capital on any kind of a commercial or business paper or real estate, buy and sell exchange, and all kinds of public or private securities and commercial paper." Laws 1887, ch. 190. The exercise of such power shall not affect any right, power, etc., granted by the char-Id. Non-user in any degree shall not affect any franchise, immunity, etc., contained in the charter. Id. Corporations whose charters expire by limitation are continued bodies corporate for five years for winding up their affairs, and "to continue the corporate husiness for which they were created during the said term of five years, but no longer." During said five years such corporation shall have all the powers, etc., and be subject to all the restrictions, granted or imposed by the charter. Code, §§ 1720, 1721, Am'd Laws 1887, ch. 197. Any corporation, whether incorporated under special or general laws, shall have the power "to lease and dispose of their property and franchises, or any part thereof, to any corporation of this or any other state engaged in or carrying on, or authorized by its charter to carry on, in this or any other state, the same general business as is authorized by the charter of any such lessor corporation; and said corporations shall likewise have the power, and are hereby authorized, to make any contract for the use, enjoyment and operation of their property and franchises, or any part thereof, with any such other corporation of this or any other state, on such terms and

conditions as may be agreed upon between the contracting corporations; and such lessee corporation or corporations are authorized and empowered to make and carry out such leases and contracts." But when such leases or contracts are made by the directors of the corporations, the same shall be approved by a "majority, in amount, of the stock of the lessor corporation present or represented at a regular or called meeting," of which sixty days' notice must have been given by publication. If the lessee is also a domestic corporation the approval of its stockholders must be obtained in like manner. This act shall not be construed to authorize "any corporation of this or any other state to lease or purchase any railroad and line that is a competitor for the same business with any line already owned or under control, by lease or otherwise, or two lines of railway that are competitors for the same business in this state," Laws 1887, ch. 198. Incorporation for mercantile business is allowed. Laws 1887, ch. 139. Incorporation is authorized for purchasing, improving, leasing, renting, enjoying, etc., of real estate. But not more than one hundred and fifty feet square shall be owned at one time. Laws 1885, ch. 78,

Manufacturing, mining, quarrying and boring companies. - In addition to the powers given to corporations under the general law, such companies may "raise, buy, sell and deal in" agricultural products, operate flouring and other mills, and deal in merchandise. Ch. 3, § 1853. Such companies may condemn a right of way. § 1854. The president shall publish annually a sworn statement showing the amount of capital stock, the liabilities, and the names of the stockholders. § 1855. Only cash shall be taken in payment of capital stock, "or land at a fair valuation." Any loan to stockholders "shall render the directors assenting thereto individually liable for the amount thereof," this liability to extend in favor of innocent stockholders as well as creditors. § 1856. If the above required statement is falsely made, all persons assenting thereto shall be "individually liable to all persons dealing or trading with said company upon the faith of such fraudulent statement." § 1857. If the debts at any time exceed the capital paid in, "the directors assenting thereto shall be individually liable to the creditors for such excess." § 1858. "The stockholders are jointly and severally liable individually at all times for all moneys due and owing to the laborers, servants, clerks and operators of the company, in case the corporation becomes insolvent." Id. If the directors pay any dividend when the company is insolvent. or which would diminish the capital stock, they shall be "jointly and severally liable to creditors for the amount of dividends thus declared," excepting those who vote against such dividends, or file their objections thereto. § 1859. mining corporation may, upon a vote of three-fourths in interest of stockholders. "subscribe for, purchase, hold or dispose of stock in any railroad company whose line of road shall be contiguous to the works of such company, or so near thereto as to be used by them in carrying on their necessary operations." § 1860. "For the purpose of raising the money to pay for such stock or the subscription therefor, such corporations are authorized to indorse the bonds of said railroad company, or to issue company mortgage bonds in such amount and to mature at such times, and to bear such rate of interest, not exceeding the lawful conventional rate of interest existing, and to dispose of said bonds and apply the proceeds thereof, as the stockholders and directors of such company may deem best for their interest." § 1861. "Said mining companies are authorized to mortgage their franchises and estates, real and personal, to secure the payment of the bonds indorsed or issued as aforesaid." § 1862. A resolution, passed by three-fourths in interest of the shareholders, may fix the time and place for holding all subsequent directors' meetings. § 1863. Manufacturing corporations may hold real estate mortgaged to it, "or conveyed in trust to secure any debt due to the corporation arising from a sale or purchase of its territorial right under its letters patent," and may purchase any such real estate at any sale thereof, and dispose of the same at will. § 1868. The corporation shall not loan money, but must declare dividends when able to pay four per cent. on the capital stock. "Any such loan or failure to declare and pay the dividend shall render the directors assenting thereto individually liable for the amount thereof" to innocent stockholders and creditors alike. § 1870. Any manufacturing company may take the assignment of any patent in payment of capital stock. § 1872.

Railroads.— Five or more citizens of full age may incorporate, the special form for the charter being given. Ch. 3, § 1891. The freight charges shall not exceed twenty-five cents per hundred for heavy articles, and ten cents per cubic foot on articles of measurement, for every hundred miles, and four cents per mile for passengers. Special rates below this limit may be made with any shipper. Code, \$ 1893. The president and other corporators shall be the first board of directors. § 1900. The board may fix the amount of capital stock and the number of shares, and under their direction subscription books may be opened. All persons have an equal right with the original corporators to subscribe for stock. "When a sufficient amount of stock is subscribed." a meeting shall be called to elect officers. The board may use their judgment as to an increase of capital stock. \$ 1901. If any officer continues to hold office beyond his term, and the proper officers fail to call a meeting to elect a new officer, such meeting may be called by any stockholder. § 1238. The stockholder petitions the court for an election. § 1240. Any railroad corporation, organized under the laws of this state, may acquire and operate any other railroad with all the franchises belonging thereto. § 1250. Such corporation shall have power "to borrow money and to issue its bonds therefor, or for any other indebtedness or liability which it may incur, or may have incurred in the exercise of its lawful purposes; and to recover the payment of such bonds. with the interest thereon, by a mortgage of the whole, or any part of its railroad and equipments and other property and franchises, containing such provisions as its directors shall approve." § 1251. Any railroad corporation whose corporate existence has been recognized by the legislature may purchase any railroad sold in any state under judicial proceedings, or sold by any purchaser who derived title under such sale. § 1252. All companies have power to cross each other's roads, "or to unite with each other as with branches." § 1249 (a). Every company shall receive the "full-loaded" freight cars of other companies, transport and return them at the same rate for the freight therein as is charged for similar transportation in their own cars. § 1249 (b). A company owning any main line "may contract with any company owning a railroad connecting with such main line for the lease thereof." § 1249 (d). The lessee shall hold the road subject to all the liens and liabilities to which it was subject before the lease, "and be bound for all payments for which the lessor was liable." § 1249 (e). All purchasers of domestic roads at judicial sales succeed to the rights, franchises, etc., and are subject to all the liabilities of the delinquent company. 1254, 1256. The purchasers may form a new corporation. § 1255. The purchasers undér a mortgage sale may adopt a corporate name and elect not less than three directors, one of whom must be a resident of the state, \$1257. At a meeting for such election each \$100 of interest shall have one vote, unless a different basis is previously agreed upon by the purchasers. § 1258. The board shall fix the amount of the capital stock, "and the amount of stock or bonds, or both, which shall represent the interest of said purchasers, dividing such stock into shares of \$100 each." § 1259. The board shall make a certificate showing (1) the name of the corporation; (2) the amount of capital; (3) the number of shares; (4) the number of directors and their residences; (5) where the road lies; (6) the former corporate name. The same must be filed with the secretary of state. Thereupon the purchasers are a corporation. § 1260. The board shall issue to the parties interested in the purchase shares of stock at \$100 each, in proportion to their rights, "which shares shall be fully paid and not liable to calls; and also such bonds and obligations as they may determine." § 1261. It shall be lawful for any domestic company, or for any lessees of such company's line, "from time to time, to sub-

scribe for or purchase the stock and bonds, or either, of any other railroad company or companies chartered by or of which the road or roads is or are authorized to extend into this state, when their roads shall be directly or by means of intervening railroads connected with each other; and to make contract with such company or companies for the construction, maintenance, repairs or equipments, as well as lease of such other railroad or railroads, upon such terms as may be agreed upon by the company or companies owning the same or by the companies and such lessees." § 1262. The consolidation of any two connecting lines is authorized. § 1263. The agreement shall be in writing and shall specify the terms and conditions of the consolidation. § 1264. The terms and conditions must be approved by a majority of the stockholders of each company at a regular annual meeting, and all indebtedness due to the state for aid in construction must be paid before the consolidation takes effect. \$ 1265. The agreement, with evidence of stockholders' approval, must be filed with the secretary of state. § 1266. The rights of existing creditors shall not be affected, and a consolidated company shall have all the rights, etc., and be subject to all the liabilities, of the old companies. §§ 1267, 1268. The new company has power to (1) fix the number of directors and the time of their election; (2) to fix the number, names and duties of its officers: (3) to pass by-laws: (4) to fix the amount of capital stock (which shall be divided into shares of \$100 each); (5) to "issue bonds and dispose of same in such form and denomination, and bearing such interest, as the board of directors may determine, and to secure the payment thereof by mortgage of every and all the property and franchises of said consolidated company, and of the companies from which it was formed;" (6) to do all things which either company might have done previous to the consolidation. § 1269. But no exemption from taxation shall be transferred to the consolidated company. § 1270. No mortgage or other lien upon any road shall be valid "against judgments and decrees and executions therefrom," for timbers furnished and work done, or for damage to persons or property. § 1271. The legislature may prevent unjust discriminations and extortions. § 1272. "All railroad companies of this state and any other states or states are authorized and empowered to build, lease or let, acquire by purchase, lease or otherwise, and operate, hold or dispose of any railroad or railroads in any state or states, or any parts or portions of any such railroad or railroads, and the distribution thereof, as may be determined upon by their stockholders, and to acquire by purchase or otherwise, and hold or dispose of, any bonds or shares of the capital stock of any railroad company or companies in any state or states, and to indorse and guaranty the bonds of any railroad company or companies in any state or states whose original charter of incorporation was granted by the state of Tennessee." Provided, the same be approved by three-fourths in amount of the stock present and voting, in person or by written proxy, at a regular or called meeting. § 1275, Am'd Laws 1891, ch. 61. Any issue of bonds must be approved by a majority in interest of the stockholders, and prior liens shall not be affected by a mortgage to secure such bonds. § 1276. Any railroad companies whose original charters were granted by this state may "issue bonds, and secure the payment thereof by mortgage upon their franchises and property in any state," or upon any part thereof, and may "issue income and indenture bonds, and such guarantied, preferred and common stock as may be determined upon" by three-fourths of the entire stock. § 1277. Any county, town or city may subscribe for stock in, or loan its credit to, any railroad "running to the same, or contiguous thereto," to an amount not exceeding one-tenth of its taxable property, when authorized by three-fourths of the votes cast at an election held to vote upon the question. Not more than thirty-three and one-third per cent. of the value of the stock so subscribed shall be collected at one time. §§ 1278, 1287, 1290. Any domestic company "that now has under construction, or proposes to construct and operate," a railroad may consolidate with "any other railroad corporation" constructing, or that proposes to construct and operate, another railroad.

The consolidation must be approved by a majority of the atockholders of each company, at a regular or called meeting. This act shall not be construed to allow competing lines to consolidate. If the consolidation is with a foreign road, the part of the consolidated road within the state shall be subject to the control of the state the same as before the consolidation. Laws 1887, ch. 188. The directors may, by resolution, change either terminus of their line before the final location of the same. The resolution, certified by the president and secretary, must be filed with the secretary of state. Laws 1887, ch. 39. Branches may be built upon an application by the board, a form for which is given. Laws 1889, ch. 158. Street railroads shall consolidate only with the consent of the local authorities. Id., ch. 70. Any railroad company whose original charter was, or may be, granted by this state may acquire connecting or branch lines in this or any state, "and pay for the same by the issue of their own capital and bonds, or hy guarantying those issued by the company whose line may be so acquired, purchased or leased." But this act shall not authorize the acquisition of any competing line. Laws 1891, ch. 125. Five or more may form a railroad terminal corporation, in the manner provided for miscellaneous corporations. The corporation may acquire in any state all real estate necessary for its tracks and buildings, and may take such real estate by condemnation. The corporation may, from time to time, borrow money necessary for its business, and issue and dispose of its bonds for such amounts and at such prices as it may think proper, and may mortgage its property rights, privileges and franchises to secure the same; and may lease to one or more railroad companies, upon such terms and for such time as may be agreed upon. its stations and other terminal facilities, located at a terminus of the railroad or railroads of such company or companies. The said railroad company or companies may "severally or jointly, or jointly and severally," guaranty the bonds issued by such terminal corporation, or in like manner guaranty the performance of any other contract made by the said terminal company in regard to its corporate business; and may also "subscribe, hold and dispose of the capital stock or bonds which may be issued by said railroad terminal corporation, and said railroad terminal corporation may acquire, hold and dispose of the capital stock or bonds of railroad companies, or of other terminal companies, for the purpose alone of raising money for the acquisition, construction, maintenance and repair" of the terminal buildings and facilities, "and not for the purpose of speculating in stocka or bonds, or managing or controlling railroads." Laws 1893, ch. 11.

Foreign corporations.—Foreign manufacturing and mining corporations, before doing business in the state, must file a certified copy of their charter or articles with the secretary of state, and record an abstract of the same with the register of each county in which they propose to do business or acquire lands. Code, § 1993. They shall then, to all intents and purposes, be recognized as domestic corporations. § 1994. They may hold real estate in fee, "or any other interest less than the fee," and personal property of every kind, as they may deem suitable for their legitimate business, and the same may be sold, leased or conveyed in any manner lawful for individuals. The right of escheat is released by the state. § 1995. All the corporate property shall be liable for debts the same as that of individuals. § 1996. Creditors who are residents of the state shall have a priority, in the distribution of assets to pay debts, over all simple contract creditors who are residents of "any other county or counties," and also "over mortgage or indgment creditors, for all debts, engagements and contracts which were made or owing by the said corporations previous to the filing and registration of such valid mortgages, or the rendition of such valid judgments." But such mortgages and judgments shall be a prior lien as against debts incurred subsequent to their registration or rendition. § 1997. Mining companies, who also manufacture mineral products, may build and operate telegraph lines and railroads from their mines to their manufactories, or to connect with any railroad, or to any river or water-way, at the most convenient point, "and for this purpose such corporation

may purchase or acquire the necessary rights of way by contract with the owner or owners of said lands on which the right of way is desired." § 1999. All corporations coming under the above provisions shall commence business in good faith within one year from the filing of their charters. The object of this act is to develop the mineral resources of the state, and facilitate the introduction of foreign capital. § 2000. Any such corporation may establish towns, villages and settlements on any lands acquired by it, and, until the population is sufficient for the formation of municipal corporations, the company may establish such rules of government as are consistent with the laws of the state. § 2001. Any part of the charter or articles of such corporations that may be in violation of the laws of the state shall be null and void. § 2003. Certain privileges are given to existing foreign immigration corporations. §§ 2004, 2005.

By chapter 122, Laws of 1891, the provisions of sections 1992-2003 "shall apply to all corporations chartered or organized under the laws of other states or 'counties' for any purpose whatsoever." The penalty for doing or attempting to do business or owning or acquiring any property in the state contrary to law, is a fine of from \$100 to \$500. Id. Any such corporation, after filing its charter, etc. may sue and be sued the same as a domestic corporation. Id. If there is no resident agent proceedings may be by attachment. Id. Any foreign corporation found doing business in the state shall be subject to suit in the state, "so far as relates to any transaction had in whole or in part within this state, or any cause of action arising here," and "any corporation having any transaction with persons, or having any transaction concerning any property situated in this state." shall be held to be doing business in the state within the meaning of this act. Laws 1887, ch. 226. Any foreign railroad corporation may extend its road into the state, not more than five miles "from the point of its entrance into this state." to reach a terminal point or a general or union depot "in or in the vicinity of any city, town or village in this state." For such purpose the company may acquire a right of way by purchase, gift or condemnation. Any such corporation may purchase and hold all real estate necessary for depots, yards, shops, etc. Laws 1887, ch. 160,

Taxation. - Chapter 96, Laws of 1889, repeals "all laws now in force whereby revenue is collected from the assessment of real estate, personal property, privileges and polls." Personal property shall, for the purpose of taxation, include the actual capital of any corporation invested in business. Also all bonds, stocks and like securities not exempt by the federal laws. Laws 1889, ch. 96, § 7. The property, including franchises, of all corporations that lie wholly or mainly within any city, district or town, or whose chief business is transacted therein, shall be assessed in such municipality, except that all realty shall be taxed where it lies. §4. No tax shall hereafter be assessed upon the capital of any bank or other corporation not assessable under sections 13 and 14 of this act, whether organized under the authority of this state or of the United States; "but the stockholders in such bank or banking association shall be assessed and taxed upon the market value of their shares of stock therein" where the bank is located "(except otherwise provided by law)." In addition, all banks shall be liable for taxes "on any property, funds or assets owned by them not included in the foregoing provisions of this section;" provided, that the surplus and undivided profits in such bank, "or other corporation," shall be assessable to "said bank or other corporation," and "the same shall not be considered in the assessment of the stock therein." § 8, Am'd Laws 1891 (Ex. Sess.), ch. 26. The president or business manager of any corporation included in the provisions of section 8 shall declare, upon oath, before the assessor, the amount of capital, and each \$100 of such capital shall be deemed a share of stock for purposes of taxation. § 9, Am'd Id. A correct list of the stockholders in such corporations shall be kept for the inspection of the assessors. § 10, Am'd Id. If the stockholder resides without the county where the corporation is located, his stock may be attached, and the tax remains a lien upon the stock. §11,

Am'd Id. It shall be the duty of the proper officer of such corporations to retain the dividends or earnings belonging to stockholders for the payment of taxes, unless the same are otherwise paid, § 12. Am'd Id. All manufacturing corporations shall pay an ad valorem tax upon the value of the property, real, personal and mixed, used in the manufacturing business. Every corporation (except banks and the quasi-public corporations mentioned in section 14), including manfacturing corporations, shall pay an ad valorem tax upon the full value of its capital stock "(including its franchises, easements and incorporeal rights and corporate property as a part of such capital stock), which shall in no case be held or deemed to be less than the actual value of all its shares of stock, together with the actual value of its bonded indebtedness; provided, that the shares of stock issued by any corporation created or organized under the laws of Tennessee, whether said corporation be engaged in mining or the manufacture of goods, . . . or other articles of value, or engaged in any other business, shall not be assessed for taxation to such corporation, nor shall said shares of stock be assessed for taxation in the hands of or against the owners or possessors of said stock. . . . but their values shall be looked into in arriving at the value of its said capital stock." \$ 13. Am'd Laws 1890, ch. 29. A list of questions is given which the assessor may ask the officers. Id. Quasi-public corporations, except railroads, shall pay an advalorem tax on their capital stock (the provisions in respect thereto being a repetition of the language of section 13, as amended by the laws of 1890, respecting the assessment of capital stock). But a reduction shall be made for the value of real estate assessed in any district or county other than the one in which the corporation is located. § 14. All corporations assessable under sections 8, 13 and 14 are required to furnish a sworn statement of their chief officer, giving answers to the questions which the assessors are required to submit under the provisions of sections 13 and 14, and every corporation which shall fail so to do shall be fined \$200. The privileges and franchises granted by the state to savings banks are personal estate and taxable, § 15. This act shall not release from taxation any corporation whose charter exempts its stock and shares, but in all cases where such stock is exempted the company shall be assessed in such way as may be lawful; and in all cases where, by the charter, shares are wholly or partly exempted, or in which a rate is fixed on the shares in lieu of all other taxes, "taxes for state, county and municipal purposes shall be assessed and levied at a rate uniform with the rate levied upon other taxable property, upon the capital stock of said corporation, the value of which capital stock shall be fixed and returned by the assessor as being equal to the aggregate market value of all the shares of stock in said corporation, including the net surplus." § 16. Express, sleeping-car, telegraph and telephone companies, railroad companies not paying an ad valorem tax, construction companies, banks and trust companies shall obtain a license from the county clerk of any county in which they propose to do business, and execute a bond to the state. with security to be approved by the said county clerk, in the sum of \$1,000, conditioned that the corporation will, one year from the date of the bond, render a true statement of the amount of capital invested in the business. For taking the bonds and issuing the license the clerk shall be entitled to \$1. §§ 19, 20, 52, Am'd Laws 1891 (Ex. Sess.), ch. 26. The form for the statement is given. § 22. The amount of capital to be assessed shall be determined "by adding together the value of the highest amount of stock on hand at any time during the year to the value of the lowest amount of stock on hand at any other time during the year, and dividing the same by two." Id. Chapter 25 of the Laws of 1891 prescribes the following privilege taxes (per annum) in each county in which the privilege is exercised: Banks, not specially chartered, \$1 on each \$1,000 of capital and surplus; construction companies, each \$100; express companies, \$500 to \$2,000 (in lieu of all taxes except ud valorem); sleeping-car companies, \$3,000 (in heu of all taxes except ad valorem); telegraph companies, \$25 to \$3,000 (in lieu of all taxes except ad valorem); telephone companies, fifty ceuts per box. Foreign insurance

companies must pay, semi-annually, a tax of two and a half per cent, on their gross premium receipts. Domestic life insurance companies pay a like tax of one and a half per cent., and fire insurance companies \$150 per annum. Each insurarce agent must pay a license tax from \$10 to \$20. Every corporation having a canital divided into shares shall pay to the state a tax "for the privilege of organizing, or, after organization, for the increase of their capital stock, or for the registration of their charters," as follows: Railroads of over one hundred miles. \$100. and of less than one hundred miles, \$50; banks, building and loan associations, loan companies, trust companies, coal, or iron and steel companies, \$25; all other corporations \$10. This tax shall be paid before the company shall exercise any corporate powers, and a failure to pay any of the privilege taxes set forth in this act shall subject the company to a fine of not less than the whole amount of taxes due, and, in addition, to a penalty of fifteen per cent. Id. For the services noted above (\$1692 et seq.), the secretary of state and the register each receive a fee of \$3. \$1703. Foreign corporations mentioned supra (\$\$ 1992-2003) shall be taxed in all respects the same as natural persons resident in the state, and shall have the privilege of all exemptions granted to citizens or corporations to encourage manufactures in this state or otherwise. § 1998.

Railroads are assessed by a state commission. § 669. Each company must. biennially, file with the comptroller a schedule of all its property and capital stock, including therein a statement of the cost of constructing and operating the road, and a report of the indebtedness of the company, with a statement of the property mortgaged to secure the bonds, \$\\$ 678-680. The assessors may excuse the company from a strict statement of the cost of construction and operation. § 681. For failure to make out such schedule by May 1st, the company shall be fined \$200 per day for the first ten days after said first of May, and \$400 per day thereafter. § 683. "The road-bed, rolling stock, franchise, choses in action, and personal property of a railroad company having no actual status," shall be known as its "distributable" property and shall be assessed by the state commission separate from the other property. After having ascertained the value of such property within or without the state, and after having deducted therefrom \$1.000, the commission shall divide the remainder by the number of miles in the entire road. The result shall be the value per mile, which shall be multiplied by the number of miles in the state, to ascertain the sum to be taxed for state purposes. The said value per mile multiplied by the number of miles in each county or municipality shall give the sums to be taxed for county and municipal purposes. § 687. In valuing the distributable property, the commission "shall have in view and look to the capital stock, the corporate property, the franchise of each company, as well as the gross receipts, the individual stock of each shareholder, and the schedules filed as herein directed." § 690. Bonded or other indebtedness "may be looked to alone for the purpose of arriving at the value" of the corporate property, and this law does not authorize the assessors to deduct the same. § 691. "The cash value of the individual shares shall not be deducted from any valuation; nor shall any railroad company have any exemption except one thousand dollars." § 692. All property, real or personal, having an actual status, shall be known as the "localized" property of the railroad, and shall be valued by the county assessors and city assessors where the property lies upon the same principles that govern the assessment of similar property belonging to individuals. The state shall be entitled to a tax on all such property. and counties and municipalities shall be entitled to a tax on the value of such property within their limits. § 694. The commission may examine any books of the company, or question any person on oath touching any matter necessary to be investigated. § 696. The governor, secretary and treasurer of the state constitute a board of examiners, to which the valuations fixed by the commission must be submitted for approval. §§ 698-701. If a company fails to file the required schedule, or the assessors regard the same as not fair and just, the said

assessors may ascertain the value of the property in the manner they deem best and add ten per cent to the taxes as a penalty. § 708. Telegraph companies are assessed in a manner as nearly identical with the mode of taxing railroad companies as the nature of the property allows, and by the same officers. §\$ 709-711.

§ 973. TEXAS: 1 Constitutional provisions. -- The state shall not aid corporations in any manner, nor anthorize any subdivision of the state to aid corporations by subscription or otherwise. Constitution of 1876, art. III, §§ 50-52. Railroad or other internal improvement companies shall not be incorporated by special laws. Id., § 56. The legislature may impose "occupation" taxes upon corporations doing business in the state: also an income tax upon any corporation. But the occupation tax levied by any municipality upon any corporation pursuing any profession or business shall never exceed one-half the tax levied by the state for the same period on such profession or business. All property of the state, whether owned by natural persons or corporations, shall be taxed according to its value. Art. VIII, § 1. The occupation tax shall be uniform upon the same class of subjects within the limits of the authority levving the tax. Id. § 2. Taxes shall be levied and collected by general laws. Id., § 3. The power to tax corporations and corporate property shall not be contracted away. Id., § 4. All railroad property lying or being in any city or incorporated town shall bear its proportionate share of municipal taxation. Id., § 5. All railroad property shall be assessed and the taxes collected in the several counties where it lies, including the road-bed and fixtures in each county. The rolling stock may be taxed in gross in the county in which the principal office is located, and the "county tax" paid upon it shall be apportioned to the several counties in proportion to the length of road in each county. Id., § 8. Any railroad corporation, "organized under the law for the purpose," shall have the right to construct and operate a railroad between any points within the state, and to connect at the state line with railroads of other states. Every railroad company shall have the right with its road to intersect, connect with or cross any other railroad; and railroads shall receive and transport each other's passengers, tonnage and cars without delay or discrimination, under such regulations as shall be prescribed by law. Art. X, § 1. The legislature shall pass laws to prevent unjust discrimination and correct abuses, and from time to time to establish maximum rates. Id., § 2. Every railroad corporation doing business in the state shall keep a public office in the state for the transaction of its business, where transfers of stock may be made, and where stock-books shall be kept open for the inspection of stockholders. The directors must hold an annual meeting in the state, and the president or superintendent shall report annually to the comptroller. Id., § 3. Rolling stock and other movable property are personalty, and subject to execution and sale. Id., § 4. Parallel or competing lines shall in no degree or manner be under the same control. Id., § 5. No domestic railroad company shall consolidate "by private or judicial sale or otherwise" with any railroad company organized under the laws of any other state, or of the United States. Id., § 6. No right to construct a street railroad shall be granted without the consent of the local authorities. Id., § 7.

Municipal corporations shall not subscribe for the stock of, or otherwise aid, any private corporation. Art. XI, § 3. Private corporations shall be created by general laws. Art. XII, § 1. Stock shall be issued only for "money paid, labor done or property actually received," and all fictitious increase of stock or indebtedness shall be void. Id., § 6.

Miscellaneous corporations.—Three or more may incorporate for the purposes specified in the statute, including the construction and maintenance of bridges, telegraph and telephone lines, ferries, steamboats, canals, harbors, mills and elevators; manufacturing or mining purposes; establishing transportation

¹The acts of the legislature down to and including the laws of 1893 are included in this synopsis. 1882

companies with power to build, buy, lease, operate and convey all kinds of steamhoats and other water-craft, and navigate the same; to hold real and personal property necessary for the corporate business, and to "receive, purchase, hold, use and convey such rights, privileges, franchises and property, and to exercise bevond the jurisdiction of this state such powers as may be granted to or conferred upon it by any foreign government, state or municipality;" for the purpose of "constructing railroads and bridges for railroad companies;" and the establishment of land companies to "buy, own, sell and convey real estate in any state or foreign country; but such companies shall only own such real estate in this state as may be necessary for its office." Rev. Stat. 1887, §§ 565, 566, Am'd Laws 1891, ch, 101; Am'd Laws 1893, ch, 83. A charter must be prepared setting forth (1) the corporate name and purpose; (2) the place of business; (3) the term of corporate existence; (4) the number of directors and the names and residences of those appointed for the first year: (5) the amount of capital stock and the number of shares; also, in case of a road company, (1) the kind of road; (2) the termini: (3) the counties to be traversed: (4) the estimated length of the road, § 567. The charter must be subscribed and acknowledged by three or more persons, two of whom must be citizens of Texas. § 568. Married women may be subscribers, stockholders or officers. Id. The charter must be filed and recorded with the secretary of state. § 569. The corporate existence dates from the filing of the charter. § 570. Amendments may be made by filing such amendments in the manner provided for filing the original articles, and shall take effect from the date of such filing. § 571. The amendments must be germane to the charter, and all charters or amendments are subject to be altered, reformed or amended by the legislature. §§ 573, 574.

Every private corporation has power, among the usual corporate powers, to "hold, purchase, sell, mortgage or otherwise convey" all realty and personalty necessary for the corporate business, and also to "take, hold and convey" such other property as need be acquired "to obtain or secure the payment of any indebtedness or liability due or belonging to the corporation;" to enter into "any obligation or contract essential to the transaction of its authorized business;" to increase or diminish, by a vote of its stockholders cast as its by-laws may direct, the number of directors, provided they are not less than three nor more than thirteen. § 575. Any corporation may increase its capital stock to not exceeding double the amount of its authorized capital stock, by a vote of a majority of the stockholders. A certificate thereof must be filed with the secretary of state. § 576. "Corporations shall have power to borrow money on the credit of the corporation. not exceeding its authorized capital stock, and may execute bonds or promissory notes therefor, and may pledge the property and income of the corporation," § 577. If the whole of the capital stock has not been subscribed, the directors "may, within three months after the filing of the charter." open subscription books at such times and places as they may determine, upon proper notice, "which books may be kept open" until all the capital is subscribed. § 578. A majority of the directors shall constitute a quorum, and be competent to fill vacancies in the board and do all corporate business, § 579. The directors may make by-laws, which are subject to amendment or repeal by a majority vote of the stockholders. § 581. A failure to elect directors shall not dissolve the corporation. § 583. The directors may dispose of the residue of the capital stock at any time remaining unsubscribed in such manner as the by-laws may prescribe. § 585. Stock books and business records shall be kept open to the inspection of stockholders. § 586. The directors shall, upon the request of one-third of the stockholders, present written reports. § 587. Stock is personal estate, and is transferable only on the books in the manner prescribed by the by-laws. § 590. The directors may require subscriptions to be paid in such manner and in such instalments as the by-laws may require. § 591. Corporations may sue their members as though they were not members. § 593. For paying a dividend while the corporation is insolvent, or which would render it so, the

directors not filing their objections thereto shall be jointly and severally liable, tothe amount of such dividend, for all the corporate debts then existing, and for all that shall thereafter be contracted while they respectively remain in office. \$ 594. After an execution against the corporation has been returned unsatisfied execution may, upon order of the court, be issued against any of the stockholders, "to an extent equal to the amount of stock unpaid:" or the plaintiff in execution may proceed by action "to charge the stockholders with the amount of his judgment, in accordance with the liability of the stockholders." § 595. The principal office of every corporation shall be kept in the state. § 597. The existence of a corporation shall not be denied in collateral proceedings. \$ 599. When a firm desires to incorporate without change of name, notice of such purpose shall be published for four weeks in a local paper, and until such publication the liability of the firm or members shall remain unchanged. § 603. Corporations shall begin active operations within three years after filing the charter, or the charter is forfeited. § 605. Upon dissolution, unless a receiver is appointed, the president and directors shall be trustees of the creditors and stockholders. § 606. "No stockholder shall be liable to pay debts of the corporation beyond the amount unpaid on his stock." § 610. Trusts or combinations to restrict trade or production, limit competition, etc., are prohibited. For violating this law, a domestic corporation forfeits its charter and a foreign corporation is prohibited from doing business in the state. Fines and imprisonment are also imposed. Suppm't, § 4847 (a). Irrigation companies may be incorporated. Suppm't, § 3000 (a). The railroad commission has power to regulate the charges of express companies. Laws 1891, ch. 45. "The unrestricted ownership of lands in this state by private corporations is a perpetuity and is hereby prohibited," and no private corporation whose main object is the "acquisition and ownership of, by purchase, lease or otherwise, shall hereafter be permitted to acquire any land within this state by purchase, lease, or otherwise." Lands acquired by any corporation specified in section 566, in payment of debts or beyond the requirements of its business, shall be sold within fifteen years. But this act shall not authorize the purchase of land beyond the amount necessary for the corporate business; and the provisions of this act shall not apply to lands within the corporate limits of the municipality, or within two miles of the corporate boundary. Laws 1893, ch. 38.

Railroads.—Ten or more may incorporate. \$ 4099. No corporation shall be formed until \$1,000 per mile is subscribed and five per cent, of that amount paid in. § 4100. The articles shall set forth (1) the corporate name; (2) the termini, and the counties to be intersected; (3) the place of the principal office; (4) the time of the commencement and the period of duration of the corporation; (5) the amount of the capital stock, and the number and amount of the shares; (6) the names and residences of the corporators, the names of the members of the first board, and in what persons or officers the management of the corporate affairs shall be vested. Suppm't, § 4101. The attorney-general must examine and approve the articles before they can be filed with the secretary of state, and when so filed and recorded, with a sworn statement of their directors that \$1,000 per mile is subscribed and five per cent, thereof paid in, the incorporation is complete. §§ 4102, 4103. The corporation shall not be formed for more than fifty years, but may be renewed from time to time. §§ 4106, 4107. Amendments must be submitted to the attorney-general, and be filed with the secretary of state. §§ 4108. The original articles or an amendment may provide for the construction of branches. Such branches shall make an angle of at least twenty-five degrees with the main line, or with any branch from which they start. § 4113, Am'd Laws 1891, ch. 105. Ten miles of any branch shall be completed within one year from the filing of an amendment declaring an intention to build such branch, and twenty miles each succeeding year. § 4114. Every corporation operating a railroad in Texas shall keep its general offices within the state, which may be kept at a particular place for a valuable consideration. All the general officers shall be

(Act of 1857).

officers or stockholders. § 4134. No by-law shall be enacted, altered, suspended, amended or repealed except by a two-thirds vote at an annual meeting. § 4137

Stock is personal estate. No transfers are valid until entered on the books. No share shall be transferable until all previous calls are paid. § 4138. The directors may require the payment of subscriptions in such manner and in such instalments as they deem proper. § 4139. The corporation shall not use its funds to purchase its own stock, or that of any other corporation, nor loan any of its funds to any director or other officer, or permit them to use the same for any other than the legitimate business. § 4142. Stockholders are liable, individually, to corporate creditors to the amount unpaid on their stock. § 4143. The stock may be increased to a necessary amount, upon a two-thirds stock vote. The order or resolution to increase shall be recorded with the secretary of state. §§ 4145-4149. The president and directors shall exhibit a full and accurate statement at the annual stockholders' meeting. § 4150. Also at a special meeting, when required. § 4151. The stockholders may, by a majority stock vote, determine the amount of loans to be negotiated for construction and equipment, fix the rates of interest and provide for the security to be given. § 4152. The holders of two-thirds of the stock may remove any officer or director and elect others in their stead. § 4153. The corporation shall not issue stock or bonds except for "money, labor or property actually received and applied to the purpose for which such corporation was organized; nor shall it issue any shares of stock in said company, except at its par value and to actual subscribers who pay or become liable to pay the par value thereof." § 4154. All fictitious dividends or other fictitious increase of the capital stock or indebtedness shall be void. § 4155. Every officer or director consenting to the violation of either of the two preceding sections shall become personally liable to the stockholders and creditors, for the full par value of such illegal stock, or for the full amount of such fictitious dividends, increase of stock or indebtedness, as the case may be." § 4156. The directors (and likewise the stockholders) shall meet annually, at least, at the public office in the state, after thirty days' notice in a local paper. §§ 4157, 4158. One notice may answer for both meetings. § 4158. Proxies shall not be voted after six months from their date. § 4164. Stock issued within thirty days from any stockholders' meetingshall not be voted at such meeting, unless it be the first meeting for organization; "nor shall any stock be voted upon, except in proportion to the amount paid

thereon, or secured to be paid, by good security, in addition to the subscription and stock." § 4165.

As to right of way, see § 4166 et sea.

Streets shall not be taken or crossed without the consent of the local authorities. § 4173. Highways may be condemned. § 4174. The corporation may "cross, intersect, join and unite" its road with any other railroad before constructed at any point. § 4175. Adjacent lands may be entered upon and construction material (except wood and fuel) may be taken therefrom. § 4178. The right of way is not lost by the forfeiture or expiration of the charter, but shall remain subject to an extension or renewal of the charter without a new condemnation. § 4206. The corporation may purchase, hold and convey any real estate necessary for its purposes. § 4211. Voluntary grants may be held and conveyed in a manner consistent with the terms of the grant. \$ 4212. All lands purchased by or donated to a railroad corporation, except such as are used for "depot purposes, reservations for the establishment of machine shops, turn-outs and switches," shall be disposed of as required in case of state grants (section 4277 below) § 4213. The corporation shall have the right to borrow, from time to time, sums of money necessary for constructing, completing, improving or operating its road, "and to issue and dispose of its bonds for any amount so borrowed, and to mortgage its corporate property and franchises to secure the payment of any debt contracted by such corporation for the purposes aforesaid." § 4219. No mortgage shall be valid unless authorized by a two-thirds stock vote. § 4220. No resolution to make such mortgage shall be valid until recorded with the secretary of state. § 4221. directors shall be empowered, in pursuance of any such resolution, to confer on any holder of any bond, for any money so borrowed as aforesaid, the right to convert the principal of said bond into the stock of such corporation at any time not exceeding ten years after the date of such bond, under such regulations as may be provided in the by-laws of such corporation," § 4232. "It shall be unlawful for any railroad corporation or other corporation, or the lessees, purchasers or managers of any railroad corporation, to consolidate the stocks, property, works or franchises of such corporation with, or lease or purchase the stocks, property, works or franchises of, any other railroad corporation owning or having under its control or management a competing or parallel line; nor shall any officer, agent, manager, lessee or purchaser of such railroad corporation act as or become an officer, agent, manager, lessee or purchaser of any other railroad corporation in leasing or purchasing any parallel or competing line." § 4246. "No railroad company organized under the laws of this state shall consolidate, by private or judicial sale or otherwise, with any railroad company organized under the laws of any other state or of the United States." § 4247. (See Constitutional Provisions.) Annual reports shall be made to the comptroller. § 4249. The penalty for neglect is a fine of \$1,000. § 4250. The freight and passengers of connecting lines shall be received and conveyed without delay or discrimination. § 4251.

For refusal to interchange business with any other railroad company, or for discrimination against any company, damages to the amount of \$1,000 shall be paid to the aggrieved person or corporation, and all further damages suffered by the aggrieved party. § 4255. Express companies shall have equal facilities and rates. § 4255 (a). Maximum freight rates are fixed at fifty cents per hundred pounds per hundred miles, and rates shall be uniform in respect to all persons and places. § 4257. For discrimination in freight rates the corporation shall pay the aggrieved person \$500. Freight schedules shall be posted. § 4258 (b)-7. "The passenger fare upon all railroads in this state shall be three cents per mile." § 4258 (b)-8. All railroad property, real and personal, shall be subject to execution and sale. § 4259. The sale, under deed of trust or decree of court, of "the road-bed, track, franchise and chartered rights" of any corporation shall not pass to the purchasers the right to recover unpaid subscriptions of the old stockholders, but said stockholders shall remain liable for the debts of the old company. § 4263. Unless the

court or the legislature appoint other persons, the directors of such sold-out company shall be trustees of the creditors and stockholders of the old company. § 4264. All state lands acquired by railroads shall be "alienated," one-half in six years and one-half in twelve years from the "issuance of patents to the same." § 4277.

If any railroad company organized under this act shall not, within two years after filing its articles, construct and put in running order ten miles of its road, and shall fail to put in running order twenty miles in each succeeding year, its corporate existence is forfeited, and its powers shall cease as far as relates to the portion then unfinished, "and shall be incapable of resumption by any subsequent act of incorporation." This act does not apply to suburban and belt roads of less than ten miles in length. Suppm't, § 4278. The charter shall be forfeited for failure to make the annual report within three months after notification by the "Whenever any line or lines of railway or railway propercomptroller. § 4280. ties within this state are by special law authorized to be sold and conveyed, the persons contemplating or engaging for the purchase thereof may be formed into a corporation for the purpose of acquiring, owning, maintaining and operating such line or lines of railway by complying, as far as is applicable," with the above provisions (sections 4099 et sea.) for the formation of railroad corporations. When such corporation has been formed, it shall have power to "purchase, acquire, own, maintain and operate" such line or lines of railway, and the properties pertaining thereto, "and all other rights, powers and privileges given by the laws of this state to railway companies, including the right to complete and extend such line or lines of railway, and to construct branch lines thereto," the extension or branch lines to be provided for either in the articles or by amendment thereto. The property so purchased shall be taken subject to all "incumbrances, judgments, claims, suits, claims for damages and for right of way against the old company, and subject to all debts and claims for damages accruing against any receiver which may have been appointed for the old company, to the same extent that such property would have been liable in the hands of the railroad company from which it was purchased, and such new company may be made a party to every suit pending against the company from which it purchased, or which may be pending against any receiver of such company, to enforce any right against such new company, and the new company may be sued to enforce any such rights, without joining the old company or the receiver, and in case any judgment has been rendered against the company from which the purchase is made, or against a receiver for such last-named company, and for which the property is liable, execution may be issued on such judgment against such property in the possession of the new company without any suit therefor." Laws 1891, ch. 86.

A railroad commission was created in 1891. Such commission has power to adopt and regulate all rates, correct abuses and prevent discriminations and extortion. They shall fix reasonable rates. They shall arbitrate questions arising between connecting lines. They may inspect any books or papers and examine any officer or agent. The company shall forfeit from \$125 to \$500 per day for each refusal to show books or papers; and each officer or agent refusing to allow any book or paper to be examined shall be fined from \$125 to \$500 for each offense. For refusing to fill out and return any blanks furnished by the commission, the company, and each officer so refusing, shall be fined \$500. For charging a higher rate than that fixed by the commission, the corporation, and any officer making such charge, shall forfeit to the state from \$100 to \$5,000. The penalty for unjust discrimination is a fine of from \$500 to \$5,000. Laws 1891, ch. 51.

"No bonds or other indebtedness shall be increased or issued or executed by any authority whatever, and secured by lien or mortgage on any railroad or part of railroad, or the franchises or property appurtenant or belonging thereto, over or above the reasonable value of said railroad property;" provided that, upon conclusive proof that the public interest or the preservation of the property demands

it, the railroad commission "may permit said bonds, together with stock in the aggregate, to be executed to an amount not more than fifty per cent, over the value of said property." Laws 1893, ch. 50, 8 2. The commissioners must ascertain the true value of all railroads in the state. § 3. "Every judicial or other sale of any railroad in this state hereafter made, which shall have the effect to discharge the property so sold from liability in the hands of purchasers for claims for damages, unsecured debts or junior mortgages against such railroad company so sold out, shall have the effect to annul and cancel all claims of every stockholder therein to any share in the stock of such railroad; and it shall not be lawful for said purchasers, or for any railroad company organized hereafter to operate said railroad, to issue any stock in lieu of the old stock, or to allow any compensation therefor in any manner whatever, nor shall all or any part of the debt, to satisfy which such sale is made, be continued or held as a claim or lien on said property." \$4. "The purchasers of said property who procure it clear of incumbrance, or any company organized by their consent to operate said railroad," may issue stock and bonds subject to the provisions of sections 2, 3 and 4, \$5. The commissioners may, upon the application of any railroad company, authorize the issue of bonds or other indebtedness, to be secured by "lien or other mortgage" on the franchises and property of the company, in advance of the completion of their railroad, but to no greater amount than fifty per cent. over the value of the whole property and franchises. § 6. The manner of issuing certificates of stock is prescribed. No railroad company shall increase its stock unless all existing shares shall have been paid in full or all unpaid shares have been sold out as forfeited. § 7. The form of bonds is prescribed. They shall not run more than thirty years, and shall not bear more than six per cent, interest per annum. Bonds shall not be valid until registered with the secretary of state. \$\\$ 8. 9. The issuance of stock or bonds contrary to the provisions of this act shall work a forfeiture of the charter, and all such stock or evidences of debt shall be void. §§ 10, 11. Any officer who shall commit a fraud in regard to the registry or negotiation of such fraudulent stock or bonds shall be imprisoned for from two to fifteen years, and also be liable to any creditor for the full amount of damages sustained. § 12.

Foreign corporations.— Any foreign corporation desiring to do business in the state or establish an office therein shall file with the secretary of state a certified copy of its articles, whereupon the secretary of state shall issue a permit to do business in the state. This provision does not apply to railroads. To procure such permit a license fee of \$25 shall be paid if the capital is \$100,000 rless; \$50 if the capital is more than \$100,000 and less than \$500,000; \$100 if the capital stock is \$500,000 and less than \$1,000,000, and \$200 if the capital stock exceeds \$1,000,000. Such permit shall only last ten years from the date of filing the articles. Suppm't, \$574 (a).

Taxation.— Every life insurance company shall pay an annual tax of one and one-fourth per cent upon its gross premium receipts within the state; other insurance companies one-half of one per cent. upon their gross premium receipts within the state. Telephone companies pay twenty-five cents for each telephone, and for failure to make a correct annual statement of the number in use the company shall pay a penalty of \$200. The above provisions do not relieve the companies specified from state and municipal taxation on real and personal property. Laws 1893, ch. 102, §§ 1, 2. Sleeping-car, dining-car and palace-car companies, and companies leasing cars to railroad companies in the state, shall pay a state tax of twenty-five cents per one hundred dollars of the capital stock employed in the state which shall be such proportion of the whole capital stock, after deducting therefrom the amount invested in real estate, manufacturing plants, materials and properties, other than cars and properties used in connection therewith, as the number of miles traversed in the state bears to the whole number of miles over which such cars are run. For failure to make proper reports the company shall be fined \$25 per day. § 3. Every corporation, domestic or foreign, shall pay an annual franchise tax of \$10, and failure to pay such tax forfeits the charter. § 5. Railroad and steamboat companies shall pay quarterly a tax of one per cent. upon their gross receipts from passenger travel within the state. Telegraph companies pay one cent for each full-rate message sent within the state, and one-half a cent for each message sent at less than full rate. \$ 4665. No person is required to list any share or portion of the capital stock of any corporation which is required to return its capital and property for taxation. § 4682. Railroad property, including rolling stock, is assessed by the county assessors, their valuation to be equalized by the county boards of equalization, which shall submit their final valuations to the state comptroller, who shall make the proper apportionments. Railroad officers shall make sworn statements to the said assessors. The tax is the same as upon other property of like value. §§ 4678, 4686, 4687. Stock in any foreign corporation held by residents of the state is taxed as personalty. § 4671. The term "person" as used in reference to taxation shall be construed to include "corporation." § 4672. Corporations shall list all their property, giving the true value thereof, and individuals shall list their stock and bonds of foreign or domestic corporations. § 4681. For filing any charter or amendment or supplement thereto of a railway, telegraph or express company, the secretary of state shall collect \$100, and \$25 additional for every \$100,000 or fraction thereof of the capital stock in excess of \$100,000. For other corporations the fee is \$25, and \$5 additional for each \$10,000 or fraction thereof in excess of \$10,000.

§ 974. VERMONT: 1 Constitutional provisions.—There are none affecting corporations.

Miscellaneous corporations, - Five or more may incorporate "for carrying on any object, purpose or business not repugnant to public policy or the laws of this state," excepting telegraph, telephone, banking, insurance or express companies, and corporations for the construction and operation of railroads, or aiding in the construction thereof; excepting also loan and trust companies and real estate companies. A supreme court judge shall have power to decide, upon the application of the secretary of state, whether the proposed corporation may be organized under this act. Laws 1892, No. 60, § 1. The articles shall set forth (1) the corporate name; (2) the "object or objects" of the incorporation; (3) the place of business: (4) the amount of the capital stock. § 2. The articles must be filed with the secretary of state, who shall return a verified copy to be recorded with the clerk of the town in which the principal place of business is to be located. The incorporation is then complete. § 3. The certificate must state the number of shares. § 4. The first meeting may be called by a notice signed by three of the corporators and mailed to each subscriber seven days before the date of the meeting. § 5. At the first meeting or adjournments thereof, the stockholders shall choose, by ballot, a temporary clerk, adopt by-laws and elect officers. § 6. If, for any cause, the annual meeting is not held, the owners of one-twentieth of the stock may petition a justice of the peace, who shall give them a warrant to call a meeting. § 7. The stockholders shall annually choose a clerk, who shall be an inhabitant of the state and keep his office therein. § 8. The clerk shall record all proceedings of the stockholders and directors, and all records, accounts and papers shall be open to the inspection of stockholders. §§ 9, 10, 11. Any clerk, treasurer or other officer having the custody of such records and accounts, who shall refuse for seven days to furnish a certified copy of any paper to any stockholder who requires it, shall forfeit to such stockholder not more than \$1,000. §§ 11, 12. There shall be not less than three directors, who shall be stockholders, and two of whom shall reside in the state. They shall elect one of their number president and may fill vacancies in their board. § 14. Each share has one vote, in person or by proxy. § 15. The period of succession may be perpetual, unless limited in the articles. § 16. The corporation may hold "by purchase, gift, grant,

¹ The acts of the legislature down to and including the laws of 1892 are included in this synopsis.

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devise or bequest real and personal property necessary for the purposes of the corporation, or taken in payment of or as security for debts due it: and may manage, mortgage, convey and dispose of the same," \$ 17. The corporation may take mortgages and pledges, or make attachments of property to secure debts. and may "perfect the title thereto;" but land so obtained which it is not antherized to held shall be disposed of within five years. § 18. Before business is commenced the president or clerk must make a sworn certificate stating the amount of capital stock actually paid in, and file it with the secretary of state, and a certified copy thereof with the town clerk. If the corporation contracts debts before the provisions of this section and of section 3 are complied with, the president and directors shall be personally liable for such debts. § 19. If the directors, knowing the condition of the company, pay a dividend when the corporation is insolvent, or the payment of which would render it so, those assenting shall be jointly and severally liable for the debts due from the corporation at the time of making the dividend. \$20. One-fourth of the capital stock shall be paid in before the corporation contracts debts, and no part of it shall be diverted from the proper purposes of the corporation; provided that "such capital stock may be issued in payment for any property deemed necessary for the business of the corporation, and the stock so issued shall be full-paid stock and not liable to further call; and no debts shall be contracted by the corporation exceeding in amount two-thirds of the capital stock actually paid in; and a director assenting to the creation of such indebtedness shall be personally liable for the excess." § 21. "The stockholders of a corporation shall be individually liable to its creditors to an amount equal to the amount unpaid on the stock held by them respectively, for contracts and debts made by such company." \$ 22. If the capital stock of a corporation is withdrawn and refunded to the stockholders before the full payment of its debts, each stockholder shall be personally liable for such debts to the amount refunded to him. Any stockholder who is compelled to pay such debt may compel the other stockholders to contribute their proportionate share. § 23. The corporation shall have a lien upon the capital held by the stockholders, and upon their property invested in the corporation, for debts due from them to it. \$ 24. The amount of the capital stock shall not be less than \$500, nor more than \$1,000,000, to be divided into shares of not more than \$100 each. \$25. The capital stock and the number of shares may be increased at a stockholders' meeting named for the purpose, but not to an amount greater than \$1,000,000. § 26. A certificate of the increase must be filed with the secretary of state, and a certified copy thereof with the town clerk. § 27. The capital stock may be reduced to not less than \$500 by a two-thirds stock vote; but no reduction shall be made so that the debts and liabilities shall exceed two-thirds of the reduced capital, and the reduction shall not affect existing debts and liabilities of the corporation or stockholders. § 28. A certificate must be filed as above provided (§ 27). § 29. The corporation shall cause a book to be kept by its clerk in the town where the principal business office is located containing a record of the articles; the names and residences of the stockholders; the number of shares held by each and the amount actually paid on each, and a record of transfers. The book shall be open to the inspection of stockholders. § 31. The corporate name may be changed upon a two-thirds stock vote, a certificate of which must be filed as provided above. § 32. The court of chancery may decree dissolution upon the petition of one-fourth of the stock. \$33. The supreme court may dissolve the corporation when its business transactions appear to be repugnant to public policy. § 36.

Railroads.—Twenty-five or more, a majority being inhabitants of the state, may incorporate for the purpose of "constructing, maintaining and operating" a railroad. They shall sign articles of association stating (1) the corporate name; (2) the termini; (3) the length of the road, as near as may be; (4) the name of each town and county into which the road will run; (5) the amount of the capital stock (which shall be at least \$10,000 for every mile of the road, and which shall

be divided into shares of \$100 each); (6) the number of shares; (7) the names and residences of the directors (who shall be chosen from and by the subscribers to the articles). \$ 3306. Each subscriber must give his residence and state the number of shares he will take. \$ 3307. No subscriber shall be bound to pay more than ten per cent, of his subscription before the corporation is established. Id. When \$5,000 per mile for the first twenty miles, "if there are so many," is subscribed, and \$1,000 for each remaining mile, and ten per cent, has been paid thereon in good faith and in cash to the directors named in the articles, and there is affixed to the articles an affidavit made by a majority of the directors that such subscriptions and payments have been made, and that it is intended "to construct or to maintain and operate" such railroad, the atoresaid articles may be filed with the secretary of state, who shall record the same. § 3308. The subscribers and subsequent stockholders shall then be a corporation. Real and personal estate necessary for the accommodation of the road, and the purposes of the corporation, may be taken, purchased and conveyed. But the amount limited in the charter or bylaws shall not be exceeded. \$ 3309. The transfer of stock may be regulated by the by-laws. Id. Changes in the proposed line of route may be made if such change does not violate the conditions of the vote of a town, or of some subscription in aid of the road. § 3310. A description of the route as changed shall be filed as an amendment to the original articles. § 3311. After filing the articles, the directors may, if the whole capital is not subscribed, open subscription books, in such places and after such notice as they think best. No subscription shall be received without a payment of ten per cent, of the same at the time of subscribing. § 3312. Each share is entitled to one vote, in person or by proxy. § 3313. "No other railroad corporation shall subscribe for, take or hold, directly or indirectly, stock or bonds of a railroad corporation organized under this chapter, unless specially authorized by the legislature." § 3314. A majority of the directors shall be inhabitants of the state. § 3315. If a corporation formed under the above provisions does not, within eighteen months after filing articles, spend five per cent. of its capital stock upon the construction of its road, or does not put the road in full operation within seven years, "its corporate existence shall cease, except as to so much of the road as has been completed." § 3316. Before beginning proceedings to acquire real estate, or an interest therein, such company must file with the county clerk a certified copy of the record of its articles and annexed affidavit. But this section shall not prevent the taking of voluntary grants in aid of the road, such grants to be held only for the purposes of the grant. § 3317. If the capital stock of a company formed under the above provisions is found insufficient, the same may be increased upon a vote of "two-thirds in amount of all the stock represented, at a meeting of the stockholders called by the directors of the company for that purpose." § 3318. Ten days' written notice of such meeting must be addressed to each stockholder. § 3319. The increase voted for may be made after filing with the secretary of state a copy of the record of the proceedings of the meeting. § 3320. The above provisions may be altered or repealed, or a corporation formed thereunder may be annulled or dissolved, by the legislature. § 3323.

A railroad corporation shall be a body corporate and politic, "from the passing of the act of incorporation, so far as to authorize such corporation, after its organization, to enforce the payment of subscriptions to its capital stock and the performance of contracts for the conveyance of real estate for the purposes of the road, although such subscriptions and contracts may have been made prior to the organization." § 3324. "The commissioners for opening books of subscription, named in an act of incorporation," shall, from time to time, open such books in such places and after such notice as the majority may direct. The books shall be kept open until all the stock is subscribed. § 3326. If the subscriptions exceed the capital stock, the commissioners shall distribute the capital stock equitably among the subscribers. § 3327. A subscriber must, at the time of subscribing,

pay five per cent. on his subscription, and, if required by the commissioners, must pay \$15 more on each share in such instalments as are ordered by the company. \$328. No secret agreement shall affect the right of the corporation to collect subscriptions. \$329. Subscribers shall have one vote for each share, but no subscriber shall vote more than one-tenth of the capital stock. \$330. This provision shall apply to any railroad corporation in the state whether formed under a general or special law. Laws 1892, No. 62. Such a corporation shall have at least five directors. \$3331. The subscription commissioners shall call the first meeting for the election of directors. \$3332. If the annual election of directors is not made on the day named in the by-laws, "the company for that reason shall not be dissolved if within ninety days thereafter it holds an election for directors in such manner as is provided for by the by-laws." §\$3333, 3334. The clerk, treasner and subordinate officers shall give bonds in such sum as the by-laws require. § 3336.

Railroad corporations shall annually, on the first day of January, lodge with the secretary of state the names of their clerks and treasurers, "and their place of business within the state." § 3337. The treasurer and clerks of a railroad corporation must be residents of the state, "except when otherwise specially provided by law." Their offices, and the books and papers belonging to said offices, shall be kept within the state. The corporation shall forfeit \$10 for each day's neglect to comply with the provisions of this section. § 3338. A railroad company may issue preferred stock, in shares of not less than \$50 each, to have preference over common stock "in dividends to be made out of the profits of the business, not exceeding seven per cent, per annum, for the purpose of paying, discharging, retiring or exchanging an outstanding claim, lien, mortgage or incumbrance against such company, or upon its property," if ordered by two-thirds of the stock represented at a meeting called by a notice published in the newspapers of St. Albans, Rutland, Boston and New York, §\$ 3339, 3340. The original stockholders have the first right to take such preferred stock, in proportion to the amount of their original stock. § 3341. The holders of preferred stock shall have the same rights as other stockholders. § 3342. Railroad corporations, "for the purpose of building or furnishing their respective roads, or the payment of their just debts," may, when anthorized by a vote of the stockholders at a called meeting, issue stock with a certain guarantied dividend, not exceeding eight per cent. per annum, for such time as they deem best. § 3343. No railroad corporation, authorized by its charter to increase its capital stock, "shall issue shares for a less amount to be paid in on each than the par value of the shares in the original stock of the corporation," without the consent of all the stockholders given in writing. § 3344. Shares of stock are personalty, and are liable to attachment and sale in the manner provided by law with respect to shares in private corporations. Transfers are made "by any conveyance in writing," as provided by the by-laws. § 3345. Equal assessments may be made in such sums as the president and directors deem necessary, but not exceeding the sum at which the shares were fixed by the charter, or by the agreement of the stockholders. § 3346. Bonds or notes may be issued, upon a vote of the stockholders at a called meeting, "in sums not less than one hundred dollars to raise money or to extinguish any debt or liability of the company, on time not to exceed thirty years, and at a rate of interest not to exceed seven per cent, and may secure them by a mortgage of its road or other property which it owns and any interest in railroad property." § 3350. Any bonds or notes given by the corporation, "or by the trustees and managers of railroad property," shall be binding, though negotiated and sold at less than par. § 3351. Mortgages and leases, and assignments thereof, shall be recorded with the county clerks of the counties through which the road passes. § 3352. Franchises and rolling stock shall, for the purpose of mortgage, be deemed part of the realty, but a mortgage lien shall not prevent such property from being attached and sold for personal injury, or for damage to property during transportation. § 3353. When it is necessary for a railroad corporation to lay out its road upon or beside a "turnpike or way, or upon a bridge owned by a town or turnpike corporation," if an agreement cannot be made with the said company or town, the commissioners appointed to appraise land damages "shall direct the railroad corporation to build such road or bridge, as a substitute for the road or bridge so located upon, as the interest of the public and the parties requires." When such road or bridge has been constructed the road or bridge located upon shall vest in the railroad corporation. An appeal may be had from the decision of the commissioners. § 3377. A railroad company may "cross or unite its road with any other railroad," at any point on its route and upon the grounds of such other company, with the necessary sidings, etc., and if an agreement cannot be reached as to the compensation therefor, the same shall be determined by commissioners. § 3398. Intersecting or connecting roads shall furnish each other proper facilities for the transportation of freight and passengers. § 3399, Am'd Laws 1882, No. 38.

The supreme court may, upon the written application of three or more freeholders of the state, reduce the rates of toll upon any railroad in the state. \$ 3426. Am'd Laws 1882. No. 37. It shall be unlawful to charge more toll for a shorter than for a greater distance. § 3427. The trustees in possession of a railroad under mortgage shall call annual meetings of the bondholders or creditors, and submit to them a report. § 3453. Non-resident trustees or lessees must appoint an agent upon whom process may be served. § 3460. When a mortgage of a railroad (or of a railroad and other property), to secure bonds, is foreclosed, and the legal title vests in the mortgagees, the holders of a majority of the bonds may form themselves into a new corporation, for "owning or maintaining and operating" the road. § 3461, Am'd Laws 1890, No. 23. They may make articles of association which, after mention of the making and foreclosure of the mortgage, shall set forth (1) the amount of bonds "owing upon and secured by" the mortgage; (2) the corporate name; (3) the amount of the capital stock "(which shall not exceed the amount of principal and interest of the bonds and twenty-five per cent, on the same in addition thereto);" (4) the number of shares "(each of which shall be fifty dollars);" (5) the number of directors, and the names of those chosen for the first year (a majority of whom shall be residents of the state). § 3462. This section shall be deemed to authorize "the issue of preferred as well as common stock in shares of one hundred dollars each," on such terms and conditions as the majority may prescribe in the articles. Laws 1882, No. 35. scriber shall state the number of shares he will take, the amount of the bonds held by him, which he intends to surrender in payment, or part payment, of subscriptions. § 3463. The articles shall be recorded with the secretary of state, and a copy filed and recorded with the county clerks of the counties through which the same runs, §3465. A notice of such incorporation must be published once a week for three weeks in the county papers, and for six days in two New York and Boston dailies. § 3466. Any holder of the above-mentioned mortgage bonds may, within thirty days after the last publication of said notices, subscribe for stock equal to the amount of bonds held by him, which he intends to surrender in payment of his subscription. § 3467. Dissenting bondholders must be paid the value of their interest, which will be assigned to the corporation by the court. § 3469. The stockholders may, by vote, increase the capital stock to not more than double the amount of principal and interest of the bonds designated in the articles. § 3472. In case of the failure of the bondholders to organize as above provided, or if the railroad (and other property) is sold or assigned under decree or judgment, the purchasers or grantees may have the rights and powers granted to bondholders; and they may associate others with themselves in forming a corporation, "In case a corporation is so formed by such purchasers or grantees and their associates, the stock of such corporation created to an amount not exceeding that hereinbefore provided may be issued in payment for the railroad and other property included in such foreclosure upon the transfer and conveyance of such railroad and other property to such corporation, and upon such issue the said stock shall be taken and deemed to be full-paid stock and not liable to any further calls. . . ." Such company shall have the same rights as the mortgagor had, including the right to mortgage its property or create and issue additional stock, and shall have the rights and liabilities of railroad corporations generally. § 3475, Am'd Laws 1890, No. 23. Where a sale is made, any creditor may, within three months after the sale, pay into court, for the use of the purchasers, "a sum bearing the same proportion to the price paid by the purchaser, with twelve per cent, interest thereon from the time of the sale, that the debt so held by such creditor under the mortgage bears to the whole amount of debt outstanding under the mortgage." Such creditor shall then have a legal equitable interest with the purchaser. \$ 3476. Where there are two mortgages the interests are equitably adjusted. \$\$ 3477-3479. A receiver appointed for that portion of a consolidated road which is in another state may become receiver of the portion within Vermont by filing the proper papers. § 3480. "The state may, at any time during the continuance of the charter of a railroad corporation, after the expiration of twenty years from the opening of its railroad for use, purchase of the corporation the railroad, and the franchise, property, rights and privileges of the corporation, by paying it therefor such sum as will reimburse the amount of capital paid in, with a net profit thereon of ten per cent, per annum from the time of the payment thereof by the stockholders to the time of such purchase," § 3002. Domestic roads may contract and arrange with each other, and with foreign roads under the authority of any state or of Canada, "for leasing and running the roads of the respective corporations, or a part thereof, by either of their respective companies;" and may hold land and buildings in fee-simple "or otherwise," in any state, for depot and storage purposes. They may buy and hold the personalty necessary and convenient for carrying into effect the object of this section, \$ 3303.

When two railroads are incumbered by a lien or liens upon the two roads, the company owning either road may issue bonds on the time and rate of interest provided by section 3350, "for the purpose of extinguishing such lien or liens, and compromising disputes, and the same may be secured by mortgage or mortgages of both roads by vote of the stockholders of the companies owning said roads," Laws 1882, No. 35. Railroad companies shall give equal and reasonable terms to all. Two or more connecting roads shall not charge more for a shorter than a longer distance, from the same point and in the same direction, Id., No. 36. "Whenever any railroad in this state shall, by the decree or judgment of court, be ordered to be sold, any railroad company in this state whose railroad connects with the railroad to be sold is authorized to purchase the railroad so authorized to be sold, and upon acquiring the title to said railroad to consolidate said road with its own railroad, and make it a part thereof." Laws 1886, No. 21. Such purchaser shall have all the franchises, etc., of the road so purchased, and shall hold the same subject to all the duties imposed by charter or the law upon the previous or original owner. Id. A railroad commission is established with power to examine all books and accounts. Laws 1886, No. 23. If the corporation refuses to allow the inspection of papers, etc., or to furnish required information, or to make reports, or shall wilfully hinder said commissioners in the discharge of their duty, the supreme or county court shall provide a remedy. And any person giving false information to the commissioners shall be guilty of perjury. Id., § 4. The commission shall have general supervision of all the railways in the state, so far as is necessary for carrying out the provisions of this act. § 5. The railroad companies shall comply with all reasonable recommendations of the commission as to rates and repairs, and the method of keeping accounts and making returns. §§ 7, 10, 13. Any domestic or foreign railroad company, owning railroad property in the state, "may issue its bonds on time not exceeding one hundred years, and at a rate of interest not exceeding six per cent, for any purpose it may desire,

upon a majority vote of its stockholders voting at a meeting duly called for that purpose," and "may mortgage its road and franchise, and any other property which it may own or in which it may be interested, to secure its bonds, or the bonds of any other railroad or transportation" company within or without this state, upon a majority vote of its stockholders voting at any meeting duly called for the purpose. Laws 1892, No. 64.

General provisions. - Every president or director must be a stockholder. Before the corporation begins business, the president and directors shall file with the secretary of state a sworn statement of the amount of capital stock. Likewise upon any increase of the capital stock, Revised Laws, §§ 3252, 3253. Attachments in favor of a creditor who is not a director shall have the preference over those in favor of a director, § 3254. The legislature may alter or repeal any act in respect to corporations. § 3257. Capital stock shall be personal estate, transferable in accordance with the by-laws. § 3258. Commissioners appointed to receive subscriptions must give a thirty days' published notice of the time and place of opening books. § 3259. Stock may be sold on execution like other personal property. § 3262. The capital stock of any corporation is liable to sale on execution against the corporation; and any number of shares of one or more members may be sold on such execution, "sufficient to satisfy the same with the charges thereon, as the shares of such stock owned by a person may be attached and sold on execution against such person, and such sale shall transfer title to the purchaser," § 3263. A person whose stock is thus sold may have an action against the corporation for damages. § 3264. Every corporation must have a clerk residing in the state, under penalty of forfeiting \$50 to any person injured by the neglect to appoint such clerk, § 3267, Am'd Laws 1882, No. 71. The clerk shall have the custody of the by-laws and records, and for neglect to exhibit the same to any owner of stock, or his representatives, such clerk shall pay to the injured party \$10 for each day's neglect or refusal. §§ 3268, 3269. A corporation shall, by its clerk, keep a record of the corporate action, with a record of each owner's name, and the number and description of his shares. § 3270. When a charter expires, or is annulled or forfeited, the corporation continues a body corporate for three years, for the sole purpose of closing the company's affairs, and the court may appoint a receiver upon the application of a creditor or stockholder. §§ 3272, 3273. The transfer, by assignment and delivery, of stock certificates or collateral shall be a valid transfer of the stock, when made to secure a valid debt or obligation, as against the party transferring, or his heirs, etc.; and when notice has been given to the clerk, and a memorandum of the transfer made upon the books, the assignment shall be valid against subsequent attaching creditors of the assignors, provided the same is made bona fide. But nothing herein shall change the evidence of ownership of such stock so far as the corporation is concerned. Laws 1884, No. 103. Any corporation formed under section 3276 et seq. may, by a vote of two-thirds of all the capital stock, at a meeting called for the purpose. reduce its capital stock to a sum not less than \$500, and no reduction shall be made so that the liabilities shall exceed two-thirds of the reduced capital stock, This act shall not affect the liability of stockholders under section 3293. All private corporations organized under special act are made subject to the provisions of sections 3279, 3283, 3284, 3287, 3291, 3292, 3293, Laws 1886, No. 79. No foreign insurance company shall do business in the state unless its paid-up capital invested in securities readily convertible into cash equals \$100,000, only one-half of which may be invested in mortgages of real estate; nor unless it has, in addition, assets equal to its outstanding liabilities. Rev. Laws, § 3607. Such company must file with the secretary of state an agreement to the effect that process affecting the company may be served on either of the insurance commissioners. § 3608. A license must also be obtained from the commissioners, after filing a copy of the charter and making a statement according to a form furnished by

the secretary of state, for which license a payment of \$5 is charged. §§ 3610, 3611. No person shall act as agent of such company until he files a certificate of the company authorizing him so to act. § 3612. Annual reports shall be made to the commissioners, who may revoke any license after a full examination of the company's affairs. §§ 3621-3623, Am'd Laws 1884, No. 44; Laws 1886, No. 105; Laws 1892, No. 74.

Foreign express companies must appoint as agent a citizen of the state, upon whom service may be made. §\$ 3650-3654.

Taxation.—Shares of stock in a foreign corporation are not taxed when all the stock of such corporation is taxed in the state where the corporation is situated to the holders thereof, wherever they reside, or where the corporation is taxed in such state for all its stock. Rev. Laws, \$ 270. "Stock in a railroad corporation in this state" is also exempt. Id. The exemption further includes "real estate used in operating a railroad for a period of eight years from the time when trains for public traffic and accommodation commence running on such railroad in or through a town;" and "manufacturing establishments and the machinery and capital used in operating them, and the machinery put into unoccupied buildings and the capital used for operating it," for five years from commencing operations, if the capital invested exceeds \$1,000. Id. "Such manufacturing establishments hereafter erected," except pulp companies, and the manufacturers of rough sawed lumber and charcoal; also quarries and mines hereafter opened, with all necessary manufacturing and mining machinery, shall be exempt for a time, not exceeding five years, limited by legal voters of the town or city. § 273. Am'd Laws 1892, No. 9. A majority of the legal voters at any town or city meeting may exempt all individuals, companies and corporations "contemplated in and as stipulated in" section 273, from taxes for not more than ten years. § 274. Am'd Laws 1890. No. 16. Shares of stock in all corporations, except railroad corporations, are listed to the owner where he resides, if he lives in the state, otherwise in the town where the principal place of business is located. § 283. The tax on the stock of non-residents shall be paid by the corporation, and it shall have a lien for the same on the stock and dividends of such stockholder. § 284. The cashiers of banks and the executive officers of every other corporation, except railroads, shall annually transmit to the clerk of each town in which shareholders reside a list of the names of such shareholders and the number of shares stauding in the name of each; and in like manner to the clerk of the town where the comnauv has its principal place of business, a list of the shares of stockholders in such bank or other corporation, except railroad corporations, who reside in that town or without the state. § 285, Am'd Laws 1892, No. 16. Stock held as collateral, and which has been transferred on the books, shall be reported according to the preceding section. § 286. The person who fails to make such required returns shall be fined \$5,000. § 287. In assessing stockholders for stock in manufacturing corporations, the value of the realty and personalty represented by such stock, and otherwise taxed, shall be deducted from the whole value of the stock and the remaining value shall be taxed; "and in assessing for stock in all other corporations the value of its real estate taxed in this state or elsewhere" shall, in like manner, be deducted. § 288. Any corporation whose officers do not make the returns required by this act (§§ 283-289) shall forfeit to the town \$5,000. § 289.

Banks of circulation, discount and deposit shall, semi-annually, at the time of declaring dividends, pay into the state treasury one per cent. of their capital; but if the bank keeps a sufficient deposit in the city of Boston, "and if that city uniformly causes its bills to be redeemed at par," such payment is not required. § 3526. Any railroad company formed under the provisions for "reorganization after foreclosure" shall be subject to taxation, notwithstanding any exemption in the original charter. Laws 1884, No. 35.

Every railroad corporation in the state shall make returns to the commissioner 1896

of state taxes of its entire gross and net earnings, and if any portion of the road is without the state, such return shall give the gross and net earnings "per mile of such road." Such statement shall also give the length of the entire main line, the number of miles thereof in the state, the number of miles of side track, "a list of its equipment, the amount and value of its capital stock, its funded and floating debt. its bonds secured by mortgage or other securities on the property of such corporation. . . . and the market value of its stocks and bonds, and the amount of dividends, interest or indebtedness paid annually or semi-annually." In case the road is operated by a lessee the amount paid for rents shall be stated. Laws 1890, No. 3, § 11. Upon receipt of the above-mentioned returns the commissioner shall appraise the property, giving due consideration to the value of the corporate franchise. § 12. If the line extends beyond the state "the whole valuation, ascertained as aforesaid, shall be divided by the number of miles of its entire main line, and the amount thus obtained shall be taken to be the value of such railroad per mile, which said sum, multiplied by the number of miles in this state, shall be taken to be the true value of such railroad, its rights, corporate franchise and property in this state for the purposes of taxation." § 13. The tax upon either of the above appraisals is seven-tenths of one per cent., one-half to be paid on or before the 15th of November and one-half on or before the 15th of May, annually, § 14. An appeal from the appraisal may be had to a commission consisting of certain state officers. \$ 16. In lieu of the above tax a company may pay annually two and one-half per cent, on its entire gross carnings, if the road is wholly within the state, and if situated partly without the state, then two and one-half per cent. upon such proportion of the entire gross earnings "as the mileage of trains run in this state bears to the mileage of all trains run on the entire main line of such road for each six months' period." § 17. When a road is operated under a lease or contract the lessee or holder of the contract shall pay the taxes and deduct the amount of the same from any payment due the lessor or person or corporation granting such contract, unless it is otherwise expressly stipulated in the contract or lease. The party who ultimately pays the tax shall be construed to be the party who may accept the provisions of section 17. § 19. Telephone companies pay a tax of three per cent, annually upon their gross receipts from business wholly within the state, after deducting from such gross receipts the amount paid to any telegraph company for the transmission of messages. § 20. Sleeping and parlor-car companies shall pay a gross-receipt tax of five per cent. annually. §§ 22, 23. A tax of four per cent, per aunum is assessed on the like gross receipts of express companies. § 24. Telegraph companies shall pay an annual tax of sixty cents per mile of posts with one line of wire, and forty cents per mile for each additional wire, or three per centum of the entire gross receipts within the state. Laws 1892, No. 15. "Steamboat, car or transportation" companies shall pay seven-tenths of one per cent upon the appraised value of their "property. business and corporate franchise," or, in lieu thereof, a tax of two per cent, unon their entire gross earnings. §§ 25-27. Every domestic corporation having a capital stock of \$50,000 or less is assessed an annual license tax of \$10; and for each \$50,000, or part thereof in excess of \$50,000, the tax is \$5. But no such tax shall exceed \$50, § 28. All insurance companies are assessed at the rate of two per cent. per annum on the gross amount of premiums and assessments collected within the state, and life insurance companies pay an additional tax of one per cent, annually "on the surplus over and above the necessary reserve, computed at four per cent, of all existing policies." §§ 31-33. Savings banks and trust companies pay seven-tenths of one per cent. on the average amount of deposits and accumulations, after deducting the value of the real estate of the corporation, and the amount of individual deposits in excess of \$1,500 each, listed to depositors where they reside. §§ 34, 35. For refusing to appear and testify before the commissioner, any officer or person shall be fined from \$500 to \$5,000. §§ 43, 44. A corporation shall forfeit \$100 for each day's neglect to make required returns. §7.

If taxes are not paid at the required time, the company shall forfeit \$100 for each day's neglect after the expiration of the time limited by law. § 8. If foreign insurance companies do not pay their taxes their licenses will be revoked. § 9.

§ 975. VIRGINIA: ¹ Constitutional provisions.—Capital invested in all business operations shall be taxed as other property. "Assessments upon all stock shall be according to the market value thereof." Constitution of 1869, art. X, § 4. "The credit of the state shall not be granted to, or in aid of, any corporation." Id., § 12. "The state shall not subscribe to, or become interested in, the stock of any corporation." Id., § 14. The state shall not become interested in any work of internal improvement "otherwise than in the expenditure of grants to the state of land or other property." Id., § 15.

Miscellaneous corporations.— Five or more persons desiring to organize a joint-stock company "for the conduct of any enterprise or business," except to construct a turnpike extending beyond the limits of the county, or a railroad or canal, or to establish a bank of circulation, may make a certificate in due form of law, setting forth (1) the name of the company: (2) the purpose for which it is formed; (3) the capital stock, and its division into shares; (4) the amount of real estate to be held by it; (5) the place at which its principal office is to be kept; (6) the chief business to be transacted; and (7) the names and residences of the officers who for the first year are to manage the affairs of the company. certificate must be presented to the circuit court of the county, or circuit or corporation court of the corporation, wherein the principal office is to be located, or to the judge thereof in vacation, and the said court or judge may grant or refuse a charter of incorporation upon the terms set forth in said certificate, or grant a charter upon terms adjudged reasonable. If the charter be granted it must be recorded with the clerk of the court, and with the secretary of state. Such charter may be amended, or the corporate name be changed, by the said court or judge, on the application of the company, authorized by a majority of the stockholders in a general meeting; and any charter granted by the general assembly. which might have been granted by the court or judge, may be amended in the same way, upon application to the court or judge where the principal office is located. Any amendment must be recorded like the original charter. Street railroads cannot be incorporated under the provisions of this section. The legislature shall not grant charters provided for in this section, or amend the same, unless the said court or judge shall have refused to do so. Code of 1887, § 1145, Am'd Laws 1891-2, ch. 324. As soon as the charter is "lodged" with the secretary of the commonwealth the act of incorporation takes effect. § 1146. "The minimum capital of every such company shall be not less than \$500, nor shall the maximum exceed twenty times the minimum capital, and the same proportion shall be preserved for greater sums." § 1148, Am'd Laws 1890, p. 56. "Subscriptions to the stock may be paid in money, land or other property (real, personal or mixed), leases, options, minerals, mines, and mineral rights, rights of way, and other rights or easements, labor or service, and there shall be no individual liability beyond the unpaid subscriptions to stock." Id. "Each certificate of stock in any such company shall set forth truly the actual capital of the company, the nominal value of each share of the stock, and the amount actually paid on each share by the holder of such certificate." Id. Any lien given by the company to prefer a creditor, "except to secure a debt contracted, or money borrowed at time of the creation of the lien or incumbrance," shall inure to the benefit of all creditors existing at the time such lien was created. § 1149. A penalty of \$100 and costs is imposed if annual reports are not made. §§ 1152, 1153. In every meeting of stockholders each share has one vote, in person or by proxy. §§ 1116, 1148. "No stock shall be assigned on the books without the consent of the company, until all the money which has become payable thereon has been paid; and on any assignment the

⁴ The acts of the legislature down to and including the laws of 1891-2 are included in this synopsis.

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assignee and assignor are severally liable for any instalments which have accrued. or which may thereafter accrue." § 1130. All books, records, funds and statements of the corporate property and condition are to be open to the inspection of the board of directors. § 1121. At the time of subscription \$2 on each share must be paid to the commissioner, and the residue must be paid as required by the president and directors. § 1107. The subscription books shall be open for ten days. If subscriptions exceed the capital stock the excess is deducted "from the largest subscriptions in such manner that no subscription shall be reduced while any one remains larger." § 1110. If at the end of ten days not so much of the capital stock has been subscribed "as is necessary to incorporate the subscribers," the hooks may be opened, with or without notice, for such time or times as the commissioners think best, until all the capital is subscribed, "or until the election of the president and directors." § 1111. (See § 1112, infra.) If the capital stock is not all subscribed when the president and directors are chosen, the president and directors shall "take measures for obtaining subscriptions for the residue. They shall not to obtain such subscriptions, sell the stock at less than par, unless specially authorized so to do, but may fix the price of such residue at a premium, which shall be for the benefit of all the stockholders ratably." \$ 1124. Am'd Acts 1890, ch. 61. The charters of railroad corporations are always subject to legislative amendment, as are all others after fifteen years from their passage, unless otherwise provided in the act. §§ 1069, 1240. No corporation shall hold more real estate than is necessary for the purposes of its incorporation. One company shall not subscribe to or acquire stock of another company unless specially authorized by act of legislature, or by terms of decree of court, or order of the judge incorporating the company or amending charter thereof." Stock acquired contrary to the provisions of this section cannot be voted in any meeting of the stockholders. § 1070, Am'd Acts 1890, ch. 65. But it may receive stock in satisfaction of or to secure debts and "may purchase stocks or other property at any sale made for its benefit." If shares of its own stock are thus received they may be "extinguished" or sold. While held by the company the shares shall not be voted. § 1071. "Every company incorporated under the laws of this state or another state, and doing business in this state, except an insurance company incorporated under the laws of another state," must keep an office in the state for settling the claims of residents. § 1104. "A person in whose name shares of stock stand on the books of the company shall be deemed the owner thereof, as it regards the company." § 1131. "If any person shall, for valuable consideration, sell, pledge or otherwise dispose of any of his shares of stock to another" and deliver the certificate for such shares, "with power of attorney authorizing the transfer of the same on the books, the title of the former (both at law and in equity) shall vest in the latter so far as may be necessary to effect the purpose of the sale, pledge or other disposition, not only as between the parties themselves, but also as against the creditors of and subsequent purchasers from the former, subject to the provisions of section 1130." § 1133. The board shall declare semi-annual dividends, and dividends shall be applied to the debts of stockholders due to the corporation. § 1136. Directors present, and not dissenting are, in their individual capacity, jointly and severally liable to company's creditors if the board declare a dividend of any part of the capital stock; and each stockholder who participates in such dividend is liable to the creditors of the company to the extent of the capital so "The stockholders, in general meeting of any company incorreceived. § 1138. porated for manufacturing or mining, and out of debt, may order dividends of capital stock after three months' notice in neighborhood newspaper." § 1139. "If any such company (incorporated by the general assembly) be not organized by the appointment of a president and directors within two years from the passage of its act of incorporation, or, though so organized, if it shall suspend its operation for two years, its corporate rights and privileges shall, in each of these cases, cease." § 1141. The act of incorporation of any company for manufacturing or mining shall be in force for thirty years, and no longer, and may at any time after fifteen years be amended or repealed by the general assembly. \$ 1143. The maximum amount of stock of an internal improvement company (which company shall have been incorporated by the legislature) which may be subscribed by a county or city shall in no case exceed one-fifth of the total capital stock of said company, or an amount the interest upon which shall not require an annual tax of more than twenty cents on \$100. \$ 1243. Three-fifths of the qualified voters of the county. city or town voting upon the question must have voted "for subscription" at an election duly held, and said three-fifths must include a majority of the votes cast by freeholders at such election, and a majority of the registered voters. §§ 1244. 1245. Corporatious are not allowed to plead usury. § 2825. Nor, unless expressly authorized, to take more than legal interest. \$ 2826. Unless otherwise provided. every corporation shall have perpetual succession; may "contract and be contracted with, purchase, hold and grant estates, real and personal," and may make by-laws. \$ 1068. Land acquired by an internal improvement company for buildings along the line shall not exceed three acres in any one parcel; but for buildings and other purposes at the termini fifteen acres in one parcel may be taken, and in the case of a railroad forty acres may be taken for main depots, etc. § 1073. Condemnation proceedings shall be under the direction of commissioners appointed by the court. § 1074 et seq. Railroad companies which have a common terminus may, with the consent of the municipal authorities, connect within such municipality, or, if such consent is refused, land may be taken for such connection outside the city or town. § 1098. Any railroad or canal company may receive land in payment of subscriptions at a valuation to be agreed upon. \$ 1108. Such land may be held and transferred, mortgaged or leased in such manner as the company deems best. § 1109. When it appears to the commissioners that "so much of the capital stock is subscribed as is sufficient to incorporate the subscribers," they shall call a meeting of the subscribers by a two weeks' published notice, and from the time of such meeting "the subscribers, their executors, administrators or assigns, shall stand incorporated," unless otherwise determined at the meeting, § 1112. (See §§ 1110, 1111, supra.) The owners of one-tenth of the capital stock may call a stockholders' meeting. \$ 1114. There shall be five directors besides the president, unless otherwise provided in the by-laws. § 1118. Neither the president nor directors shall receive any compensation, unless allowed by the stockholders. § 1119. The board shall make a report to the stockholders at their annual meeting, stating fully the condition of the company, and such report shall, at any time within thirty days before such meeting, be shown to any three or more stockholders owning one hundred shares of stock, or be produced at any meeting when demanded. § 1123. The president and directors of any corporation formed to construct a railroad or other work of internal improvement may construct branches not exceeding five miles in leugth each way, and when authorized by two-thirds of all the votes of all the stockholders may construct branches not exceeding twenty miles in length. Code, § 1189, Am'd Laws 1891-2, ch. 340. Unless other rates are prescribed by law, a railroad company may charge six cents per mile for passengers and eight cents per tou per mile for freight, except manures, for which the charge may be four ceuts per ton per mile. § 1202. Discriminations against local traffic in favor of through transportation, whether the route of the common carrier is wholly or partly in the state, are forbidden. § 1207. No discrimination shall be made in respect to persons or property, and all common carriers shall furnish reasonable facilities for connections with other lines. § 1207. Any company violating any provision of the two preceding sections shall be fined from \$100 to \$500. \$ 1214, Am'd Laws 1891-2, ch. 614. The railroad commissioner shall from time to time investigate the acts of common carriers to ascertain whether the laws have been violated. § 1212.

Express transportation over railroads is regulated. § 1215. No internal im-

provement company, unless expressly authorized by its charter, may borrow money until all the capital stock has been paid up and expended, excepting only the losses arising from delinquent stockholders. "But the president and directors may horrow an amount not exceeding that part of the capital stock which is unsubscribed, and may issue certificates for the money so borrowed, and may make such certificates convertible, within a prescribed time, into stock of the company, at the pleasure of the holder." § 1232. If the corporate property of such company is sold under foreclosure proceedings or judicial decree, the conveyance shall mass to the purchaser, not only the property mortgaged, but all property subsequently acquired, other than debts due, and the said company shall be dissolved ipso facto; and "the said purchaser shall forthwith be a corporation." \$\$ 1233, 1236. The corporation "created by or in consequence of such sale and conveyance" shall succeed to all the franchises and obligations, with respect to the conduct of the corporation, which attached to the original company, but shall not be entitled to debts due the original company, or liable for claims against it which are not assumed in the contract of purchase. His interest in the corporation shall be personal estate, and he or his assigns may create shares, not exceeding the amount of stock in the first company at the time of sale, and assign the same. \$ 1234. Am'd Laws 1891-2, ch. 377. Careful reports must be made to the board of public works. §§ 1237, 1238, Am'd Laws 1891-2, ch. 614. The board of public works may sell a work of internal improvement if it is idle for three successive years. § 1239. Tolls shall not be reduced so as to prevent dividends of fifteen per cent. per annum for the first thirty years from the time the first dividend was declared, or of twelve per cent. per annum for the next twenty years after the expiration of said thirty years, or of ten per cent. per annum after the expiration of fifty years from the declaration of the first dividend.

A railroad commissioner has general supervision of all the railroads of the state. § 1299. Railroad companies must make annual reports to the commissioner. § 1309. Discriminations in favor of long hauls against included short hauls is forbidden, without the permission of the railroad commissioner. Laws 1891–2, ch. 614, § 1. Discriminations by rebates, or special rates, or against any locality, are prohibited. §§ 2, 3. Proper connections, without discrimination, shall be made with other common carriers. § 4. The commissioner shall annually report to the governor the condition of railroads in the state. § 11. For violating any provision of this act, or of any general law, the corporation shall be fined from \$100 to \$500. § 13. All employees, from conductor down, and all furnishers of supplies and materials to any transportation company, and all clerks, mechanics and laborers furnishing their services to mining or manufacturing companies doing business in the state, shall have a prior lien on all the franchises, gross earnings and property of such companies. Laws 1891–2, ch. 224.

Foreign corporations.— Every foreign corporation shall, before doing business in the state, appoint an agent with power of attorney, and file a copy of its charter with the clerk of the county court. The company shall pay the clerk \$10 for his services. If the above provisions are not complied with, the officers, agents and employees of such company doing business in the state shall be personally liable to any resident of the state having a claim against the company. \$\frac{8}{5}\$ 1104, 1105. Express and insurance companies shall keep an agent (in case of insurance companies, in the city of Richmond) with power of attorney, and a copy of such power of attorney shall be filed with the auditor of public accounts. Insurance companies shall give bonds in the sum of from \$1,000 to \$5,000, and express companies shall deposit Virginia or United States bonds of the value of \$50,000. \$\frac{8}{5}\$ 1216, 1266, 1267.

Taxation.—The fees for filing papers, making entries, copies, etc., are double those for deeds. § 1151. Shares of stock are deemed personal estate. § 1125. If property not otherwise taxed belong to a corporation, "it shall be listed to the corporation by the principal accounting officer and at the principal place of busi-

ness of such corporation; but if not so listed, it shall be listed and taxed in the place where the property is," § 492. "If the property consist of money, bonds, stocks or other evidences of public or private debts, in any county or city other than that of his residence, or state other than Virginia, it shall be listed by and taxed to the owner thereof." § 492. Every domestic railroad and canal company not exempted by its charter, and every such company formed in other states, shall report annually to the state auditor all its real and personal property, stating its location in the state. The report shall include the roadway and track, or canal bed. depots and other fixtures, real estate not included in other classes, rolling stock, boats, etc.: telegraph lines; stocks, bonds, etc., held by the company; all personal property not otherwise enumerated, taxable to individuals, and the gross and net receipts. The report shall show what proportion of the line is in the state. If the company fails to report or to pay the tax, the real estate and rolling stock shall be assessed at \$20,000 per mile of the road, and the other property at a fair cash value. The rate shall be the same as upon other property. Mining and lumber companies owning railroads which transport passengers or freight for others shall be subject to the above provisious as to all property except real estate not used in connection with the railroad. Laws 1891-2, ch. 254. Forty cents per \$100 of the cash value of the property of Pullman sleeping, palace and dining-car companies, invested in the state, is assessed to such companies. Laws 1891-2, ch. 535.

§ 976. WASHINGTON.1- No law shall grant any irrevocable privilege, franchise or immunity. Constitution of 1889, art. I, § 8. No law shall grant to any citizen. class of citizens or private corporation any privileges or immunities "which upon the same terms shall not equally belong to all citizens or corporations." Id., \$ 12. Before any right of way is appropriated for the use of a corporation other than municipal, full compensation therefor shall be paid the owner, or paid into court for such owner, the compensation to be irrespective of any proposed improvement by the corporation. Such compensation shall be ascertained by a jury unless a jury be waived. The courts shall decide whether property is taken for public or private use, without regard to any legislative assertion that the use is public. Id., § 16. No special law shall be passed granting corporate powers or privileges, or releasing any portion of the debts, liability or obligation of any person or corporation. Art. II. § 28. Ownership of land, absolutely or in trust, by aliens who have not bona fide "declared their intentions" is prohibited, except where inherited or acquired under mortgage or in good faith in the collection of debts. This prohibition does not extend to lands containing valuable deposits of "minerals, metals, iron, coal or fire-clay," and the necessary lands for mills and machinery to be used in developing the same and manufacturing the products thereof. Corporations the majority of whose stock is owned by aliens shall be deemed aliens for the purposes of this prohibition. Id., § 33. Public officers shall not accept or usc passes from railroads or other corporations, or purchase transportation on favored terms. Id., § 39. The legislature shall provide a uniform and equal rate of taxatiou on the money value of all property, so that every person and corporation shall pay a tax in proportion to the value of his or its property. The legislature may provide by general law for the exemption of property from taxation. Art. VII, § 2. Corporation property shall be taxed as nearly as may be by the same methods as the property of individuals. Id., § 3. The power to tax corporations shall not be surrendered or suspended by any contract or grant to which the state may be a party. Id., § 4. The credit of the state shall not be given or loaned to or in aid of any corporation. Art. VIII, § 5. No county or municipality shall give any money or property, or loan its money or credit to or in aid of any corporation, or directly or indirectly own any of the stock or bonds of any corporation. Id., § 7. Corporations shall be formed under general laws only, and all laws relating to corporations may be altered or repealed by the

The acts of the legislature down to and including the laws of 1891 are included in this synopsis.

legislature at any time. All corporations doing business in the state may as to that business be regulated, or restrained by law. Art. XII, § 1. Each stockholder, except in banking and insurance companies, "shall be liable for the debts of the corporation to the amount of his unpaid stock and no more, and one or more stockholders may be joined as parties defendant in suits to recover upon such liability." Id., § 4. Stock shall not be issued except to bona fide subscribers therefor or their assignees, nor shall a corporation issue "any bond or other obligation for the payment of money except for money or property received or labor done." The stock of corporations shall be increased only in pursuance of general law, and no law shall authorize such increase without the consent of the holders of the majority in value of the stock, nor without due notice. "All fictitious increase of stock or indebtedness shall be void." Id., § 6.

Foreign corporations shall have no greater privileges than domestic corporations. Id., § 7. "No corporation shall lease or alienate any franchise, so as to relieve the franchise, or property held thereunder, from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise or any of its privileges," Id., § 8. "The state shall not in any manner loan its credit, nor shall it subscribe to or be interested in the stock of any company, association or corporation." Id., § 9. The exercise of the right of eminent domain shall never be abridged or construed so as to prevent the legislature from taking corporate property and franchises for public use the same as the property of individuals. Id., \$10. Only the lawful currency of the United States shall be put in circulation as money. "Each stockholder of any banking or insurance corporation or joint-stock association shall be individually and personally liable, equally and ratably and not one for another, for all contracts, debts and engagements of such corporation or association accruing while they remain such stockholders, to the extent of the amount of their stock therein or the par value thereof, in addition to the amount invested in such shares." Id., § 11. Any officer of a bank who receives deposits, knowing that the bank is in failing circumstances, "shall be individually responsible for such deposits so received." Id., \$12. "Any association or corporation organized for the purpose, under the laws of this state, shall have the right to connect at the state line with railroads of other states." Any railroad company shall have the right to "intersect, cross or connect with "any other railroad, and when railroads are of a similar gauge "they shall at all crossings and at all points, where a railroad shall begin or terminate at or near any other railroad," form connections for the speedy transfer of cars, and transfers shall be made without delay or discrimination. Id., § 13. No common carrier shall combine or contract with the owners of any vessel entering or leaving any port in the state, or with any common carrier, whereby "the earnings of one doing the carrying are to be shared by the other not doing the carrying." Id., § 14. No discrimination in charges or facilities shall be made by any transportation company between places or persons. No greater charges shall be made for a short than a long haul in the same direction. Id., § 15. Competing lines shall not consolidate their stock, property or franchises. Id., § 16. Rolling stock and other movable property of a railroad company shall be personalty, and shall be liable to taxation and execution like the personal property of individuals. Id., The legislature shall pass laws establishing reasonable maximum rates, and to correct abuses and prevent discrimination and extortion. A railroad and transportation commission may be established. Id., § 18. Telegraph and telephone companies may organize and construct lines, and may construct and maintain the same along the right of way of any railroad company, or they may exercise the same under the right of eminent domain. They shall receive and transmit each other's messages without discrimination or delay, and are declared to be common carriers subject to legislative control. Id., § 19. No transportation company shall grant free passes to any public officer or legislator in the state, nor sell them tickets at a greater discount than is allowed to the public. Id., § 20. All express

companies shall have equal rights respecting transportation over any and all railroads. § 21. "Monopolies and trusts shall never be allowed in this state, and no incorporated company, copartnership or association of persons in this state shall directly or indirectly combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders, or the trustees or assignees of such stockholders, or with any copartnership or association of persons, or in any manner whatever for the purpose of fixing the price or limiting the production or regulating the transportation of any product or commodity." Id., § 22. The territorial laws are continued in force, so far as the same are consistent with this constitution, until altered or repealed by the legislature. But this section shall not be construed to validate any territorial act granting shore or tide lands to any person or corporation. Art. XXVII, § 2.

Miscellaneous corporations. -- Any two or more may incorporate for any species of trade or business, according to the provisions of this chapter; "such corporations and the members thereof being subject to all the conditions and liabilities herein imposed and to none others; Provided, that no corporation shall commence business or institute proceedings to condemn land for corporate purposes until the whole amount of its capital stock has been subscribed: and provided further, that the provisions of the foregoing proviso shall not apply to corporations engaged exclusively in loaning money on real estate." Code of 1881, ch. 185, § 2421, Am'd Laws 1885-6, p. 84, Laws 1891, ch. 116. The corporators shall subscribe articles in triplicate which shall state (1) the corporate name: (2) the object: (3) the amount of capital stock and the number of shares: (4) the period of existence (which shall not exceed fifty years); (5) the number of trustees and their names, who shall manage the affairs for such period, not exceeding six nor less than two months, as the certificate may designate: (6) the name of the principal place of business. The articles must be duly acknowledged. One copy must be filed with the secretary of state, another with the county auditor, and the third retained by the company. Amendments are made by supplemental articles executed and filed in the same way. Id., \$ 2422. The filing of the certificate completes the incorporation. The stockholders, by their corporate names, may "purchase, hold, mortgage, sell and convey real and personal property." They may fix the compensation of officers, and prescribe their duties, require of them such security as they think proper, and remove them at will, "except that no trustee shall be removed from office unless by a vote of two-thirds of the stockholders as hereinafter provided." They may regulate the transfer of stock. Id., \$ 2424. There shall be not less than two trustees, all of whom shall be stockholders, and a majority of them American citizens and residents of the state, and they shall take an oath. In elections of trustees, each stockholder shall, in person or by proxy, "be entitled to as many votes as he may own or represent by proxy shares of stock." But "nothing herein contained shall prevent any corporation by their by-laws limiting such bona fide shareholder to a single vote, or one vote for every full share of paid-up stock, or its equivalent in assessable stock, disregarding the number of shares of stock he may own." Meetings for the purpose of removing trustees and electing their successors must be called by such notice as the by-laws prescribe. Vacancies occurring in any other manner are filled by the trustees. Id., § 2425. If an election is not held on the day appointed by the by-laws, it may be held on any other day as provided in the by-laws. Id., § 2426. The first meeting of the board shall be called by a notice signed by one or more trustees, which notice shall be delivered personally to each trustee, or published twenty days in a county paper. Id., § 2428. The stock of the company is personal estate. No transfer shall be valid, except between the parties thereto, until entered upon the books. Shares of stock are liable to attachment. Id., § 2429, and § 178. If the by-laws do not prescribe the times, manner and amounts in which subscriptions shall be made, the trustees may so prescribe. In all cases, notice of an assessment must be given personally, or by publication in a county paper: Provided, that the capital stock of a hank incorporated under this act shall be at least \$25,000, divided into shares of \$100 each, all of which shares shall be subscribed and three-fifths of the capital stock paid in before commencing business, the remainder to be subject to the call of the trustees. The trustees must file with the articles an affidavit that three-fifths of the capital has been paid in. Id., § 2430, Am'd Laws 1885-6, p. 84. Any stockholder may pledge his stock by a delivery of the certificate "or other evidence of his interest." but may still represent his stock at all meetings. Id., § 2432. It shall be unlawful for the trustees to make any dividend except from net profits, or divide or withdraw any part of the capital stock, and if this provision is violated, all the trustees present and not entering their dissent shall be "jointly and severally liable to the corporation and the creditors thereof, in the event of its dissolution, to the full amount so divided, reduced or paid out." Id., § 2433. No corporation organized under this chapter shall have the power to issue money, "except bonds by railroad companies, which shall at no time exceed double the amount of paidup stock issued by said company. Each and every stockholder shall be personally liable to the creditors of the company to the amount of what remains unpaid upon his subscription to the capital stock and not otherwise; Provided, that the stockholders of every bank incorporated under this act shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association accruing while they remain such stockbolders, to the extent of the amount of their stock therein at the par value thereof in addition to the amount invested in such shares." Banks must file an annual report with the territorial auditor. It is also further provided, "that the provisions of this section shall not apply to the debentures or bonds of any company duly incorporated under the provisions of this chapter, the payment of which debentures or bonds shall be secured by an actual transfer of real-estate securities for the benefit and protection of purchasers of said debentures or bonds, such securities to be at least equal in amount to the par value of such bouds or debentures, and to be first liens upon the unincumbered real estate, worth at least twice the amount loaned thereon; provided further, however, that such issue of debentures or bonds shall in no case exceed ten times the capital stock of the issuing corporation." Id., § 2434, Am'd Laws 1885-6, p. 84, Am'd Laws 1887-8, ch. 32. No executor, etc., shall be personally liable as a stockholder, but any person pledging stock shall be thus liable. Id., § 2435. The trustees shall keep a stockholders' book, for the inspection of creditors and stockholders, and if any clerk or officer in charge of the same shall make any false entries therein, or refuse to exhibit the book, or to furnish certified extracts therefrom when requested, he shall pay to the party injured from \$100 to \$1,000, with all damages resulting to such creditor or stockholder. For failure to keep such book the corporation shall forfeit \$100 for each day's neglect. Id., §§ 2436, 2437. The capital stock may be increased, or diminished to an amount not less than the corporate liabilities, by filing a certificate with the secretary of state and the county auditor, upon a vote of two-thirds of the stock. Id., §§ 2438-2440. Upon dissolution the trustees shall be trustees of the creditors and stockholders, and after settling up the corporate affairs they shall divide the property among the stockholders. Id., § 2441. Any corporation formed under this act may be dissolved by presenting a petition to the circuit court, upon a two-thirds vote of all the stockholders. Id., § 2442. The principal place of business may be removed to another county by filing with the county auditor of that county a certified copy of the certificate of incorporation; or to another city or town by a published notice of such removal once a week for four weeks in the paper nearest to the locality to which removal is made. Id., § 2444. Where the capital stock of a corporation "consists of the aggregate valuation of the whole number of feet, shares, or interest in any mining claim in this territory, for the working and development of which such corporation shall be or have been formed," no actual subscription to the capital stock shall be necessary; "but each owner in said mining claim shall be deemed to have subscribed such an amount to the capital stock of such corporation as under its by-laws will represent the value of so much of his interest in said mining claim, the legal title to which he may by deed, deed of trust or other instrument vest or have vested in such corporation for mining purposes," But assessments shall not be affected by the fact that the full amount of capital mentioned in the articles has not been subscribed as provided in this section, provided the greater part has been so subscribed. This section shall not be construed to prevent the stockholders from regulating subscriptions and assessments by their by-laws, or by express contract. Id., § 2446. Telegraph and telephone companies may exercise the right of eminent domain. They shall receive and transmit each other's messages without delay or discrimination. They may have a right of way along any railroad, and any railroad company which refuses such right of way shall pay as damages from \$1,000 to \$5,000 for each offense, and \$100 per day during the continuance thereof. Railroad companies shall show no discrimination respecting such companies. Laws 1887-8, ch. 33, Laws 1889-90, p. 572.

The right to use any lake, pond or flowing stream for "irrigation, mining or manufacturing purposes" or for water-works may be appropriated, and "the first in time is the first in right." Laws 1891, ch. 142. "In any contract of or for the sale of railroad equipment or rolling stocks, it shall be lawful to agree that the title to the property sold or contracted to be sold, although deliverable immediately or at any time or times subsequently, shall not vest in the purchaser until the purchase price shall be fully paid or that the seller shall have and retain a lien thereon for the unpaid purchase-money; and in any contract of or for the leasing of such property it shall be lawful to stipulate for a conditional sale thereof at the termination of such lease, and that the rentals may, as paid, be applied and treated as purchase-money, and that the title to the property shall not vest in the lessee or vendee until the purchase-price shall be paid in full, notwithstanding delivery to and possession by such lessee or vendee;" provided, that "no such contract shall be valid as against any subsequent judgment creditor or any subsequent bona fide purchaser for value and without notice, unless" the same be evidenced by a duly. acknowledged instrument filed with the county auditor, and each locomotive or car shall have the name of the vendor or lessor plainly marked on each side thereof, followed by the word "owner" or "lessor" as the case may be. 1883, p. 62. Any company operating a railroad in the state may take, own, sell and guaranty the bonds and stocks of irrigation companies, or may themselves own and operate irrigation ditches for reclaiming lands contiguous to their lines. Laws 1889-90, p. 121. The method of proceeding to appropriate lands, real estate or other property for corporate purposes, and of ascertaining and securing compensation therefor, is regulated by Laws 1889-90, p. 266. Any railroad company authorized to do business in the state may extend its railroads from any point named in the charter or articles, or may build branch roads from any point on its line, "or from any point on the line of any other railroad connecting or to be connected with its road, the use of which other road between such points and the connection with its own road such corporation shall have secured by lease or agreement for a term of not less than ten years from its date." Before building any such extension or brauch, the directors shall, by a resolution, designate the route, the estimated length of the road and the names of the counties through which it will pass, and a copy of the record containing such resolution must be filed with the secretary of state. Laws 1889-90, p. 558, § 1. Any such corporation may consolidate with any non-competing liue within or without the state upon such terms as may be agreed upon, with the right of further consolidation with other corporations. The articles stating the terms shall be approved by a majority in interest of the stockholders at an annual or called meeting or shall be assented to in writing by such stockholders. A copy of the articles, with a copy of the record of such approval or consent, "accompanied by lists of their stockholders and the number of shares held by each, duly certified by the respective presidents and secretaries," with the corporate seals affixed shall be filed with the secretary of state before such consolidation shall take effect. But "in no case shall the capital stock of the company formed by such consolidation exceed the sum of the capital stock of the companies so consolidated at the par value thereof. nor shall any bonds or other evidences of debt be issued as a consideration for or in connection with such consolidation." Any corporation whose line is wholly or partly within the state "may lease or purchase and operate the whole or any part of the railroad of any other railroad corporation, together with the franchises, powers, immunities and all other property or appurtenances appertaining thereto." Id., § 2. Any railroad corporation formed in the United States, whose constructed railroad shall reach the boundary of the state, may extend its road from any point or points to any place or places within the state, and may build branches from any point on such extension. But before building any such extension or branch the corporation must file with the secretary of state a record of a resolution of the board, designating the route and the estimated length of the road and the counties through which it will pass. The corporation then has the same privileges. etc., regarding the building of such road as though incorporated within the state. Id., § 3. "All such railroad corporations, consolidated companies and their branches, including their stock, property and franchises within the jurisdiction of this state," shall be subject to and controlled by the constitution and laws of this state. Id., § 4.

Foreign corporations.—Any foreign corporation whatever, organized for any of the purposes for which domestic corporations may be formed, may do any act that they could do if incorporated in the state. It may acquire, mortgage, sell or otherwise dispose of any real estate necessary for the corporate business, "and also any interest in real estate by mortgage or otherwise due to, or loans made by, such foreign corporations within the boundaries of this state, either prior to or after the passage of this act." But this act shall not be construed to grant more favorable terms to foreign corporations than are allowed to domestic corporations, and no corporation, the majority of whose stock is owned by aliens. who have not "declared their intentions," shall acquire the ownership of any lands in the state, other than lands containing valuable deposits of "minerals, metals, iron, coal or fire-clay," and the necessary lands for mills and machinery "to be used in the development thereof, and the manufacture of products therefrom, except when acquired under mortgage or in good faith in the ordinary course of justice in the collection of debts." No foreign corporation hereafter organized, "which has among its other powers the business of dealing in real estate, and buying and selling the same, and for the purpose of carrying on a realestate brokerage business," shall be allowed to carry on such transactions in real estate. Laws 1889-90, p. 398, § 1. Such corporation shall file with the secretary of state a copy of its charter or articles of incorporation, certified to by the custodian of the same, or by the officer who is authorized to issue the same by the laws of the state where the corporation was formed. Id., § 2. A resident agent shall be appointed by an instrument in writing, which shall be filed with the secretary of state. Id., § 3. Any agent of a foreign corporation, doing business in the name of the corporation, contrary to the provisions of this chapter, shall be fined not more than \$200, or imprisoned not exceeding three months, or be both fined and imprisoned. Code, § 2485.

Taxation.—"The owner or holder of stock in any firm or corporation, the capital or property whereof is assessed, must not be assessed individually for his stock in such firm or corporation." Code, § 2840, Am'd Laws 1891, art. 140, § 8. All stocks are personalty for the purposes of taxation. Laws 1891, ch. 140, § § 3, 8. The personal property of express and transportation companies shall be assessed in the county where it is usually kept. All vessels are assessed in the county where the owner, managing owner or agent resides. § 10. A form for a detailed

list is given. § 16. Every manufacturer must include in his list the value of all articles held for the purpose of being used in any process of manufacturing, combining, rectifying or refining. Such manufacturer shall list, as part of the stock, the value of all engines, machinery and tools, except such fixtures as are a part of the realty, § 19. The president, secretary or principal accounting officer of any corporation, "except as otherwise provided for in this act," shall deliver to the assessor a sworn statement of (1) the name and location of the company; (2) the realty of the corporation, and where situated: (3) the nature and value of the corporate personal property. The real and personal property shall be assessed the same as other realty and personalty. \$ 20. All banks "shall be assessed and taxed in the county, town, city or village where such bank . . . is located and not elsewhere." The accounting officer shall furnish to the county or city assessor an annual statement, verified by oath, giving the paid-up capital, the surplus or reserve fund, and the undivided profits, all of which shall be assessed and taxed as other like property in the state is taxed: Provided the legally authorized investments in real estate shall be assessed and taxed as other real estate, and the amount of such investment shall be deducted from the aggregate amount of the above-mentioned capital surplus and profits before the taxes are levied. \$21. The bank shall be liable for the shareholders' proportionate tax, and may pay the same out of the undivided profit or charge it to the account of the respective shareholders. § 23. Property held under contract for the purchase thereof shall be considered, for purposes of taxation, as belonging to the person so holding the \$ 24. Every railroad corporation shall annually return sworn schedules of taxable property, and file the same with the assessors of each county through which the road runs. The schedules shall show the value of the right of way in each county or village, and the value of improvements and stations thereou. SS 27, 28. All lands occupied and claimed exclusively as a right of way, "with all the tracks and all the substructures and superstructures which support the same, must be assessed as a whole and as real estate, without separating the same into lands and improvements, at a certain sum per mile, which sum, like other lands, shall be [the] full cash value thereof, and all such real estate situated in the state, occupied and claimed by any railroad company as such right of way, shall be deemed to be the property of such company for the purpose of taxation." § 29. "All railroad improvements, other than the track and the substructures and superstructures which support the same," whether situated upon the right of way or other lands, must be assessed as personalty. § 30. "The value of the 'railroad track' shall be listed and taxed in the several counties in the proportion that the length of the main track in such counties bears to the whole length of the road in the state, except the value of side and second tracks, and all turnouts and all station-houses, depots, machine shops or other buildings belonging to the road, which shall be taxed in the county in which the same are located." § 31. The movable property of railroads shall be deemed personalty, and, for the purpose of taxation, shall be called "rolling stock." A complete schedule of such property shall be annually furnished to the county assessors. § 32. The rolling stock shall be listed and taxed in each county "in the proportion that the length of the main track used or operated in such county bears to the whole length of the road used or operated by such person, company or corporation, whether owned or leased by him or them in whole or in part." The schedule shall set forth the number of miles of main track on which said rolling stock is used in Washington, and the number of miles of main track on which the same is used elsewhere. § 33. All personal property other than "rolling stock" shall be assessed in the county where the same may be on the 1st day of April in each year. All real estate, other than "railroad track," shall be listed as "lands or lots, as the case may be," in the county where it is located. § 34. At the time of returning the above-required schedules. the corporation shall also furnish to the state auditor a complete schedule, containing in minute detail a list of all the various kinds of corporate property, for which a form will be furnished by the auditor. The schedule shall include a statement of (1) the authorized capital and the number of shares: (2) the paid-up capital: (8) the market value, or, if there is no market value the actual value of the shares: (4) the total indebtedness exclusive of the current expenses of operation: (5) the total listed valuation of all the tangible property in the state. § 36. For failure to make such schedules to the county assessor or state auditor, the corporation shall pay, as a penalty, not less than \$10,000 for each offense. Telegraph and telephone companies shall return like schedules to the county assessors. according to a form furnished by the state auditor, and all their property "shall be subject to the same levies as the property of individuals and the same rules that govern other companies and corporations." § 39. For failure to make the required return, or for a false statement therein, the company shall be liable to a penalty of from \$10 to \$2,000. § 40. The person making a false statement in such list shall also be guilty of perjury. § 41. Insurance companies pay, in lieu of all other taxes on the personal property of the company, and the shares of stock therein, an annual tax of two per cent, on the gross receipts of the company, less the losses paid in the state of Washington. The penalty for failure to make the required statement, or pay the tax, is \$100 for each day's delay. \$42. The realty of such companies is taxed like other real estate. Id. Corporations are liable for the poll tax of employees, and may deduct the same from their wages. §§ 60, .61. The state board of equalization reviews the value fixed by the county assessors. The state board shall levy the state taxes, which shall not in any one year exceed three mills on the dollar. §§ 71-74. The maximum county tax is fixed at eight mills on the dollar: the school tax at six mills: the road tax at five mills: the bridge tax at two mills; and all other taxes are levied "in accordance with the state laws," § 74. All mineral lands are assessed at their actual value. Code. § 2859. The county assessors must report annually to the secretary of state the names of all foreign corporations and their agents doing business in the state, giving the nature of their business. § 2482. The provision for taxing the gross earnings of railroads is repealed. Laws of 1887-8, ch. 105. It is enacted "that the taxes upon the property of railroad companies in this territory shall hereafter be assessed, levied and collected as the taxes upon the property of individuals in this territory are assessed, levied and collected, and that all the provisions of law now in force, or that may hereafter be put into operation in this territory, providing for the assessing, levying and collecting of taxes upon the property of individuals, shall, unless otherwise provided, apply and be applicable to the assessing, levying and collecting of taxes upon the property of railroad companies." Laws 1887-8, ch. 125,

§ 977. WEST VIRGINIA: 1 Constitutional provisions. - All property, real or personal, shall be taxed in proportion to its true value. The legislature may, by uniform and equal laws, tax all privileges and franchises of persons or corporations. Constitution of 1872, art. X, § 1. The credit of the state shall not be given to, or in aid of, any corporation or person; nor shall the state become a stockholder in any corporation whatever. Id., § 6. The legislature shall provide general laws for the organization of corporations, uniform as to the class to which they relate; but no corporation shall be created by special act. Art. XI, § 1. The stockholders of all corporations and joint-stock companies, except banks, created by the laws of the state, "shall be liable for the indebtedness of such corporations to the amount of their stock subscribed and unpaid, and no more." Id., § 2. Cumulative voting shall be allowed at all elections. Id., § 4. The legislature shall not grant the right to construct street railroads within any city, town or incorporated village "without requiring the consent" of the local authorities. Id., § 5. Railroad corporations shall report annually to the state auditor, or some other officer designated by law. Id., § 7. Rolling stock and other movable property

The acts of the legislature down to and including the laws of 1893 are included in this synopsis.

shall be considered personalty, and be liable to execution and sale. Id., § 8. The legislature shall pass laws, of general application, fixing maximum rates, for the correction of abuses, and the prevention of discriminations. Id., § 9. Consolidation with or the control of a parallel or competing line, "without the permission of the legislature," is forbidden. Id., § 11. Corporate property may be taken under the right of eminent domain, like the property of individuals. Id., § 12.

Miscellaneous corporations.—The corporations formed under this chapter are subject to the provisions of chapters 52 and 53, so far as the same are applicable. (See MISCELLANEOUS PROVISIONS.)

Corporations may be formed under this chapter for any lawful business, including railroad business and other works of internal improvement. Code of 1891, ch. 54, §§ 1. 2. But this chapter shall not be construed to authorize the formation of any corporation whose object, or one of whose objects, is to deal in real estate for profit. § 3. The capital stock of corporations formed under this chapter, except for canal or railroad purposes, shall not exceed \$5,000,000. § 5. Five or more may incorporate, except for railroad purposes, by making and signing an agreement, for which a form is prescribed in this section. The agreement shall state (1) the corporate name and purpose; (2) the principal place of business; (3) the period of existence: (4) the capital stock subscribed by the corporators, the amount paid in and the desired amount of increase; (5) the par value of the shares. All subscribers shall pay ten per cent of the par value of their stock at the time of subscribing. § 7. The affidavits of two corporators shall be annexed to the agreement, to the effect that the amount stated to have been paid has bona fide been paid in for corporate purposes, without any understanding that the same shall be withdrawn before the expiration of the corporation. § 8. The agreement, properly acknowledged, and the affidavits, shall be filed with the secretary of state, who shall then issue a certificate of incorporation. §§ 9, 10. Any corporation formed for mining, manufacturing, insurance, mercantile and a few other purposes may, with the approval of a majority of the stockholders, representing a majority of the capital stock, at a special meeting, adopt a new agreement, so as to enlarge or diminish the objects of the corporation, without changing the nature of the corporate business: or so as to increase or diminish the number of shares. A copy of such resolution shall be filed with the secretary of state. § 10. No corporation formed hereunder, except insurance, banking, railroad and other internal improvement companies, shall continue for more than fifty years. § 11. Existing corporations, excepting banking and internal improvement companies, may accept the provisions of this chapter and chapter 53. \$\ 12-14 (Act of 1881). A majority of the corporators may appoint a time and place for holding the first meeting, for the election of directors, to make by-laws, and transact other business. Such time shall be between twenty-one and ninety days, both inclusive, from the date of the certificate, and a two weeks' notice shall be given. § 15. After the certificate has been issued, and before the directors have been "elected or qualified," additional stock may be disposed of, so that the maximum be not exceeded, by the corporators, or those holding a majority of the shares, subject to the provisions of sections 23-27 of chapter 53 (see MISCELLANEOUS PROVISIONS). § 16. Any corporation formed under this chapter may, by a resolution passed by a majority stock vote, at a special or general meeting, noticed four weeks, certified and filed with the secretary of state, increase or diminish the number or par value of the shares of stock. §§ 21, 22. Stockholders' or directors' meetings, including the first meeting, may be held out of the state, and the principal office may be kept anywhere in the United States; but the assent of a majority of the stock shall be had for holding such meetings without the state, and reasonable notice of the meetings shall be given. § 23. Every corporation having its principal office within the state shall appoint some person with power of attorney, in the county where the business is carried on, or if the principal office is out of the state, some person residing in the state, to accept service of legal process and list property for taxation. Such agent shall be appointed within thirty days after organization. The power of attorney shall be recorded with the county clerk and the secretary of state 824

Railroads. - Five or more may incorporate. The articles of incorporation shall state (1) the corporate name: (2) the termini: (3) the principal office: (4) that the corporation shall continue perpetually; (5) the capital stock and the value of the shares: (6) the names and residences of the cornorators and the number of shares subscribed by each. Ch. 54 §§ 31, 32. The articles shall be properly acknowledged and filed and recorded with the secretary of state. \$33. The secretary of state shall then issue a certificate of incorporation. The corporation shall have perpetual succession. "It may declare the interest of its stockholders transferable," and shall make by-laws, rules and regulations. \$ 34. The by-laws shall be recorded with the secretary of state; also all additions or amendments thereto. § 35. The first meeting shall be held at such time and place as a majority of the corporators decide upon, of which notice shall be published once a week for four weeks in a local paper and two other papers. The owners of a majority of the shares shall elect a temporary board of directors, consisting of such number as they desire. But before such meeting subscription books must be opened, at such places and by such persons as the majority may determine, five per cent, of the stock, including that held by the original corporators, must be subscribed, and ten per cent. of such subscription must be bona fide paid in. The stockholders shall, at the meeting provided for herein, appoint the time and place for the first annual meeting and designate the principal place of business, and may perform all business proper to be done at a stockholders' meeting, § 36. The company shall, by power of attorney, appoint an agent in the county in which the principal office is kept, to receive service of process. Failure to do so subjects the corporation to a forfeiture of from \$500 to \$1,000 for each six months' delay, and makes the corporate property liable to attachment like that of non-residents. § 37. At each annual election from five to thirteen directors shall be elected. A majority shall constitute a quorum unless otherwise provided by the by-laws. The number of directors, the manner of their election and removal from office, and the mode of filling vacancies, shall be prescribed by the by-laws, and shall only be changed at the annual meeting. At every annual meeting except the first, the president and directors shall exhibit a full and distinct statement of the corporate affairs; and a similar statement may be required by a majority of the stock represented at any meeting. At any general meeting, a majority of all the stock may fix the rates of interest to be paid for loans for construction purposes, and the amount of such loans. The stockholders may examine all the records and books. § 38. Onefourth of the stock, or a majority of the directors, may call special meetings. Two-thirds of the stock must be represented at special meetings. § 39. Stockholders' and directors' meetings may be held out of the state. The principal office or place of business may be out of the state. But an office shall be kept within the state where "an exhibit of the transfers of all stock" shall be kept, and where complete stock-books and books showing the condition of the company shall be kept. § 40. Failure to elect directors at the appointed time shall not dissolve the corporation, if an election is held within six months thereafter. § 41. The directors may call in subscriptions in such manner and in such instalments as they deem proper. § 43. Stock is personalty, and shall be transferable in the manner prescribed by the by-laws. No share shall be transferred without the consent of the board, until all previous calls thereon are paid. § 44. The capital stock may be increased at an annual meeting, or at a special meeting, upon a two-thirds stock vote. The resolution authorizing the increase shall be recorded with the secretary of state. § 45. Subscribers are individually liable to corporate creditors "for any sum remaining unpaid on the stock subscribed for" by them, and no further, "for the payment of any debts or liabilities of such corporation." But transferees are, in no case, liable to corporate creditors for any sum whatever,

"which may be due or unpaid on such stock, or any part thereof due from another." § 47. A railroad corporation may, by agreement with a municipality, take and use a street or road in such municipality, and exchange therefor and dedicate to the public use any real estate acquired by the corporation, by condemnation or purchase. § 48. Or under agreement with the municipality may condemn land for such new street. Id. Construction materials wood, earth, gravel or stone - in the vicinity of the road may be taken by condemnation. § 49. Every corporation formed under this chapter shall have, among the usual corporate powers, the power (1) to take, hold and convey voluntary grants of real estate and other property "in aid of the construction and use of its railroad," provided the terms of the grant are complied with; (2) to purchase, hold and convey any property necessary for the cornorate purposes: (3) to change the route or termini, for the improvement of the road and the good of the public, upon a vote of two-thirds of the stockholders, a copy of which resolution of the stockholders shall be recorded with the secretary of state: (4) to construct its railroad across, along or upon any street, road or water, it being the duty of the corporation to restore any such road, etc., to its former state of usefulness, as nearly as may be; (5) to cross, "intersect, join and unite" its road with any other railroad, at any point, with the necessary switches, etc.; (6) "from time to time to borrow such sums of money as may be necessary for completing, finishing, improving or operating" any such railroad, "and to issue bonds, bills of credit or indebtedness and preferred stock, and dispose of the same for the amount so borrowed; and to mortgage its corporate property and franchises, to secure the payment of any debt contracted by such corporation for the purpose aforesaid;" but two-thirds of the stock must, by a resolution passed and recorded as provided in section 45, authorize such mortgage; (7) "to mortgage its property, real and personal, and its franchises, to secure any bonds or stock issued by such corporation for any of the purposes designated in the fifty-second section of this chapter." § 50. Rolling stock and other movable property shall be deemed personalty, and be subject to execution and sale. § 51. "Every such railroad corporation may sell, issue and transfer its stocks or bonds, or both, for land, money, labor, property or other materials to be used for the purposes for which the corporation was formed, and especially for the construction and equipment of its railroad: and in case it be found necessary to do so, it may sell and dispose of the same at less than the par value. But no such corporation shall issue any stock, or declare any stock dividend, except as aforesaid, for any sum which shall exceed the net earnings of such corporation, and which shall have been actually and in good faith applied and invested in and for the purposes of the corporation. All other stock dividends, and all fictitious increase of the capital stock, or indebtedness of any such corporation, shall be void." § 52. Any domestic company may, upon a vote of the "stockholders owning a majority of the stock present at any general or special meeting," extend its line beyond either or both of the original termini, and such extension may, with the consent of the adjoining state, pass in and out of the state as often as necessary. A certificate of the proposed extension shall be filed with the secretary of state. No railroad wholly or partly within the state shall consolidate with a parallel or competing line, but any company owning such road, completed or in process of construction, may merge or consolidate with, or lease its railroad or any part thereof, for a term of years to "any other corporation of this or an adjoining state owning or operating a line of railroad completed or in process of construction, wholly or partly within this or an adjoining state," and connected directly or by means of an intervening road or roads, in order to make a continuous line, with or without change of cars, or break of bulk, or transfer of passengers or freight; "and may sell to or purchase such connecting line of railroad." The terms and conditions of any such arrangement shall he approved by a majority of the stock of each company. No sale or consolidation shall take place, except after sixty days' published notice. § 53.

Annual reports shall be made to the auditor after a form prescribed in section 67 of chapter 29. § 54. The legislature may, from time to time, enact laws applicable to all railroads of the state, fixing maximum rates, correcting abuses. preventing discrimination, and preserving the rights of the public. § 55. Cumulative voting shall be allowed. § 56. Counties, towns and municipalities may subscribe for stock in corporations formed under this chapter. \$\\$ 57-60. Profile maps of the route shall be filed with the secretary of state and the county clerks of the counties cut by the road. § 65. If construction is not begun within two years after filing the articles, and ten per cent, of the "amount of its capital" is not spent thereon within three years from the date of organization, and the road is not finished and put in operation within ten years after filing the articles, the corporate existence and powers shall cease. § 66. Subscriptions may be payable in "lands, property, material, work, labor and otherwise," upon such terms and conditions as may be agreed upon between the directors and owners. and the company "may also receive, purchase and hold real estate as a basis for the construction of the railroad of any such corporation," and may issue stock or bonds, or both, "for the payment of the same," upon such terms as the "stockholders, directors or owners thereof may agree upon and determine," and may sell such real estate "upon such terms and conditions as the corporation may authorize." § 68. Branches not exceeding fifty miles in length may be built, and telegraph lines may be constructed and operated by the company along any part of its road. \$ 69. The owner of any timber lands or timber, quarries, mills, oil or salt wells, coal mines, lime kilns "or other real estate," not more than twelve miles from any railroad, canal or "slack-water navigation," may condemn land and build a railroad to connect his property with such railroad or water-way. He shall transport the freight offered along the route of his road. No franchise or right of way thus acquired shall be leased or otherwise transferred without the consent of the legislature. § 69 (a). A judicial sale of railroad works and property, by virtue of a deed of trust or mortgage, or under a decree of the court, and a conveyance thereof, shall pass to the purchaser or purchasers "not only the works and property of the corporation as they were at the time of making the deed of trust or mortgage, but any works which the company may, after that time and before the sale, have constructed, and all other property of which it may be possessed at the time of the sale, other than debts due to it. Upon such conveyance to the purchaser the railroad company shall, inso facto, be dissolved, and the said purchaser shall forthwith be a corporation by any name which may be set forth in said conveyance, or in any writing signed by him or them, and recorded in the office of the clerk of the county court of any county wherein the property so sold, or any part thereof, is situated." § 72. The corporation so created shall succeed to all the rights, franchises and privileges (except immunity from taxation) which the original company enjoyed, and be subject to the same duties; but it shall not be entitled to the debts due the first company, or be liable for its debts or claims not expressly assumed. The interest of the purchaser in the corporation shall be personal estate, and he or his assignees may create so many shares of stock therein as he or they may think proper, not exceeding together the amount of stock in the first company at the time of the sale, and assign the same in a book kept for that purpose. The said shares shall thereupon be on the footing of shares in joint-stock companies generally, except only that the first meeting of the stockholders shall be held on such day and at such place as shall be fixed by the said purchaser, of which notice shall be published for four weeks in a paper of each county in which the corporation may do business. § 73. Any railroad company may, upon a vote of two-thirds of the stock, "become surety for, or guaranty the bonds, stock or debt" of another railroad company, "or in any other manner aid such railroad company in the construction of its railroad or other works or improvements," or lease its road to any railroad corporation in the state. But this section shall not be construed to authorize any consolidation

with or control of a competing or parallel line. § 82 (a). Any company authorized to issue bonds may issue either coupon or registered bonds, or both, and may, at the request of the holders, change registered to coupon bonds, or vice versa, such changed bonds being entitled to the same protection and security as the original bonds. § 82 (b). An exhaustive classification of railroads is made, and maximum rates are prescribed for each class. § 82 (c).

Miscellaneous provisions. -- If no time is limited in the charter the corporato existence shall be perpetual. Ch. 52, § 1. "Unless specially authorized, no corporation shall purchase real estate, in order to sell the same for profit, or hold more real estate than is proper for the purposes for which it is incorporated. subscribe for or purchase the stock, bonds or securities of any joint-stock company, or become surety or guarantor for the debt or default of such company." § 3. [See ch. 54, § 82 (a), and ch. 53, § 8.] But a "mining, manufacturing, oil, salt or internal improvement company" may lay out a town not to include more than six hundred and forty acres, at or near its works, and sell lots therein; and "any corporation" may take "real estate, stocks, bonds and securities," in full or part payment of "any debt bona fide owing to it, or as a security therefor, or may purchase the same if deemed necessary to secure or obtain payment of any such debt, in whole or in part, and may manage, use and dispose of what has been so taken or purchased, as a natural person might do: and any corporation may compromise or purchase its own debt, and establish and manage a sinking fund for that purpose," and any manufacturing company may, upon a two-thirds stock vote-"subscribe for or purchase the stock, bonds or securities of any corporation formed for the purpose of manufacturing or producing any articles or materials used in the business of such joint-stock company, or dealing in any articles or materials manufactured or produced by such joint-stock company, or constructing a railroad, or other work of internal improvement," through or into the county in which the principal place of business of such joint-stock company may be, "or operating a railroad or other work of internal improvement so constructed, and may, with like assent, become surety for or guaranty the debts of such corporation, or in any manuer aid it in carrying on its business." § 4: and ch. 53, § 3. No company shall occupy any street in a city, town or village without the consent of the local authorities, unless under special provision of law. § 10. Any internal improvement company may enter upon any convenient lands and condemn wood, gravel, etc., for purposes of construction or repair. § 14. No corporation shall plead usury as a defense. § 22. If a corporation is not organized and business begun within one year from the date of its certificate of incorporation, the certificate shall be void. Ch. 53, § 6. If the corporate business is suspended for two successive years, "the corporate rights and privileges shall cease." § 7. The legislature may annul or repeal any corporate charter or franchise, or any law applicable to any corporation, with due regard to justice. § 8. The amount of each share shall be prescribed by the charter, but shall be uniform for all shares. § 15. The stockholders may, by resolution or by-law, provide for or authorize the issue of preferred stock, on such terms and conditions as they deem proper; but the maximum capital stock shall not be exceeded, and four weeks' published notice must be given of the intention to offer such resolution or by-law. § 16. If the number of stockholders shall be less than five for any six months continuously, the corporation shall be dissolved. § 17. If the corporation acquire its own stock, it may either extinguish or sell the same. Stock thus extinguished shall operate as a reduction of the capital stock. No vote shall be cast on any stock owned by the corporation. § 18. The person in whose name shares stand on the books is the owner so far as the corporation is concerned. § 19. Shares are personalty. § 20. A transfer book shall be kept, in which transfers shall be made under such regulations, "if there be any," as the by-laws prescribe. § 21. No share shall be transferred without the consent of the board of directors, until fully paid up. § 22. "In no case shall stock be sold or disposed

of at less than par in order to increase the capital" of any corporation; but this section shall not be construed to prevent mining companies from issuing "stock or bonds and negotiating the sale of the same," in payment of real and personal estate for the corporate uses, at such prices and upon such conditions as may be agreed upon; and any subscription to the stock of such companies may be paid in property, upon the terms agreed on. § 24. At least ten per cent. of the par value of each share in any corporation shall be paid at the time of subscribing, and the balance as the directors may require. § 25. "No stock shall be regarded as taken, or the person subscribing therefor considered entitled to the same, until the first instalment is paid thereon." \$ 26. If the subscriptions at any time exceed the "maximum capitial, or the amount of capital to be disposed of," they shall be reduced to the proper amount by deducting the excess from the largest subscriptions, so that no subscription shall be reduced while any other remains larger. \$ 27. Security may be required for any amount unpaid on subscriptions. §§ 31-34. Certificates of stock shall show the amount paid on each share. § 35. A stockholder to whom a certificate has been issued shall not transfer the shares mentioned therein, or any part thereof, without delivering the said certificate to the corporation for cancellation, unless it is lost or destroyed. \$ 36. If the board declare a dividend by which the capital stock is diminished, all the members present and not recording their dissent shall be "jointly and severally liable to the creditors of the corporation for the amount the capital may have been so diminished," and every stockholder shall be liable to creditors for the amount so received by him. § 40. Stockholders' meetings may be called at any time by the board or one-tenth of the stock. § 41. number of stockholders or the amount of stock necessary for a quorum may be prescribed by the by-laws. If there is no such by-law, a majority of the stock must be represented at any meeting. § 42. Cumulative voting shall be allowed. § 44. No officer or director shall vote as the proxy of a stockholder. § 45. The board shall present at the annual meeting a complete report of the condition of the All the corporate property, funds, books, correspondence § 46. and papers shall at any time be subject to the inspection of a committee of the board, or a committee appointed by a stockholders' meeting. The minutes of the board shall, for thirty days before the annual meeting, he open to the inspection of any stockholders, and shall be produced at any general meeting upon request. § 47. If the by-laws do not prescribe a place for holding stockholders' meetings. they shall be held at the principal office. § 48. There shall be five directors, unless the by-laws prescribe the number. The stockholders may also by by-law prescribe the qualification of directors; but if not otherwise provided, directors must be residents of the state and stockholders. The stockholders, in general meeting, may remove any director and fill the vacancy; vacancies otherwise caused are to be filled by the board. A majority of the board shall be a quorum unless the by-laws provide otherwise. § 49. "No member of the board shall vote on a question in which he is interested otherwise than as a stockholder, except the election of a president, or be present at the board while the same is being considered; but if his retiring from the board in such case reduces the number present below a quorum, the question may nevertheless be decided by those who remain." § 52. The board may appoint officers and agents and fix their compensation; "but there shall be no compensation for services rendered by the president or any director, unless it be allowed by the stockholders." § 53. The directors shall cause correct books of account to be kept, and to be balanced every six months. § 54. For proceedings to dissolve a corporation, see §§ 56-59. The court may, upon the application of a creditor or stockholder, appoint one or more receivers. This provision applies also to foreign corporations. § 58. The corporate books, papers and property may be inspected at any time by a legislative committee. § 60. Corporations shall not hold more than one hundred acres of land; but a company for mining iron, lead or copper, and manufacturing the

same, may hold ten thousand for every charcoal blast furnace, and three thousand for every other furnace; companies for mining and selling coal, ten thousand acres each; other mining companies, salt companies and oil companies, three thousand acres each; other manufacturing companies one thousand acres each. Not more than five acres shall be held in any incorporated town or city, except as provided in section 4 of chapter 52. § 62. A married woman may vote as a stockholder. Laws 1893, ch. 3. For surety companies, see Laws 1893, ch. 27.

Foreign corporations.—Any foreign corporation may, "unless it be otherwise expressly provided," hold property and transact business in the state, upon complying with the provisions of this section, and not otherwise. Such corporation so complying shall, in all respects, stand on the footing of domestic com-The corporation shall file with the secretary of state a copy of its charter and of the law and authority under which it was incorporated. The secretary of state shall issue a certificate of the fact of such filing, which shall be filed and recorded with the clerk of the county court of the county in which its business, or a part thereof, is to be transacted, and a copy of the charter shall be filed with such clerk. Railroad companies doing business hereunder are declared to be domestic corporations. Such railroad corporations as are the lessees of railroad property and franchises in the state shall, besides complying with the above provisions, file with the secretary of state an acceptance of the provisions of this section, and its failure so to do may be pleaded in abatement of any action or proceeding. For doing business in the state contrary to the provisions of this section, a corporation shall be fined from \$500 to \$1,000 for each month's offense.

For every certificate issued hereunder the secretary of state shall be paid \$5. Ch. 54, § 30.

Taxation. - When the "property, stock or capital" of any company is assessed to the company, no shareholder therein is taxed on his shares. Ch. 29. 8 51. The assessors shall ascertain from the proper officers of corporations in their districts ("except railroads and foreign insurance, telegraph and express companies") the actual value of the capital employed or invested in the business (exclusive of real estate and property exempted by law), and enter the same as personal property. The real estate shall be taxed like that of individuals. The value of the capital shall be estimated by taking the aggregate value of all the personal property, not exempted from taxation, wherever situated, including money, credits and investments, in or out of the state, and deducting from the money, credits and investments (and not from said aggregate) "what they owe to others as principal debtors." Each part shall be assessed separately. All property of transportatation companies (except railroads), real or personal, shall be taxed where situated. When the capital of a company is assessed as aforesaid, the personal property thereof shall not be otherwise assessed, nor shall individual shareholders be assessed on their interests in the capital. § 64. Railroad corporations must make a very full report to the auditor, specifying, among other details, the whole length of the road within and without the state, including branches; the whole number of miles in each county, including hranches and switches, and the fair cash value thereof per mile; also a detailed statement of all rolling stock, used wholly or partly within the state, giving the fair cash value of the part used wholly within the state and of the portion used partly within the state; all buildings and structures, including telegraph lines, and the cash value thereof; all personal property, including moneys, credits and investments, wholly held or used in the state: a detailed statement of the capital subscribed and paid in, gross earnings in and out of the state, and gross expenditures. The tax shall be levied on the fair cash value of all the property, as ascertained from the said report and other sources, in each county through which the road runs, like taxes on the property of individuals, for all state and local purposes. All buildings and other real estate not used for railroad purposes shall be taxed the same as like property of individuals. Every company incorporated in the state whose principal place of business or chief works are in the state shall pay an annual license tax of \$10. Such companies whose principal place of business or chief works are outside the state shall pay an annual license tax of \$50. Failure to pay the license tax forfeits the charter. Ch. 32, §§ 86-88; also ch. 29, L. 1887, §§ 86-88. The provisions of sections 86-88 above apply to foreign corporations doing business in the state. Ch. 54, § 30. The fees of the secretary of state are \$4 for every certificate issued by him; and for recording the original articles, or issuing a certified copy, fifty cents, or, in lieu thereof, fifteen cents per hundred words. Ch. 54, § 18. A fee of \$50 is also charged upon incorporation if the principal place of business is out of the state. Ch. 29, L. 1887, § 87.

§ 978. WISCONSIN: 1 Constitutional provisions.—The credit of the state shall never be given in aid of any person or corporation. Constitution of 1848, art. VIII, § 8. Corporations without banking powers may be formed under general laws only, unless the object of the corporation cannot be attained under general laws. Art. XI, § 1. Any general or special act may be repealed. Id. No special act shall grant corporate powers or privileges. Art. IV, § 31, of the Amendments.

Miscellaneous corporations.—Three or more adult residents of the state may incorporate for any lawful business or purpose whatever, except banking, insurance, building or operating railroads, or plank or turnpike roads, "or other cases otherwise specially provided for." Executors or trustees under a will, if authorized by the will so to do, may form a corporation, individually or as executors. or together with the legatees, and may subscribe for stock "to the amount of the value of the property mentioned and referred to in such will," and the executors or trustees may convey such property to such corporation "in payment of the stock so issued and subscribed without application to or authority from any court." Annotated Statutes 1890, ch. 86, § 1771, Am'd Laws 1891, ch. 403. The articles of incorporation of a corporation formed under this chapter shall specify (1) the corporate purpose; (2) the name and location; (3) the capital stock, the number of shares and the amount of each: (4) what general officers there shall be and their duties, and the number of directors (not less than three): (5) "the method and conditions upon which members shall be accepted, discharged or expelled" (but only stockholders can be members); (6) any other provisions consistent with law, "including, if desired, the duration of its existence." The articles may require the directors to be divided into three classes, one-third to be elected each year; but the first board shall be elected for one year. A copy of the articles, verified by the affidavits of two signers, shall be filed with the recorder of the county in which the corporation is located; "and no corporation shall, until such articles be so left for record, have legal existence. A like verified copy shall, within sixty days, be filed with the secretary of state, and for a failure so to do, each signer of any such articles shall forfeit twenty-five dollars." § 1772. The signers shall direct the corporate affairs until directors are elected. The first meeting may be held at any time after one-half the capital is subscribed, and may be called by two signers, giving ten days' personal notice in writing or two weeks' notice in a local paper. No such corporation shall transact business with any one but its members until one-half the capital is subscribed and twenty per centum thereof paid in; "and if any obligation shall be contracted in violation hereof, the corporation offending shall have no right of action thereon; but the stockholders then existing of such corporation shall be personally liable upon the same." § 1773. Amendments may be made upon a two-thirds stock vote, unless the articles prescribe otherwise. They must be filed like the original articles, under the same penalty for failure. § 1774. Any such corporation may take by gift, devise, purchase or otherwise, and manage and dispose of at pleasure, real and personal property of any kind, necessary for its "business or purposes," and "such as shall be taken in payment or security for debts due to such corporation." No such corporation "shall take or hold stock

The acts of the legislature down to and including the laws of 1893 are included in this synopsis.

in any other corporation, except upon and with the assent of the holders of three-fourths of the capital stock of both the corporation proposing to take such stock and the corporation in which it is proposed to be taken;" but lumber or river improvement companies may, upon a three-fourths vote, take stock in like companies; any mining or manufacturing company may, by a like vote, take stock in a company which furnishes them power or light; and manufacturing companies in the cities or towns of the state may, by the same vote, take stock in other like manufacturing companies. This section shall not apply to railroad corporations § 1775, Am'd Laws 1891, ch. 403, ch. 234 and ch. 283. A turnpike company may purchase the property and franchises of another turnpike company at a judicial sale. Laws 1893, ch. 82.

For insurance companies, see Laws 1893, ch. 115. For boom companies, see Laws 1893, ch. 260.

Railroads.—Five or more may incorporate for constructing and operating a railroad, or for operating a road already constructed. The articles shall state (1) the corporate name; (2) the termini, the length of the road and the names of the counties to be intersected; (3) the amount of the capital stock, the number of shares and how much preferred stock, if any: (4) the names and residences of the directors for the first year (the number to be from five to thirteen). Each subscriber shall state how many shares he will take. There shall be annexed to the articles the affidavits of three directors that the signatures are genuine and that it is intended in good faith to construct, or maintain and operate, the railroad. The articles and affidavits shall be filed and recorded with the secretary of state, whereupon a patent shall be issued by the governor and secretary of state. Ch. 87. \$ 1820. If the capital stock is not all subscribed, the directors may, after receiving the patent, open subscription books, at such times and places, and after such notice, as they deem proper. § 1821. Directors shall be elected "at such time, in such manner, and for such terms," as the by-laws may prescribe. But each stockholder shall have one vote for each share owned by him for thirty days before the election. Vacancies shall be filled in the manner provided by the by-laws. Directors shall be stockholders and be qualified to vote at the election at which they are chosen. At every election the books and papers shall be exhibited if a majority of the stockholders present require it. § 1822. Subscriptions may be called in in such manner and in such instalments as the directors require. § 1824. The directors may, within one year from the filing of the articles, classify the directors, so that the term of one-third shall expire at the next election, and onethird at each subsequent election, § 1824 (a). Stock shall be personal estate and transferable in the manner fixed by the by-laws. But no share shall be transferred until all previous calls have been paid. § 1825. The capital stock may be increased to a necessary amount, upon a vote of two-thirds of all the stock. § 1826. In addition to the powers given corporations by chapter 85, every railroad corporation shall have power (1) to take and hold voluntary grants of any kind of property for the use of its road, such property to be held for the purposes of the grant only; (2) to acquire any necessary property; (3) to "cross, intersect, join and unite" its railroad with any other railroad, with the necessary switches, etc.; (4) to borrow, from time to time, such sums of money, at such rates of interest, and upon such terms, "as the corporation or board of directors shall agree upon and authorize as necessary or expedient," to execute trust deeds or mortgages, or both, on any part of the railroad constructed or being constructed, and to make provision therein for transferring all the corporate property, rights, exemptions and franchises, then owned or to be thereafter acquired, as security for any evidences of debt. In case of sale under such trust deed or mortgage, "the persons acquiring title under such sale, and their associates, successors and assigns, or such corporation as they shall organize, according to section 1820, with all the powers conferred upon reorganized corporations by section 1788 [see General Provisions], shall thereafter have, exercise and enjoy all such described grants, which were purchased at such sale,"

including all rights, immunities, franchises, etc., mentioned in the deed or mortgage, which were possessed by the mortgagor, "so far as the same relate or appertain to that portion or line of road granted or mortgaged and purchased at such sale, and no further, as fully and absolutely in all respects as such corporation, its shareholders, officers and agents might have done if such sale had not taken place. And whenever the person so acquiring title under any such sale shall own or represent a majority in amount of the bonds or other evidences of debt secured by any such trust deed or mortgage, and shall also include the persons who owned at the time of the sale a majority in amount of the capital stock of such mortgagor corporation, such purchasers, and such corporation as they may organize as aforesaid, shall also have, possess and enjoy any special exemption, privilege or immunity previously granted by any law to such former corporation relating to any of the property so acquired, to the same extent as if such latter corporation had been named in such law as the grantee thereof." \$ 1828. Any domestic company may exercise its rights and franchises in other states with any additional powers granted by such states. § 1830. Branch roads and extensions may be built after the directors have filed a designation of the route with the secretary of state. \$ 1831. Land may be condemned to build sours to mills or other industries. § 1931 (a), Am'd Laws 1893, ch. 188. Any domestic railroad company, or company formed by the consolidation of a domestic and a foreign company, may consolidate its stock, franchises and property with any domestic or foreign company, when the respective roads "can be lawfully connected and operated together, to constitute one continuous main line, with or without branches," upon such terms as may be agreed upon, and become one corporation, "which within this state shall possess all the powers, franchises and immunities, including the right of further consolidations with other corporations under this section, and be subject to all the liabilities and restrictions of this chanter, and such in addition, including land grants and exemptions of land from taxation, as such corporations peculiarly possessed or were subject to at the time of consolidation or amalgamation by the laws then in force applicable to them or either of them." The terms of the agreement shall be approved by a majority stock vote of each corporation. A copy of the vote and of the articles of agreement so approved, with a list of the stockholders and the shares held by each, shall be filed with the secretary of state before the consolidation shall take effect. "Any such railroad corporation may lease or purchase and take a conveyance or assignment of the railroad, franchises, immunities and all other property and appurtenances, and the stock or bonds thereof, of any other railroad corporation or any portion thereof, within or without this state, when their respective railroads can be lawfully connected and operated together to constitute one continuous main line, or when the road so purchased will constitute branches or feeders of any road maintained and operated by such purchasing corporation. And any such railroad corporation may purchase and hold the stock or bonds of any railway company to which it has furnished the money for the construction of its railway, or may purchase for the money so furnished, or for such other consideration as may be agreed upon between the companies by their respective boards of directors, and take a conveyance of the whole or any portion of the franchises of said corporation, and of the railway property and appurtenances thereof." But this section shall not authorize the consolidation with, lease, purchase or control of a parallel or competing line. § 1833. Such contracts as the companies think best may be made with Michigan railroad companies. Steamboats may be owned to facilitate the business operations between the respective companies. § 1834. A street or road may be condemned, but must be restored. § 1836. Rolling-stock and fuel are fixtures; and all such property and all additional rights of way, depot grounds and other realty, "acquired subsequently to the execution of any trust deed or mortgage, which shall have been described or provided for therein, shall be subject to the lien thereof to the same extent as the property therein described which the corporation owned at the time of its execution." \$ 1838. Conditional sales or leases of rolling-stock and equipment shall be valid as to subsequent purchasers in good faith and creditors: provided, that the time during which instalments are to be received does not exceed ten years, that the contract is in writing and recorded with the secretary of state, and that the name of the lessor or vendor is on each car. § 1839 (a). board may, annually or oftener, set apart a sum, not exceeding fifty per cent, of the net earnings, "as resources for any one year," to redeem the corporate debts. § 1840. No such corporation can plead usury. § 1841. The shareholders may, by a majority vote of the stock present, classify the directors into three classes, onethird to be elected annually. § 1842. Annual reports shall be made to the stockholders after a form prescribed in this section. § 1843. All books and papers shall be open to the inspection of a committee appointed by one-tenth of the stockholders. § 1844. As to the mode of condemning land, see § 1845 et seq. Railroad land may be condemned for the use of another road, but not so as to interfere with the main track, except for crossings. § 1854. A railroad company to which state lands have been granted may sell such lands, upon a two-thirds stock vote, to any other railroad corporation authorized to build a road where such lands would be applicable. § 1858. Any lands conferred upon or transferred to a railroad company to aid in constructing its road may be mortgaged or pledged, with the entire avails thereof, "when acquired by such corporation and sold;" provided, that no bonds or other evidences of debt thus secured shall run for more than twenty years, and that all lands remaining unsold at the expiration of such twenty years shall thenceforth remain subject to purchase by actual settlers, at not more than \$6 per acre. § 1859. There is a railroad commissioner, who shall investigate charges made to him against railroad corporations. \$\$ 1792 (a)-1794. The proper officer shall make annual reports to the commissioner, under a penalty of \$100 per day for failure to do so. \$ 1795. There shall be no discrimination against any person or corporation, and all charges shall be reasonable. For violation of this section the injured party may recover three times the damage sustained. § 1798. The corporation is liable to a contractor's laborers for not more than thirty days' wages at one time, after demand therefor has been made upon the corporation. § 1815. Whenever any railroad corporation in the state becomes the "successor of a pre-existing railway corporation," it shall become liable for the amount then due the employees and laborers upon said railroad for a period not exceeding six months prior to the transfer of the road. § 1815 (a).

General provisions. -- Any corporation, unless other provision is specially made, may mortgage its franchises, tolls, revenues and property, real and personal, to secure the payment of its debts, or may borrow money for the purposes of the corporation, and no other, with the consent of a "majority of the stockholders;" and with a like consent may establish a sinking fund for the payment of its debts. Ch. 85, § 1748. A majority of the directors, and a majority of the stock, shall constitute a quorum in the respective meetings, unless otherwise provided in the articles or the by-laws, § 1749. Except in the case of railroads operating roads in Wisconsin and another state, the principal office, and the principal books, including stock-books, shall be kept within the state; and the principal managing officer shall reside within the state. Any corporation not subject to the above provisions shall, when required by the railroad commissioner, legislature or court produce its account-books and stock-books. A failure to designate such office, and inform the railroad commissioner thereof, or a failure to comply with any foregoing provision of this section, shall cause a forfeiture of the franchise. At least once a year a statement of the condition of the corporation shall be filed in the principal office, for the use of the stockholders. § 1750. "The capital stock of any corporation, divided into shares," shall be deemed personalty, "and when certificates thereof are issued "such shares may be transferred by indorsement of the owner, his attorney or legal representatives, and delivery of the certificate."

Such transfer to a bong fide purchaser or pledgee for value, shall transfer the title as against all parties, but shall not be valid as against the cornoration until recorded, or until a new certificate is issued. \$ 1751. No corporation shall issue any stock or certificate of stock, "except in consideration of money, or labor or property estimated at its true money value, actually received by it, equal to the par value thereof, or any bonds or other evidence of indebtedness, except for money, labor or property estimated at its true money value, actually received by it, equal to seventy-five per cent. of the par value thereof." All stocks and bonds issued contrary to the provisions of this section, "and all stock dividends or other fictitious increase of the capital stock," shall be void. \$ 1753. Unless otherwise provided by law, or by the articles, the directors may call in subscriptions, by instalments, in such proportion and at such times as they think proper. On the forfeiture of stock to pay instalments, the delinquent stockholder is liable for any deficiency. \$ 1754. If the capital is diminished by a corporate vote, the stockholders "shall be liable for the payment of all debts then remaining unpaid," to an amount equal to the sum "respectively refunded to them, or credited upon their debts for unpaid stock, or both. And also the stockholders voting for such diminution shall be jointly and severally liable to any creditor whose debt shall then remain unpaid, to an amount equal to the whole amount refunded to the stockholders, or credited upon their debts for unpaid stock, or both," § 1755. If stock which is not fully paid shall be transferred, "the corporation may, by agreement to be noted on its stock-book, discharge the stockholder making such transfer from liability to it for the unpaid part of its stock subscription, and accept that of the person to whom the stock is transferred in his place; but the person transferring such stock shall be liable for the amount unpaid thereon to the then creditors of the corporation, and those who may become such within six months after such transfer, or to any lawfully appointed receiver or assignes of the corporation for their use." § 1756. Stock-books and accounts shall be open to the inspection of stockholders. The officers shall furnish to any creditor correct information respecting the capital stock and stockholders. § 1757. In actions for the benefit of creditors against stockholders, to recover the amount "due and unpaid" on any stock, the stockholders shall be credited only with such sums as have been actually paid in, "in money, or its equivalent in value on account of such stock," and not with any dividend which may have been declared and applied on such stock. § 1758. The stock-books shall show all the stockholders since the organization. An officer who fails to make a proper entry shall forfeit from \$25 to \$1,000, and be liable for all damages thereby sustained. \$1759. Each stockholder has one vote for each share "held and owned by him." A failure to elect directors at the proper time shall not dissolve the corporation. If the proper officers shall neglect for ten days after the time fixed for the annual election to call a meeting, then two or more stockholders may call a special meeting for an election. § 1762. If a corporation shall have remained insolvent, or have neglected to pay its debts, or shall have suspended its ordinary business, for a whole year, it shall be deemed dissolved. § 1763. After dissolution for any cause, the corporation shall continue its existence for three years for the sole purpose of closing up its affairs. § 1764. No dividend shall be paid until the capital stock has been fully paid in. If dividends are paid out of the capital stock, "every stockholder receiving the same shall be liable to restore the full amount thereof. unless the capital be subsequently made good;" and if the directors declare any dividend contrary to the provisions of this section, or any fraudulent dividends, they shall be "jointly and severally liable to the creditors of the corporation at the time of declaring such dividend to the amount of their debts; provided, that any corporation which has invested or hereafter may invest its net earnings or income, or any part thereof, in permanent additions to its property, or whose . property shall have increased in value, may lawfully declare a dividend upon its capital, payable to stockholders, either in money or in stock, to the extent of the

net earnings or income so invested, or of the said increase in the value of its property: but the total amount of such dividend shall not exceed the actual cash value of the assets owned by the company in excess of its total liabilities, including its capital stock," § 1765. Am'd Laws 1893, ch. 59. The legislature may at any time limit or restrict the powers of any corporation, and, for just cause, anul the same, and prescribe the manner of settling the corporate affairs. \$ 1768. The stockholders, except in railroad corporations, "shall be personally liable to an amount equal to the stock owned by them respectively in such corporation, for all debts which may be due and owing to its clerks, servants and laborers for services performed for such corporation, but not exceeding six months' service in any one case." § 1769. Corporations may maintain actions against their stockholders. and, vice versa, stockholders against their corporation, the same as against any person. § 1770. As to proceedings by and against corporations, see chapter 140. Any person or association of persous, becoming the owner or assignee of the "rights, powers, privileges and franchises" of any corporation organized under the laws of the state, at any mortgage or other judicial sale, may, at any time within two years after such purchase or assignment, organize anew by filing articles of association, as provided elsewhere in case of corporations for similar purposes, and shall thereupon have all the "rights, privileges and franchises" of the old corporation. "They may fix at what price or for what number of shares the rights, privileges, powers, franchises or property of such former corporations. purchased by them, shall be put into the new organization." § 1788. Any corporation may dissolve upon the written consent of two-thirds of the stock at a special meeting, unless other provision is specially made in the articles. Such written resolution shall be recorded the same as an amendment to the articles, and a copy shall be filed with the secretary of state. § 1789. Franchises shall not be granted by municipalities until they have been published at the expense of the applicant for the same. Laws 1893, ch. 148.

Foreign corporations.—Foreign corporations shall not do business in the state until they have established an office therein, and appointed an attorney to receive service of legal process. The penalty for a violation of this section is a fine of \$500 for the first offense, and of not less than \$1,000 for any subsequent offense. § 1750 (a). Foreign manufacturing companies shall, annually, upon the written request of any resident creditor, file with the secretary of state a full statement respecting their stock and stockholders. The penalty for non-compliance herewith is a forfeiture of the right to do business in the state. § 1770 (a).

Taxation.—"Stock in any corporation in this state which is required to pay taxes upon its property in the same manner as individuals" is exempt from taxation. Ch. 48, \$ 1038. Exemptions include also the personal property of all insurance companies; and the "track, right of way, depot grounds and buildings, machine shops, rolling stock and all other property necessarily used in operating any railroad in this state belonging to any railroad company," except that the same shall be subject to special assessment for local improvements in cities and villages. All lands not adjoining the track shall be subject to all taxes. property, except real estate, of telegraph corporations is exempt. § 1038. property of zinc manufacturing companies is exempt for three years. Id. The annual license fee for railroads is four per cent of the gross earnings, where the same equal or exceed \$3,000 per mile per annum of the operated road; if the gross earnings exceed \$1,500 per mile per annum, and are less than \$3,000, then the tax is two per cent. of the gross earnings in excess of \$1,500 per mile and also \$5 per mile of road operated; and \$5 per mile of operated road when the gross earnings are less than \$1,500 per mile. § 1213. For failure to pay such license fee the corporation shall absolutely forfeit to the state \$10,000; and such neglect shall also • be a cause for forfeiture of the charter. § 1214. Telegraph companies shall pay a license fee of one dollar per mile for the first wire, fifty cents per mile for the second wire, twenty-five cents per mile for the third and twenty cents per mile for each subsequent wire. § 1216 (a). Telephone companies pay an annual license fee of one and one-half per cent. of the gross receipts from business in the state. § 1222 (a). Every corporation formed under chapter 86 pays the secretary of state \$10 for filing the articles of incorporation, and \$5 for filing any amendment.

§ 979. WYOMING: 1 Constitutional provisions.—All taxation shall be equal and uniform. Constitution of 1889, art. I. § 28, and art. XV, § 11. The legislature shall not pass any special law chartering ferries, bridges or insurance companies, or 'Agranting to any corporation, association or individual the right to lay down railroad tracks, or any special or exclusive privilege, immunity or franchise whatever, or amending existing charter for such purpose;" exempting property from taxation, or in any other case where a general law can be made applicable. Art. III. \$ 27. The legislature shall not authorize executors, administrators, guardians or trustees to invest trust funds in the bonds or stock of any private corporation. Id. \$38. The legislature shall not authorize the state or any county to "contract any debt or obligation in the construction of any railroad, or give or loan its credit to or in aid of the construction of the same." Id., § 39. No liability or obligation of any corporation to the state or any municipal corporation therein shall ever be "exchanged transferred remitted released or postponed," or in any way diminished by the legislature. Id., \$ 40. The legislature shall provide a general law for the organization of corporations, and such laws may be altered as the public good may require. Art. X. § 1. The police power of the state is the same over corporations as over individuals. Id., § 2. No corporation can do business in the state until it has filed an acceptance of the constitution and laws. Id., § 5. No corporation may engage in more than one general line or department of business, which shall be distinctly stated in the charter. Id., § 6. All railroad, telegraph, telephone, pipe-line, express and other transportation corporations are declared to be common carriers. Id., § 7. "There shall be no consolidation or combination of corporations of any kinds whatever to prevent competition, to control or influence productions or prices thereof, or in any manner to interfere with the public good and general welfare." Id. § 8. Corporate property and franchises may be condemned for public use like the property of individuals. Id., § 9 and § 4 (a). Any corporation organized for the purpose shall have the right to construct and operate a railroad between any points in the state and to connect at the state line with railroads of other states. "Every railroad shall have the right with its road to intersect, connect with or cross any other railroad," and all railroads shall receive and transport each other's passengers, tonnage and cars without delay or discrimination. Id., § 1 (a). Discrimination against corporations or individuals is prohibited. Id., § 2 (a). All railroads must make annual reports to the auditor of the state. Id., § 3 (a). Neither the state nor any political subdivision thereof shall "loan or give its credit or make donations to or in aid of" any railroad or telegraph line. Id., § 5 (a). "Any association, corporation or lessee of the franchises thereof" organized for the purpose" may construct and maintain telegraph lines in the state and connect them with other lines. Id., § 7 (a). Foreign railroad and telegraph companies shall keep an agent in each county through which the road runs upon whom process may be served. Id., § 8 (a). A suitable depot shall be maintained by every railroad company for the use of any city or town not more than four miles distant from the railroad. Id., § 9 (a). Neither the state nor any subdivision thereof shall aid any corporation by credit or donation, nor subscribe to or own the capital stock of any corporation. The state shall not engage in any work of internal improvement "unless authorized by a vote of two-thirds of the people." Art. XVI, § 6. All laws in force in the territory of Wyoming not repugnant to this constitution shall remain in force until they expire by limitation or are repealed by the legislature. Art. XXI, § 3.

 $[\]hat{i}$ The acts of the legislature down to and including the laws of 1893 are included in this synopsis, 1923

Miscellaneous corporations.—Three or more may incorporate for the purpose of "carrying on any branch of business designed to aid in the industrial or productive interests of the county," including the construction of railroad and telegraph lines. They shall make and acknowledge duplicate certificates, stating (1) the corporate name; (2) the object of the incorporation; (3) the amount of the capital stock: (4) the term of existence (not to exceed fifty years): (5) the number of shares: (6) the number of "trustees" and the names of the first board: (7) the names of the town and county where the business is to be carried on. The certificates shall be filed with the county clerk and the secretary of state. R. S. 1887. \$ 501. The corporation shall "be capable in law of acquiring by purchase, preemption, donation or otherwise, and holding or conveying by deed or otherwise, any real or personal estate whatever, which may be necessary to enable the said company to carry on their operations named in the certificate." § 502. The certificate may designate one or more places where the business is to be carried on. § 503, "If any company shall be formed under this chapter for the purpose of carrying on any part of its business in any place outside of this territory, the certificate shall so state, and shall also state the name of the town and county in which the principal part of the business of said company, within this territory, is to be transacted, and said town and county shall be deemed the town, place and county in which the operations and business of the company are to be carried on, and its principal place of business, within the meaning and provisions of this chapter." § 504. There shall be from time to time trustees who shall be stockholders. At the annual election only one-half the stock is required to be represented. Each share has one vote, in person or by proxy. Vacancies shall be filled in the manner provided in the by-laws. \$ 505. There shall be a president selected from the trustees. § 507. The trustees may call in subscriptions at such time and in such instalments as they deem proper, not exceeding ten per ceut, in any one month. § 508. The stockholders or the trustees, if the certificate so provide, may make such by-laws as they think best for the management and disposition of the business and stock. § 509. The stock is personalty and shall be trausferable in the manner provided in the by-laws. But the by-laws must be just and reasonable, and the company shall not use any of its funds to purchase any stock in its own or any other company; provided, that "such company may, in its discretion, purchase, hold and own any stock, and to any amount in any other company that is or may be subsidiary or tributary to, and that does contribute to the objects and purposes of, the first company in this proviso mentioned." § 510. The stockholders shall be "severally, individually" liable to creditors of the corporation "to the amount of unpaid assessments on capital stock held by them respectively, and to no other or further amount, for all debts and contracts made by such company, until the whole amount of assessments on capital stock, fixed and limited by the trustees, shall be paid in, and the assessment on capital stock, as fixed and limited by the trustees, shall all be paid in, ten per cent thereof within one year, and the balance shall be payable in instalments as shall be required by the trustees, who shall give six weeks' notice, by publication, of the time and place for the payment of the same." The trustees may purchase mines, manufactories and other property necessary for their business, "and issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be declared and taken to be full stock," and not liable to any further calls. But this stock shall not be reported as issued for cash. § 513. The president and a majority of the trustees shall, within thirty days after the last instalment of the capital stock has been paid, make a certificate of the amount fixed and paid in, and record the same with the county register of deeds where the corporate business is carried on. § 514. For declaring a dividend when the company is insolvent, or which would make it insolvent, or diminish the capital stock, the trustees "shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be thereafter con-

tracted while they shall respectively continue in office." But no trustee who files a certificate of his objections shall thus be liable, § 515. The pledgor of stock is liable as a stockholder, and a person holding stock as executor, guardian. etc., shall not be so liable. § 516. The capital stock may be increased, or diminished to an amount not less than the corporate indebtedness, the corporate name may be changed and the business extended to any other branch specified in this chapter. See Const., art. X. § 6. For either purpose, a meeting must be called upon the application of the owners of a majority of the stock, and two-thirds of all the outstanding stock must be voted in favor of any such change in the capital stock, business or corporate name. A certificate of the proceedings of the meeting must be filed like the original certificate of incorporation. §\$ 519-522, Am'd Laws 1890, ch. 7. If the indebtedness shall at any time exceed the capital stock, the trustees assenting thereto shall be personally liable to the creditors for such excess. § 523. Upon the written request of the owners of fifteen per cent of the stock the treasurer shall, within twenty days, furnish a sworn statement of the condition of the company, in minute detail, and keep a copy thereof posted for six months where it can be inspected by any stockholder. The penalty for failure so to do is a forfeiture of \$50 to the person presenting the request, and \$10 for every twenty-four hours thereafter. § 524. Any such corporation engaged in mining may construct and operate a railroad, or other road, to any point desired. Unoccupied public land may be taken for a right of way. § 525. Special provisions govern ditch and irrigation companies formed under this chapter, §§ 532-536. Am'd Laws 1890-1, ch. 88; and ferry companies, §§ 538-540. Telegraph companies formed under this chapter may construct their lines along any highway. § 541.

Railroad corporations may condemn land. The mode of proceeding is minutely prescribed. Laws 1888, ch. 56, and Laws 1890-91, ch. 39. Every railroad company organized under the general laws shall have power to "mortgage or execute deeds of trust, in whole or in part, of the real and personal property and franchises," including United States grants; to secure money borrowed for the construction and equipment of their roads, "and may also issue their corporate bonds in sums not less than \$1,000; to make all of said mortgages or deeds of trust payable to bearer or otherwise, negotiable by delivery, bearing interest at rates not to exceed ten per cent, per annum, convertible into stock or not, at the option of the holder, and may sell the same at such rates and prices as they may deem proper; and if said bonds shall be sold below their nominal or par value, they shall be valid and binding upon the company, and no plea of usury shall be put in or allowed by said company in any suit or proceeding upon the same. The principal and interest of said bonds or either of them may be made payable within or without this territory [state], at such place as may be determined upon by said company." § 549. Whenever a railroad company has constructed any portion of its line so as to connect with any two or more roads, the company owning such connecting lines may consolidate. The trustees may make an agreement prescribing the terms and conditions of consolidation; the mode of effecting the same; the name of the new corporation; the number of trustees (not less than seven); the time and place of holding the first election; the number of shares and the amount of each; the manner of converting the capital stock; the manner of compensating stockholders who refuse to convert their stock; provided, that all stockholders who refuse to convert their stock shall be paid the appraised value thereof. \$ 550. A duplicate of the agreement must be filed with the secretary of state. All the property of the consolidating companies shall pass to the new company without any deed or transfer, subject to all liens or liabilities affecting such property. §§ 550-552. railroad company, domestic or foreign, may by subscriptions to the stock, or purchase of the stock or bonds, or guarantying the bonds of "any other railroad company," or in any other way, aid such company in constructing its road, within or without the state. Any domestic company may extend its lines into any other

state, and may build, buy, lease or consolidate with any foreign or domestic company, and may own necessary real estate in any other state; or may sell or lease to any domestic or foreign company any part of its road in the state, constructed or to be constructed, with all rights and franchises pertaining thereto. Any foreign company may extend its road to any points in the state under the same conditions and privileges provided for domestic companies. All consolidations, sales and leases shall be made upon the terms agreed upon by the respective boards, approved by a majority in interest of the stockholders. Before foreign companies avail themselves of the provisions of this act, they shall file a copy of their charter with the secretary of state. Laws 1890, ch. 18. See, also, R. S., §§ 553, 554, 562. The organization and operation of building and loan associations are provided for. Laws 1890, ch. 29.

For insurance companies, see Laws 1888, ch. 22 and ch. 64; Laws 1890, ch. 40; and R. S., 8 603 et sea.

All corporations shall hold all stockholders' meetings within the state. R. S., § 643. Upon dissolution the trustees become trustees of the creditors and stockholders, unless others are appointed by the court, and are jointly and severally liable for all assets which come into the possession of any of them. § 647. The fee of the secretary of state for filing a certificate of incorporation is one dollar. § 1178. Any existing domestic corporation may, upon the unanimous consent of the stockholders, "issue and dispose of" preferred stock, and may stipulate that the holders thereof shall receive dividends not exceeding seven per cent. per annum; provided, that, if the earnings available for dividends on all the stock shall be at least seven per cent., all the stock of the corporation shall participate equally in the dividends. Corporations hereafter formed may provide in the certificate of incorporation for the issue and disposal of preferred stock of the "kind and character" above provided for, to an amount stated in such certificate. The holders of the common stock shall have the first privilege of taking the preferred stock, in proportion to their holdings; and in case of liquidation of the corporation the net assets shall be distributed to all stockholders in proportion to their stock. Laws 1888, ch. 24.

Foreign corporations. (See also under "RALROADS.")— Every foreign corporation (except insurance companies, for which special provisions are made) shall, within thirty days after commencing business in the state, file with the secretary of state, and the county register of deeds, a copy of its charter. R. S., § 600. Failure to do so renders every agent, officer and stockholder, jointly and severally, personally liable on all contracts made or to be performed within the state. § 601. The fee of the register of deeds for filing the charter is \$1. § 602. Foreign building and loan associations may do business in the state upon payment of \$25. Laws 1890-1, ch. 87.

Taxation.—(See, also, "Constitutional Provisions.") "Ferries, franchises and toll-bridges," which are considered real estate for purposes of taxation, all shares of stock, and all real and personal property of domestic and foreign corporations, shall be listed for taxation in the county where owned or situated. R. S., § 3776, Am'd Laws 1890-1, ch. 36. The property of corporations, domestic or foreign, constructing or owning canals, ditches, flumes, "railways," telegraph lines, roads, ferries and similar improvements, shall be assessed to the corporation. § 3787. The paid-in capital of all corporations doing business in the state. together with the accumulated surplus, not including realty outside the state. shall be assessed to the company issuing the same, and the holders of the capital stock shall not be assessed therefor. Laws 1890-1, ch. 38. Railroad corporations shall annually list for taxation their franchises, roadway, rolling-stock, and all property belonging to and used in the operation of the road, except machine shops, rolling-mills and hotels. All sleeping, dining, palace and other cars making regular trips over the road, and not owned by the railroad company, shall be listed by the agent in charge thereof, and taxed like railroad property to the corporation operating them. The list shall show the actual cash value of the property herein enumerated, the length of the line within the state and the number of miles in each county. The report shall be made to the state auditor by the third of July annually. The state board shall determine the average value of the line per mile, and shall not assess any property not used in the operation of the road or line, nor any machine shop, rolling-mill or hotel, such property being assessed by the county assessors. The state hoard shall apportion their assessments to the counties for collection. Telegraph companies are assessed by the method prescribed for railroads, as far as applicable. § 3839, Am'd Laws 1890-1, ch. 99. See, also. §§ 3778-3781.

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CHAPTER LVII.

THE TERRITORIES—STATUTORY PROVISIONS AFFECTING CORPORA-TIONS.

§ 980. Federal statutes relative to corporations in territories.

981. Arizona.

§ 982. New Mexico.
983. Oklahoma.
984. Utah.

§ 980. FEDERAL STATUTES relative to corporations in territories. The territories shall not grant "private charters or special privileges," but may by general laws permit incorporation for the purposes for which corporations are usually formed, including the colouization of land in connection with works of internal improvement. R. S. U. S., § 1889, Am'd Act July 30, 1886 (ch. 818). In all cases where a general law may be made applicable, no special law shall be passed. Neither a territory nor any of its subdivisions shall, by subscriptions or otherwise, aid any corporation. Act 1886, ch. 818. No corporation more than twenty per cent. of whose stock is owned by foreigners shall hold or own real estate in any territory. No corporation other than those organized for the "construction or operation of railways, canals or turnpikes," shall hold more than five thousand acres of land in any territory; and the companies herein excepted shall hold only such real estate as may be necessary for the proper operation of their business. Acts 1887, ch. 340.

§ 981. ARIZONA: 1 Miscellaneous corporations.—Any number may incorporate for the transaction of any lawful business. But the corporation shall have no nowers not possessed by natural persons, except as herein provided. R. S. 1887, § 232. Among the powers of the corporation shall be the power to have perpetual succession; "to render the shares or interest of stockholders transferable and prescribe the mode of making such transfers;" to exempt the private property of members from liability for corporate debts; to possess the same powers as individuals in respect to acquiring and transferring property. § 233. Before commencing business, except that of their own organization, they must adopt articles of incorporation, which shall be acknowledged like deeds and recorded with the recorder of the county where the principal place of business is to be. The articles must state (1) the names of the corporators, the name of the corporation and the principal place of business; (2) the general nature of the business; (3) the amount of the capital stock and the times when and the conditions upon which it is to be paid in: (4) the period of duration; (5) by what officers the corporate business is to be managed, and the times at which they are to be elected; (6) the highest amount of indebtedness or liability to which the corporation is at any time to subject itself; (7) whether private property is to be exempt from corporate debts. Unless so exempted, stockholders are liable for the corporate debts "in the proportion which their stock bears to the whole capital stock." § 234.

Corporations for the construction of any work of internal improvement shall, in addition, file a certified copy of such articles with the territorial secretary, and the indebtedness of such corporations shall at no time exceed two-thirds of the capital stock. § 235. A copy of the articles of corporations organized under this act shall be published for six days in a paper of the county where the principal place of business is to be kept. § 236. The corporation may begin business as

¹ The acts of the legislature down to and including the laws of 1891 are included in this synopsis.

soon as the record is made with the county recorder, and its acts shall then be valid if the publication above required is made, and a copy filed with the territorial secretary, when necessary (see § 235), within three months from the time of recording with such county recorder. § 237. Internal-improvement corporations may be formed for fifty years, and other corporations for twenty-five years, which terms may be renewed for a "period not greater than was at first permissible." when approved by a three-fourths vote at a special meeting (see § 233). § 238. Intentional non-compliance with the articles is punishable by a fine of from \$100 to \$1,000, or by imprisonment for from three to twelve months, or by both; and any party injured thereby may recover damages. \$ 240. A like fine is imposed for keeping false books or accounts. § 241. Transfers shall not be valid, except as between the parties, until entered on the books, which books shall be open for the inspection of any stockholder. § 242. Non-user for five successive years forfeits the franchise. \$ 243. Nothing herein contained shall exempt the stockholders from "individual liability to the amount of the unpaid instalment on stock owned by them, or transferred to them for the purpose of defrauding creditors: and an execution against the corporation to that extent may be levied upon the private property of such individual." § 245. For the purpose of making repairs. building or extending works, or to meet contingencies and provide a sinking fund for the payment of debts, the corporation may establish a fund and loan the same, upon good security. § 246. Manufacturing and mining companies may construct and operate railroads or canals from their principal works to any navigable stream, or to any railroad. \$ 250.

For insurance companies, see § 251 et seq.

Pledgors of stock, not the pledgees, shall have the right to vote the stock transferred for security. Laws 1889, No. 50.

Railroads.—" Any number of persons, not less than five, either in this territory or throughout any portion of the states or territories of the United States contiguous to this territory, being subscribers to the stock of any contemplated railroad," may incorporate. After \$1,000 per mile of the road has been subscribed, the subscribers, in person or by written proxy, may adopt articles of association and elect from their number from five to thirteen directors. § 296. The articles shall set forth (1) the corporate name; (2) the period of existence (not to exceed fifty years); (3) the amount of capital stock (to be divided into shares of \$100 each, and which shall be the actual contemplated cost of construction and equipment, estimated by competent engineers); (4) the names and number of the directors; (5) the termini and the counties to be traversed. In necessary cases the articles may be signed by proxy. § 297. The articles shall be filed with the territorial secretary. § 298. The directors shall organize within five days after receiving notice of their election. § 299. The secretary and treasurer shall give bonds. The directors shall, "when deemed necessary," open subscription books at such times and places, upon such terms, and under such supervision as they see fit, due notice being given; but no subscription except the original subscription shall be binding on any of the parties until approved and accepted by the board. § 299. Two of the directors shall be residents "at the time of their election," and all of them must be stockholders. Whenever a majority of the stock is held outside the territory, the principal office may be kept outside the territory and the meetings of the company be held thereat; but an agent must be kept within the territory § 300. The directors shall cause to be kept a "Record of Corporate Debts," which shall be open to inspection of stockholders. § 305. The secretary shall keep records of all proceedings, a "Book of Stockholders" and transfer books. shall not be valid, except as between the parties, until entered ou the books; nor until at least twenty per cent. has been paid thereon, unless approved by the directors, §§ 306, 307. Assessments can be made only to the extent of ten per cent. per month, "unless otherwise stipulated in the articles of subscription." § 308. Any such railroad company may lease to "any other corporation" any part of its road, or grant to any corporation the right to use in common any part of its road. \$\$ 308, 317. The corporation may borrow from time to time, under the restrictions imposed by a two-thirds vote of the directors, money necessary for constructing or maintaining the road, and may issue bonds or notes therefor in denominations of net less than \$500, and at not more than ten per cent, interest, and may also issue such bonds or notes in payment of debts. §\$ 310, 319. Within thirty days after the payment of the last instalment of the capital stock, a certificate of such payment shall be filed with the territorial secretary. § 311. Such corporations shall have perpetual succession (see § 297, supra), and may deal in necessary real estate. § 312. The usual powers are given respecting the laying out and construction of the read, crossing other railroads, etc. \$ 313. Railroad corporations shall have the power to consolidate with any number of domestic or foreign railroad corporations, upon the terms agreed upon by the respective boards of direct ers, confirmed in writing by three-fourths of the subscribed stock of each corporation. Articles of incorporation identical with those above specified (§ 297). containing also a full statement of the terms and conditions of the consolidation, shall be filed with the secretary of the territory. The new corporation shall have all the property, rights and franchises enjoyed by the respective consolidating companies, and shall assume all their contracts and liabilities, and all the property of the consolidated corporation shall be liable for any debts of any of the said corporations existing at the time of the consolidation. § 317. The preceding section shall not apply to competing lines having the same termini within the territory, \$318. Bonds or notes shall not be issued in excess of the capital stock. The directors may confer the power to convert such bonds or notes into stock. § 319. Amendments may be made and filed like the original articles, upon a vote of two-thirds of the stockholders or a vote of three-fourths of the directors. § 329. Not more than six cents per mile shall be charged for transporting passengers. Laws 1891. No. 38. There is a railroad commission whose duty it is to hear all complaints respecting unreasonable rates or discriminations, and report their findings to the governor. Unreasonable rates and unjust discriminations are prohibited. Laws 1891, No. 89.

Foreign corporations.— Any foreign corporation, before having a place of business in the territory, shall file copies of its articles with the territorial secretary and the recorder of the county where the principal office is to be kept; and before doing business or acquiring property, such corporation shall also file in the same manner an appointment of an agent. The agent shall be a bona fide resident of the county where the appointment is filed, and if the above provisions are violated, or the agent shall absent himself from his county for four months, all acts of the corporation during such violation of law shall be void. When the law is complied with such corporations have the same rights as domestic companies, but cannot hold more than three hundred and twenty acres of land, exclusive of mining lands, and lands necessary for mining and milling or smelting purposes, "or for manufacturing or commercial pursuits." §\$ 347-352.

Taxation.—"Shares of stock in a corporation possess no intrinsic value over and above the actual value of the property of the corporation for which they stand and represent, and the assessment and taxation of such shares and also of the corporate property would be double taxation. Therefore all property belonging to corporations shall be assessed and taxed, but no assessment shall be made of shares of stock, nor shall any helder thereof be taxed therefor." § 2633. Ditches for mining, manufacturing or irrigation purposes, and telegraph lines, shall be assessed the same as real estate by the county assessor "at a rate per mile for that portion of such property as lies within his county, and must be by him listed as a whole without separating the land and franchise and improvements, either in the description or valuation of the same." §§ 2647, 2649, Am'd Laws 1889, No. 31. Railroads are assessed by a territorial board on all property, "except lots and parcels of real estate owned by the road within each county and improvements thereon,

and other improved property not connected with the operation of such road and located in any county, which shall be taxed in the county where situate." The board shall assess at its full cash value the franchise, right of way, road-bed, buildings, station grounds, telegraph lines and all equipment and other property used exclusively in operating the road, basing their valuation on a detailed report which must be furnished by the corporation. For failure to report the valuation shall be increased thirty per cent. The assessment of the board is apportioned to the counties and taxed at the same rate as other property. § 2649. Any railroad corporation which, within six months from the passage of this act, files its intention of building a railroad and begins the construction of its road within six months from the filing of such intention, shall be exempt from taxation for twenty years from the passage of this act. Laws 1891, No. 41. (Approved March 16, 1891.)

\$ 982. NEW MEXICO: 1 Miscellaneous corporations. - Three or more may incorporate for mining, manufacturing, "or industrial or other lawful pursuits," or the "construction or operation of railroads, wagon roads, irrigating ditches, and the colonization and improvement of land in connection therewith." Such corporations shall be subject to all the liabilities and conditions imposed by this chapter, and to no others. Compiled Laws 1884, tit. V, ch. I, SS 192, 193, Am'd Laws 1893, ch. 52. By a later statute the above provisions are extended to all corporations which may be formed under a general law, and they are empowered to enjoy their franchises, do business, and to acquire, mortgage and dispose of "property" anywhere in the Union. Laws 1889, ch. 82. A certificate shall be filed with the secretary of the territory stating (1) the corporate name and objects: (2) the amount of the capital stock and the number of shares: (3) the period of existence (not to exceed fifty years); (4) the location of the principal place of business; (5) the number of directors, and the names of those who shall serve for the first three months. The fee of the secretary of the territory is five dollars. \$ 193. Real estate necessary for the corporate business may be held. Directors can only be removed by a vote of two-thirds of the board. § 195. There shall be at least three directors, and they shall be stockholders, a majority of them American citizens, and one-third of them residents of the territory. In the election of directors each share shall have one vote, in person or by proxy. § 196. The first directors' meeting shall be called by a notice signed by one or more of the directors, and published ten days in the county paper, or served personally upon each director. § 199. The manner of transferring stock shall be regulated by the by-laws, but no transfer shall be valid, except as between the parties thereto, until recorded on the books. § 200. The directors may call in subscriptions in such payments as they think proper, notice of any assessment to be given personally or published once a week for four weeks. § 201. For making dividends, except from surplus profits, or dividing or reducing the capital stock, the directors assenting thereto shall be, jointly and severally, personally liable to the corporation and creditors thereof, in the event of dissolution, for the full amount so withdrawn. § 204. They are likewise liable, in case of dissolution, for any excess of debts over the capital stock. § 205. Persons holding stock as executors, etc., are not personally liable as stockholders, but pledgors of stock are thus liable. § 206. The capital may be increased, or diminished to an amount not less than the corporate liabilities, upon a vote of two-thirds of all the stock, at a meeting called by a majority of the directors. §§ 207, 208. A certificate of the proceedings of the meeting must be filed with the secretary of state. § 209. Failure to commence business within two years from the date of filing the certificate forfeits the charter. § 212. No other corporation shall be formed for the same immediate purpose. § 214. Corporations, except railroad and telegraph companies, shall keep accurate lists of stockholders. Such books shall be open to the inspection of stockholders and creditors at the principal office, and no transfer

 $^{^{1}}$ The acts of the legislature down to and including the laws of 1893 are included in this synopsis. 1931

shall be valid for any purpose, except to render the person to whom the transfer is made liable for the corporate debts, unless entry is made on the books within sixty days from the date of the transfer. Officers who refuse to make proper entries or to exhibit the books are guilty of a misdemeanor, and the company shall forfeit fifty dollars for each offense, and be liable for all damage resulting therefrom. § 224. Corporations may be formed, subject to the provisions of this chapter, to lay out towns, and to improve and sell lands in connection therewith. § 226. Shares of stock in any domestic or foreign corporation may be sold on execution, and transfers after levy of attachment are void. §§ 227, 228. Whenever a majority of the stock is held outside the territory, the principal office may be kept outside the territory, and all directors' and stockholders' meetings may be held outside the territory. But a principal place of business and an agent shall be kept within the territory. § 230.

For insurance companies, see § 1450 et seg., Am'd Laws 1889, ch. 102.

For building and loan companies, see Laws 1889, ch. 108.

Special provisions apply to irrigation and land-improvement companies. No limit is placed upon the amount of land to be held by land companies, except in the statement that land may be held for corporate purposes. Laws 1887, ch. 12.

Railroads.—Five or more American citizens may incorporate. The articles must state (1) the corporate name and purpose; (2) the principal place of business; (3) the term of existence (not to exceed fifty years); (4) the number of directors (from five to eleven), and the names of the first board; (5) the capital stock (not to exceed an estimate of the necessary amount, made by competent engineers), and the number of shares; (6) the amount actually subscribed and by whom; (7) the termini and intermediate branches; (8) the estimated length of the line and branches; (9) that at least ten per cent, of the capital subscribed has been paid to the treasurer, whose name and residence must be given. Compiled Laws. §§ 2622, 2623, 2624. At least \$1,000 per mile of the main line and branches must have been subscribed. § 2625. The articles must be filed with the secretary of the territory. § 2627. By-laws must be adopted within three months thereafter, by a majority stock vote, or upon the written assent of two-thirds of the stock. When no other provision is made in this act, the by-laws may provide for the time, place and manner of calling directors' and stockholders' meetings; the number of stockholders constituting a quorum; the mode of voting by proxy; the compensation and duties of officers; the manner of election and the tenure of office of all officers other than directors; fines for violations of the by-laws, not exceeding \$100 in any one case; and the mode of collecting assessments. § 2631. The by-laws must be open to public inspection. The power to ameud or adopt new by-laws may be delegated to the directors by a two-thirds vote. \$2632. The number of directors may be changed by a two-thirds stock vote. § 2633. Each share shall have one vote. § 2635. The directors must meet within one week after filing the articles at the principal office, and elect one of their number president. § 2636. At all elections of directors a majority vote shall elect. § 2635. The provisions of section 204, supra ("Miscellaneous Corporations"), are reaffirmed in reference to directors. § 2637. Directors may be removed by a two-thirds stock vote, and the vacancies filled at the same meeting. § 2638. When there is no person authorized to call a meeting, a justice of the peace may do so, upon the application of two or more stockholders. § 2639. At all meetings a majority of the stock must be represented in person or by proxy; and no one who is not a stockholder can vote at any meeting. § 2640. Officers shall be jointly and severally liable for damages if they make a false report or certificate, or a wrong entry. § 2644. Stockholders' and directors' meetings must be held at the principal office. The principal place of business may be changed within the state, upon the written assent of two-thirds of the whole capital stock. § 2650. A book containing in detail a record of the condition and contract liabilities of the company shall be open to the inspection of any party in interest. A book containing com-

plete records of directors' and stockholders' meetings shall be kept; and a "book of stockholders," open to the inspection of stockholders and creditors. A transfer book shall also be kept at the secretary's office, \$ 2650. Shares are personal property. No transfer shall be made on the books until all previous assessments are paid, and no transfer shall be valid, except as between the parties thereto, unless twenty per cent, has been paid, and certificates issued therefor, except by consent of the directors. § 2651. Certificates may be issued prior to full payment. under restrictions imposed by the by-laws. § 2652. The directors may call in subscriptions only to the amount of ten per cent, per month, unless a greater assessment is necessary to meet liabilities. § 2656. If a corporation purchases its own stock, when sold to pay assessments, the same shall be subject to the control of the stockholders and cannot be voted. § 2659. Necessary real estate may be held. § 2664. Telegraph lines may be operated in connection with the road. Id. Generally the corporation has the same rights as individuals in the management of its business. Id. The usual privileges respecting materials for construction, laying out of the route. crossing other roads, etc., are granted. § 2665. The corporation shall have power: (1) To borrow, with the unanimous consent of the directors, money necessary for constructing and equipping the road and telegraph lines, and to issue bonds or notes therefor, in denominations of not less than \$500, at a rate of interest not exceeding ten (10) per cent, per annum; also to issue such bonds or notes in payment of any "debts or contracts for constructing, equipping or completing its railroad and telegraph lines, and all else relating thereto," and may secure the same by a mortgage of the corporate property and franchises. The amount of such bonds or notes shall not exceed the capital stock. (2) To lease any part of its road to any domestic or foreign company owning a connecting line, or to allow such company to use its lines. (3) To lease any such railroad, or make a contract for the common use of such line by both companies. (4) To increase or diminish the capital stock, upon a vote of two-thirds of all the stock. (5) To consolidate with any other railroad corporation, domestic or foreign, with the assent of three-fourths of the stock of each company, upon filing new articles of incorporation, identical with those specified above, but containing additional matter respecting the proceedings of consolidation. Railroad corporations are given the same rights as natural persons in carrying on their business. § 2665. For condemnation proceedings, see §§ 2667, 2713. See, also, § 2729. Annual reports of the business done and of the condition of the company must be made to the secretary of the territory. § 2686. Construction must be begun within two years after filing the articles, and the road be in operation in six years, or the charter may be forfeited. § 2688. The right of way is granted over swamp lands belonging to the territory, § 2689. Any railroad company may "borrow money and purchase property, real and personal, for the use of the corporation," and may mortgage all of its property and franchises. § 2700. Any railroad company may, by subscription or otherwise, aid any other railroad company to construct a road within or without the territory, for the purpose of forming connections, or may lease or purchase the same; or the two or more companies may make any other arrangements for their common benefit. But in any case the agreements must be anproved by two-thirds of the stock, § 2701. Any company operating a railroad or bridge wholly or partly within the territory may consolidate with any other company or companies to form a connected line, either alone or by means of any intervening road, bridge or ferry. § 2702. The directors shall make a joint agreement, which must be submitted to the stockholders, at separate meetings, and be approved by two-thirds of all the stock of the respective corporations. A copy of the agreement shall be filed with the secretary of the territory, upon which all the property, franchises, exemptions and stock subscriptions of the two or more companies shall pass to the new company without further act. But subscribers to unpaid stock shall have the option to take stock so subscribed or not. § 2706. The name may be changed by a resolution of the stockholders. § 2708. Passenger rates shall not exceed six cents per mile. The penalty for a greater charge is a forfeiture of \$500. §\$ 2721, 2722. One-fourth of the directors shall be residents of the territory, § 2728. All contracts to restrict or abridge the powers or franchises of any railroad company in respect to any railroad in the territory, "or to make any railroad connections or to co-operate with any corporation or person in any railroad or other business, or to promote the construction or operation of any railroad, or to establish any parallel or competing line or branch, or to establish or promote any competitive business, or to deal with any railroad corporation or other corporation, firm or individual, or to waive any corporate duty, object or franchise, being contrary to public policy, are hereby declared null, void and inoperative in this territory." § 2730. Discriminations in rates are forbidden. § 2731. Cars and freight of other companies shall be received and transported at the rates charged for its own business. §§ 2732, 2735. Intersecting roads of the same gauge shall connect. §§ 2733, 2735. For any violation of the above provisions (\$ 2730 et sea.) the corporation shall forfeit \$500, and be liable to treble damages. § 2738. There may be conditional sales of rolling stock. § 2739.

Foreign corporations.—Railroad and telegraph corporations found in contiguous states may extend their lines into New Mexico with all the rights of domestic companies, upon filing copies of their articles with the secretary of state and the probate clerk of the county where the principal office is kept. Compiled Laws, §§ 215, 216. The same provisions are enacted respecting any foreign corporation of the United States, with the recorder of deeds substituted for the probate clerk, and a further requirement that a certificate of the principal place of business shall be filed with the articles. No foreign corporation can have any greater powers or rights, respecting real estate, or otherwise, than domestic companies, nor be permitted to mortgage, or otherwise incumber, its real or personal property in the territory to the injury or exclusion of any citizeu or corporation who may be its creditors; and no mortgage of any such corporation, except railroad and telegraph companies, given to recover a debt created in any other state, shall take effect against any citizen or corporation of New Mexico until all its liabilities due to "any person or corporation" in the territory at the time of recording the mortgage have been satisfied. \$218. Failure to comply with the provisions of the preceding section shall render every officer, agent and stockholder of the corporation "jointly, severally and personally liable on any and all contracts of such company made within this territory during the time that such company is so in default." § 219. For filing the several certificates and charters, the secretary of state shall receive the fees allowed for filing articles of the incorporation of domestic companies. §§ 217, 220.

Taxation. -- Corporate property shall be assessed in the county where situated. The corporation shall pay the tax, and may charge the same to the stockholders. Stockholders are not assessed individually for their shares when the entire capital or property of the corporation is assessed. Compiled Laws, § 2815. Shares of stock shall be assessed at their cash value. § 2818. Irrigation ditches, canals and reservoirs shall be exempt from taxation for six years from the time of commencing their construction. Laws 1893, ch. 22, Am'd Laws 1891, ch. 95. Mines and mining claims (but not the net product or improvements) shall be exempt for ten years from the date of the location thereof. All railroad property is exempt for six years after the completion of the road and branches, it being the intent of this law that the road be considered completed, "as to any operating division thereof," when offered for public business. This provision applies only to roads of which some portion shall be opened for traffic within three years from the date of this act. Laws 1891, ch. 95, Am'd Laws 1893, ch. 21. "The exemption laws heretofore and now in force in this territory are hereby repealed." Laws 1891, ch. 25, § 31. All owners of sleeping, palace or drawing-room cars, except railroad companies operating railroads in the territory, shall make annual statements to the territorial auditor of the number of cars run and miles operated in each county, and

of the gross annual receipts within the territory. A tax of two and a half per cent of such gross receipts shall be paid, said tax to be equally divided between the state and the counties. For collecting fares without paying the tax, a fine of \$100 for each offense is imposed. Laws 1893, ch. 48. Express companies shall pay two per cent of their gross receipts in the state, after deducting the amounts paid for transportation to railroad or other companies in the state. But this act shall not release their taugible property from taxation. Half the road tax is paid to the counties. Laws 1891, ch. 82. Rates shall not be reduced so as to affect any railroad company until the surplus earnings of its roads and telegraph lines shall exceed ten per cent upon the total cost of construction and equipment. Compiled Laws. \$ 2691.

§ 983. OKLAHOMA: 1 Organic act.—All property subject to taxation shall be taxed according to its value. § 6. The legislature shall not authorize the issuance of any bond or other evidence of debt by the territory or any county or other municipality for the construction of any railroad. § 7.

Miscellaneous corporations.— Three or more may form a corporation for profit, except that insurance companies are to be formed by seven or more persons. Statutes of 1893, ch. 17, art. I, § 12. One-third of the corporators and onethird of the officers must be residents. §§ 9, 16. Articles must be prepared stating (1 and 2) the corporate name and purpose; (3) the principal place of business; (4) the term of existence; (5) the number of directors and the names of the first board; (6) the amount of the capital stock and the number of shares. The articles of railroad or wagon-road companies shall also state (1) the kind of road intended: (2) the termini and intermediate branches; (3) the counties to be traversed; (4) the estimated length and cost of the road. §§ 14, 15. The articles must be filed with the territorial secretary, § 17. "A subscription to the stock of a corporation about to be formed is to be held for the benefit of the corporation when it is formed, and may be enforced by it." Art. II, § 1. The directors must open books and secure subscriptions to the full amount of the fixed capital. § 2. The bylaws may provide for issuing certificates prior to the full payment of subscriptions. § 4. Unless otherwise provided, a corporation may purchase, hold and transfer its own stock, "from surplus profits, . . . or by the unanimous consent in writing of the stockholders," in such manner and for such consideration as the stockholders may unanimously determine. § 6. Necessary real estate may be held. Art. III, § 1. By-laws must be adopted within a month after filing the articles, by a majority of all the stock. § 2. A "book of by-laws" must be kept open for public inspection. The power to make new by-laws may be delegated to the directors. § 4. Each share has one vote. § 7. There shall be from three to eleven directors, who must be stockholders. § 8. The directors must elect one of their number president. § 9. For making fraudulent dividends, or dividing the capital stock, or creating debts beyond the subscribed stock, the directors assenting thereto are individually, jointly and severally liable to creditors, after dissolution of the corporation, to the extent of such withdrawal of capital or excess of debts. § 10. For false representations, officers are personally liable for damages resulting therefrom. § 11. Directors can be removed by a twothirds stock vote. § 12. Only stockholders can vote a proxy. § 13. Each stockholder is individually and personally liable for the debts of the corporation to the extent of the amount unpaid on his stock. § 15. The capital stock may be increased, or diminished to an amount not less than the corporate debts, or the estimated cost of proposed works, upon a two-thirds stock vote, or upon the written assent of three-fourths of the stock. § 18. Records of all corporate acts must be open to the inspection of interested parties; also a stock and transfer book. Art. IV, § 1. For dissolution, see art. V. After one-fourth of the capital stock has been subscribed, the directors may levy assessments, not exceeding ten per

The acts of the legislature down to and including the laws of 1893 are included in this synopsis.

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cent of the amount fixed in the articles. But if not all the capital has been paid up, the assessment may, if necessary to meet liabilities, be for the whole amount unpaid. The assessments shall not exceed ten per cent per month unless otherwise provided in the articles. § 2. The franchise and privileges of any corporation authorized to receive tolls may be sold on execution, but without any exemption. Art VII, § 1. The purchaser succeeds at once to all the rights of the delinquent corporation. § 2. The franchise may be redeemed within one year. § 5. A committee of the legislature may at any time examine all books and papers of the corporation. Art VIII, § 1.

Corporations for mining, manufacturing and other industrial nursuits may be formed as provided in this article. The period of existence shall not exceed twenty years. The articles must clearly specify the purposes of the incorporation. and the funds must not be appropriated to any other purpose, nor money be loaned to stockholders; and the officers who assent to such appropriation or loan shall be jointly and severally liable to the extent thereof for all corporate debts contracted before the repayment of such funds. Art. XII, §§ 1, 2. Records of the corporate business shall be kept for the inspection of stockholders, to whom a statement of accounts shall be rendered annually. § 3. The stockholders shall be jointly and severally liable, as individuals, for all debts due to mechanics, workmen and laborers employed by the corporation, after an execution against the corporation has been returned unsatisfied; provided, that an action is commenced within four months. § 4. Full reports of the condition of the company shall be published annually in the nearest newspaper. § 5. The owners of twenty per cent, of the stock may demand from the treasurer, once in six months, a statement of the assets and liabilities. For refusing to render such statement within twenty days the treasurer shall forfeit to the applicants fifty dollars, and ten dollars for each day's delay. § 6. A place of business may be kept outside the territory, and directors' or stockholders' meetings held thereat, but the main office for the transaction of business shall be kept within the territory. § 7. The directors assenting to any violation of this "chapter" which renders the corporation insolvent shall be jointly and severally liable for all debts contracted after such violation. § 8. Ditch, flume or tunnel companies may condemu land for a right of way. §§ 9-15. Every corporation formed under the provisions of this article shall commence the construction of its works or the transaction of its business within ninety days from the issue of its certificate, and complete its works within two years from the time of commencement. Any corporation failing to comply with the provisions of this section shall forfeit "all right to the route so claimed," and the same may be claimed by another corporation, Building and loan associations are specially provided for. Art XVII.

For insurance companies, see ch. 44.

Railroads .- (Some of the following provisions apparently conflict with those given above, since the provisions under "Miscellaneous Corporations" seem to apply to railroads.) Five or more may incorporate. The articles must set forth (1) the corporate name; (2) the termini; (3) the estimated leugth of the road and the name of each county to be traversed (4) the amount of the capital stock, and the number of shares, stating the amount of commou and preferred stock; (5) the names and residences of the first board of directors, of which there shall be from five to thirteen. Art. IX, § 1. The filing of the articles with the secretary of the territory completes the incorporation. Id. The directors may open subscription books. They shall be elected at such time and for such terms as the by-laws prescribe. They must be stockholders. §§ 2, 3. The directors may exercise their discretion in making assessments. § 5. No stock shall be transferable until all previous calls thereon are paid. § 6. The capital stock may be increased upon a two-thirds stock vote in favor thereof. § 7. The corporation shall have perpetual succession. § 9. Voluntary grants of real estate may be taken, but must be held for the purposes of the grant only. All necessary real estate may be acquired by purchase, and be sold when not needed. Id. The corporation, or the board of directors, has full discretion as to borrowing money and mortgaging all the property and franchises, owned or to be acquired, to secure any evidences of deht. § 10. The purchasers of a railroad at a judicial sale, or such corporation as they shall organize, shall have the same privileges as the original corporation; and when the purchaser or purchasers own a majority of the evidences of debt, and include the owners of a majority of the stock, they shall enjoy any immunity granted to the original company. Id. Conditional sales of rolling stock shall be in writing and the term of a lease thereof shall not exceed ten years. \$\$ 11, 12. Branches may be built to any extent. \$ 13. Any railroad company may consolidate with any domestic or foreign railroad corporation, for the purpose of making a connected line, upon such terms as may be agreed upon. Articles stating the terms of consolidation must be approved by a majority of the stock of each corporation. Any corporation whose line is wholly or partly in the territory may lease or purchase any part of any other railroad, which will form with its road a continuous line. The capital stock of the consolidated company shall not exceed the combined capital of the consolidating corporations, and no bonds or other evidences of debt shall be issued in connection with such consolidation. § 15. All property, real or personal, acquired subsequently to the execution of any trust deed or mortgage shall be subject to the lien thereof to the same extent as the property described therein. § 19. The directors may annually or oftener set apart for a sinking fund an amount not exceeding fifty per cent, of the net earnings. § 21. No railroad corporation may plead usury against any holder of its obligations. § 22. The stockholders may classify the directors into three classes, each class to be elected annually for three years. \$23. The officers shall annually make a report to the stockholders. § 24. The right of eminent domain may be exercised by any domestic company, or any foreign company which extends its line into the state. §§ 25-31. Public lands may be taken. § 32. (See Acts of Congress, March 3, 1875.) The streets or any public way or ground of a municipality may be condemned, if an agreement cannot be made with the municipal authorities. § 34.

Foreign corporations.—Foreign corporations shall not do business in the territory, nor acquire or hold any property in the territory, before they have filed with the secretary of the territory a copy of their articles; nor until an agent is appointed, and a copy of his appointment or commission filed with the secretary of the territory and the county register of deeds. Art. XXI.

Taxation.—The stock of any corporation doing business in the territory is taxed. Ch. 70, art. I, § 3. Depreciated shares shall be listed to the holders at their current value. §§ 1, 17. Railroad companies must make full reports, and shall be taxed as follows: The railroad track (i. e., right of way and superstructures), and all buildings belonging to the road, are assessed as realty by the local assessors along the route, the "railroad track" being assessed at a fair value per mile. All the property shall be assessed at its actual cash value. The assessments are subject to review by the board of equalization. All movable property is denominated "rolling stock," and is personalty. A schedule of the rolling stock must be returned by the company, and such property is taxed locally according to the number of miles of the road in each taxing district. Art. III. Telephone and telegraph companies shall make annual returns to the territorial auditor and the county clerk, and their property shall be assessed at its fair and proper value. Art. IV. The fee of the secretary of the territory for filing articles of incorporation is \$5, and for issuing a certificate of incorporation \$3. Ch. 36, art. II.

§984. UTAH.1—Five or more, one-third of them residents of the territory, may incorporate for "any mining, manufacturing, commercial or other industrial pursuit or for conducting the business of loan, trust or guaranty associations, and

¹ The acts of the legislature down to and including the laws of 1892 are included in this synopsis. (122)

for the construction or operation of wagon roads, irrigating ditches or the colonization and improvement of lands." They shall sign an agreement stating (1) the principal place of business; (2) the corporate name; (3) their own names and residences; (4) the time of duration (not less than three nor more than fifty years); (5) the nature of the proposed business; (6) the amount of stock, amount of each share and the limit agreed upon; (7) the number and kind of officers, their qualifications, term of office and the manner of their election: (8) how many of the board shall form a quorum; (9) whether the private property of the stockholders shall be liable for the corporate obligations or not; and other things deemed proper; provided, that, in case of land companies, no actual subscription shall be necessary, where the capital stock consists of the aggregate valuation of the property for the management of which the company is formed, but each owner of such property shall be deemed to have subscribed the cash value thereof; provided, also, that this section shall not be construed to prevent the stockholders of any corporation from regulating the mode of subscriptions and of calling in the same; and provided further, that where subscriptions are not paid in money the fact shall be stated. The agreement must be acknowledged before the probate judge, but not until ten per cent, of the stock subscribed by each shareholder has been paid in. Compiled Laws of 1888, §§ 2267, 2268, Am'd Laws 1890, ch. 45. The agreement shall, within ten days from its execution, be filed with the probate clerk of the county where the principal office will be. § 2269. Officers must give bonds. § 2270. Upon filing with the secretary of the territory a certificate of the probate clerk that the above provisions (including the filing of bonds) have been complied with, the secretary of the territory shall issue a certificate of incorporation. § 2271. Only real estate necessary for the corporate business may be bought and sold. Directors shall be stockholders, and one-third of them residents. A quorum shall not be less than one-fourth the whole number of directors. (See §§ 2267-68.) § 2272, Am'd Laws 1890, ch. 45. The capital stock may be increased to not more than \$20,000,000, or diminished to not less than twenty-five per cent. more than the corporate indebtedness. There shall always be from three to twenty-five directors, and their number and the corporate name may be changed. But no change above specified shall be made without a two-thirds stock vote in favor thereof, § 2273, Am'd Laws 1890, ch. 45. Subscriptions shall be collected in the mauner, and in such instalments, as the agreement or by-laws provide. § 2276. Stock is personal property, and transferable as provided in the by-laws. \$ 2280. False entries in any book or record shall be punished as forgeries, and misappropriations by officers of the corporate funds shall be deemed embezzlement. § 2282. Transcripts of records shall be furnished to interested parties. § 2283. Non-user for two years forfeits the franchise. § 2284. Each share has one vote, in person or by proxy. § 2285. The joint corporate property and the unpaid stock shall be liable for the corporate debts — also the private property of stockholders, if the articles so provide. § 2286. The incorporation and operation of telegraph companies are specially provided for. § 2294 et seq. Also telephone companies, § 2428 et seq.; and insurance companies, §§ 2394-2402 and § 2461 et seq. Special provisions apply to irrigation com-§ 2403 et seg.

Railroads.—Seven or more, being subscribers to the capital stock, two-thirds of them residents, may incorporate. § 2315, Am'd Laws 1892, ch. 8. The articles shall set forth (1) the corporate name and period of existence (not to exceed fifty years); (2) the amount of the capital stock, which shall be divided into shares of not more than \$100 each; (3) the contemplated cost of construction, estimated by competent engineers; (4) the number and names of the first board of directors; (5) the termini and the counties to be traversed. § 2317. Such articles of association shall not be adopted by the subscribers until \$1,000 per mile of the proposed road has been subscribed, and ten per cent. thereof paid in cash to a treasurer, appointed by the subscribers from their number; nor until from five to thirteen

of the subscribers shall have been chosen directors. § 2316. The subscribers may sign the articles by proxy. § 2318. The articles must be filed with the territorial auditor, and a certified copy from the auditor must be filed with the secretary of the territory. § 2319. Am'd Laws 1892, ch. 8. The directors named shall meet within twenty days after receiving notice of their election, and shall elect a president from their number, and a secretary and treasurer from the stockholders. The secretary and treasurer shall give bonds. § 2320, Am'd Laws 1890, ch. 6. The directors shall open books of subscription "when deemed necessary," under such supervision and at such times and places as they may direct; but no subscription of stock shall be binding on the parties until approved by a resolution of the board. § 2321. The annual election shall be held in some county traversed, or in Salt Lake City. Every share has one vote, in person or by proxy. § 2322, Am'd Laws 1892, ch. 8. The directors, or one-third of the stock, may call special meetings. By a majority vote of the whole stock, two-thirds of the stock being represented, the route or termini may be changed, the capital stock increased or diminished, the number of directors changed, or other amendments be made § 2323, Am'd Laws 1892, ch. 8. The directors have full power to make by-laws, if not disapproved by the stockholders. § 2326. A "book of corporate debts" shall be kept open to the inspection of stockholders. S 2327. "Stockholders' books" shall be open for the inspection of creditors and stockholders. § 2328. A transfer book shall also be kept, "and no transfer of stock of such company shall be valid until it shall have been entered therein." Id. Subscriptions may be called in by the directors "in equal instalments" of not more than ten per cent per month, unless otherwise stipulated in the subscription. § 2330. Within thirty days after the payment of the last instalment, a certificate of such payment shall be filed with the auditor. § 2332. The company may purchase, or receive by donation, any necessary real estate. Ground belonging to another company may be condemned to form connections with such company's road. Branches may be built five miles in each direction. § 2333, Am'd Laws 1892, ch. 8. Condemnation proceedings are conducted under the direction of commissioners appointed by the court. § 2335 et seq. If, within two years from the filing of the articles, five per cent of the capital has not been expended in constructing the road, and the road is not in operation within ten years, the act of incorporation shall be void as to all the line not then completed. § 2358, Am'd Laws 1892, ch. 53. Any domestic company may consolidate with any domestic or foreign company not operating a competing line, § 2360, Am'd Laws 1890, ch. 33. The "presidents or secretaries" of the several companies may make an agreement specifying the terms and conditions of the consolidation, the number and names of the new directors and officers, the number of shares of capital stock, and the manner of converting the stock of the several companies into that of the new corporation; the principal place of business in each state traversed; and other proper details. The agreement shall be ratified or authorized by each board of directors, and be adopted by a two-thirds stock vote of all the stockholders of the several corporations, at a meeting called by personal notices to the stockholders; provided, that if the laws of another state are inconsistent herewith the laws of such state may be followed by any corporation domiciled therein. § 2361, Am'd Laws 1892, ch. 8. The rights and liabilities of the several corporations attach to the new company, and all the corporate property, "and all debts due on whatever account, as well as of stock, subscriptions and other things in action belonging to each of such corporations," shall be transferred to the new company without further act. §§ 2362, 2363. The new compauy shall keep an office in the territory. § 2364. Any domestic company may lease any road in or out of the territory, or lease its road to any domestic or foreign company, upon such terms as may be agreed upon. § 2367. Any company organized in the territory may issue bonds for such sums, payable at such times and places, and drawing such interest, as may be deemed proper; and may mortgage any or all the corporate property, franchises, incomes and profits acquired, or to be acquired, to secure the payment of such bonds; "and if such bonds are sold below their par value, they shall be binding and valid, according to their terms." §\$ 2368, 2370. A purchaser at a sale under such mortgage or trust deed shall "have all the rights of a purchaser at an execution sale." § 2369. Railroad corporations may be formed to purchase any railroad property situated in the territory, which is to be sold under foreclosure, or at a private sale. § 2373.

Foreign corporations.—Such corporations shall, within sixty days after commencing business in the territory, file with the territorial auditor and the probate judge of the county wherein their principal office is situated certified copies of their articles and by-laws, and designate an agent upon whom process may be served. Any corporation failing to comply with these provisions shall be deprived of all right to plead any statute of limitation in the territory. § 2293.

Taxation.—Shares of stock are exempt when the corporate property is taxable. § 2009. Shares of stock in corporations, except national banks, when taxable, shall be assessed and taxed in the county where the shareholder resides. § 2011. The property, real and personal, of corporations shall be assessed and the tax collected to the same extent as if the property were owned by individuals. § 2014. The corporation is taxed as to its intangible property in the county where the principal place of business is located. § 2011. The territorial board of equalization shall assess and value all "railroad, railway, depot, telegraph and telephone companies," and their assessment shall be final for county and territorial taxation. Every such company shall, by May first in each year, furnish a sworn statement of all the property owned in the territory, including a statement of mileage in each county. Objections to valuation shall be heard and decided by the board. The valuation shall be apportioned to the several counties in which the property is situated, and be taxed like other property in the respective counties. Laws 1892, ch. 23.

CHAPTER LVIII.

THE FEDERAL GOVERNMENT — CONSTITUTIONAL AND STATUTORY PROVISIONS AFFECTING CORPORATIONS.

§ 985. No state shall pass a law "impairing the obligation of contracts"

§ 989. No person shall "be deprived of life, liberty or property without due process of law; nor shall

986. Congress shall have power "to regulate commerce with foreign nations and among the several states."

987. "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

988. Jurisdiction of the United States courts in cases affecting corporations.

§ 989. No person shall "be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

990. No state shall "deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

991, Corporations created by the United States.

992. National banks.

993. The Interstate Commerce Act.

§ 985. No state shall pass a law "impairing the obligation of contracts." Art. I, § 9. This provision has given rise to a large number of decisions both in the state and federal courts. Great difficulty has been found in fixing the limit where the legislative power of the state ends and where the application of the above provision begins. Formerly the federal courts favored a restriction of the legislative power of the states and an expansion of this constitutional provision of the United States. But of late years the contrary tendency has prevailed and has led to the decisions in the "Granger Cases." The growth, application and extent of this constitutional provision may be seen from the following decisions, which are given in chronological order:

A college charter granted by the king previous to the American independence is a contract which cannot be amended arbitrarily by the legislature of the state in which the college exists. Trustees of Dartmouth College v. Woodward, 4 Wheat., 463 (1819). The voluntary surrender of a charter and a dissolution under a statute passed subsequently to the granting of the charter is not a violation of contract as regards corporate creditors. Mumma v. Potomac Co., 8 Peters, 281 (1834). A charter granting to a corporation the right to take tolls at a ferry does not prevent the granting of a subsequent charter to another corporation to establish a rival ferry. Charles River Bridge v. Warren Bridge, 11 Peters, 420 (1837). An exemption of corporate lands from state taxation does not exempt the lands from taxation after the corporation has sold them. Armstrong v. Treasurer, etc., 16 Peters, 281 (1842). An exemption of a corporation from taxation is violated by a tax on the Although the corporate charter expires and is renewed, the exshares of stock. emption is not necessarily renewed. Gordon v. Appeal Tax Court, 3 How., 133 A penalty incurred by a corporation may be released by the state, since it is not a contract within the above provision. State of Maryland v. Baltimore & Ohio Railroad Co., 3 How., 534 (1844). The above constitutional provision does not prevent the state from authorizing the condemnation of corporate property or franchises under its power of eminent domain. That power cannot be contracted away. West River Bridge Co. v. Dix, 6 How., 507 (1847). A state may enact a

law retrospectively authorizing banks to sue on notes payable to their cashiers. Crawford v. Branch Bank, etc., 7 How., 279 (1848). An agreement of the state to accept the bills of a corporation in payment of debts due to the state cannot be repealed. Woodruff v. Trappall, 10 How., 190 (1850). The legislature may pass a statute vacating condemnation proceedings which have not been fully completed. Baltimore & S. Railroad Co. v. Nesbit. 10 How., 395 (1850). A railroad charter stipulating that no other charter shall be granted for a railroad within a certain distance so as to affect the former road's passenger traffic is not violated by a charter to a railroad to transport merchandise. Richmond, etc., Railroad Co. v. Louisiana Railroad Co., 13 How., 71 (1851). Land granted to and accepted by a private corporation, an institution of learning cannot afterwards be retaken by the state granting it. Vincennes University v. State of Indiana, 14 How., 268 (1852). A statute taking from corporate creditors of an insolvent corporation the right to its assets and depriving them of remedies against the corporate property is unconstitutional. Curran v. State of Arkansas, 15 How., 304 (1853). An exemption from all taxation other than a prescribed tax on profits is a contract that cannot be broken. State Bank of Ohio v. Knoop, 16 How., 369 (1853). Such is the law, even though the additional tax is imposed by a new constitution of the state. Dodge v. Woolsey, 18 How., 331 (1855.) Where a county had voted a subscription to a railroad under a statute authorizing the subscription, and the constitution of the state was amended after the vote, but before the subscription was made, it was held that the constitutional amendment prohibiting such subscriptions invalidated this one. Aspinwall v. Commissioners of Daviess County. 22 How., 364 (1859), cp. sub. A statutory exemption of corporate property from taxation, made after incorporation and without consideration, may be repealed. It is not a contract. Rector, etc., Christ Church v. County of Philadelphia, 24 How., 300 (1860). A case involving substantially the same facts as those of State Bank v. Knoop, supra, was similarly decided in Jefferson Branch Bank v. Skelly. 1 Black, 436 (1861). So also in Franklin Branch Bank v. State of Ohio, id., 474 (1861). The above constitutional provision protects bondholders secured by a lien on a canal. The state cannot postpone the priority of that lien. Wabash, etc., v. Beers, 2 Black, 448 (1862). An exclusive right to "bridge" a river is not violated by the subsequent construction of a railroad bridge by another company. Bridge Proprietors v. Hoboken Co., 1 Wall., 116 (1863). The individual liability of stockholders cannot be repealed, so as to lessen the security of corporate debts existing at the time of the repeal. Hawthorne v. Calef, 2 Wall., 10 (1864). A charter clause that no other bridge within a certain distance shall be built is protected. The Binghamton Bridge, 3 Wall., 51 (1865). A state may grant a subsequent charter though its use destroys the profits of a previous charter to another competing company. Turnpike Company v. State, 3 Wall., 210 (1865). A state authorizing a county to issue bonds to aid a railroad cannot afterward withdraw the taxation powers of a county to pay the bonds. Von Hoffman v. City of Quincy. 4 Wall., 535 (1866). Furman v. Nichol, 8 Wall., 44 (1868), is practically the same case as Woodruff v. Trapnall, supra. A charter exemption from taxation, the charter stating that the right to repeal or amend the charter should not exist is an inviolable contract. Home of the Friendless v. Rouse, 8 Wall., 430 (1869), and Washington University v. Rouse, id., 439. Under a reserved right to amend or repeal, the state may consolidate two college corporations, especially where the consolidation is accepted by the trustees of both. Pennsylvania College Cases, 13 Wall., 190 (1871). A charter exemption from taxation cannot be violated by a subsequent statute. Wilmington Railroad v. Reid, 13 Wall., 264 (1871). A bounty of money and of exemption from taxation to individuals or corporations manufacturing salt is repealable at any time. Salt Company v. East Saginaw, 13 Wall., 873 (1871). Foreign-held bonds, secured by a mortgage on a domestic railroad corporation, cannot be taxed by the state. Case of the State Tax on Foreign-held Bonds, 15 Wall., 300 (1872). Under the reserved power to amend or repeal, an exemption of a corporation from taxation may be repealed. Tomlinson v. Jessup. 15 Wall., 454 (1872). Upon the consolidation of two roads, the rights of exemption from taxation previously existing continue to apply to the property of each. but the exemption of one does not thereby extend to the property of the other. The consolidation makes no change as regards the exemptions. v. Branch, 15 Wall., 460 (1872). A statute giving to a municipality a certain representation in the board of directors of a railroad corporation may, under the state's reserved right to amend or repeal, be changed, giving the municipality a greater representation. Miller v. State, 13 Wall., 478 (1872). Corporations building a bridge may subsequently be required to build a fish-dam for migratory fish. Holyoke Co. v. Lyman, 13 Wall., 500 (1872). An exemption of a corporation from taxation is inviolable. Humphrey v. Pegues, 16 Wall., 244 (1872). A state cannot direct the assets of an insolvent bank to be applied to the payment of state debts. The assets belong to the bank's creditors. Barings v. Dabney, 19 Wall., 1 (1873). An exemption of a corporation from taxation cannot be violated. Pacific Railroad Co. v. Maguire, 20 Wall., 36 (1873). A creditor of a corporation whose stockholders are individually liable cannot hold individually liable the subscribers to new stock, issued after a constitutional amendment providing against individual liability. Ochiltree v. Railroad Co., 21 Wall., 249 (1874). An exemption of a corporation from taxation, granted by a gratuitous amendment to the charter, is repealable. Tucker v. Ferguson, 22 Wall., 527 (1874). A vote of the county anthorities making a railroad subscription and authorizing the issue of bonds therefor, under statutory power, is a contract and is not affected by a subsequent constitutional provision prohibiting such acts, even though the actual subscription was never made and the bouds were issued after the constitutional amendment. County of Moultrie v. Rockingham, etc., Bank, 92 U. S., 631 (1875). A license to a foreign corporation to do business does not prevent taxation of it. Home Ins. Co. v. City Council, 93 U. S., 116 (1876). The case West, etc., R'y Co. v. Supervisors, 93 U. S., 595 (1876), is substantially the same as Tucker v. Ferguson, supra. The reserved right of the state to amend or repeal does not necessarily apply to subsequent amendments to previously existing charters. The legislature may by implication exclude the right to amend from a charter or charter amendment. So held in a tax case. New Jersey v. Yard, 95 U. S., 104 (1877). A change in the method of serving corporations with process is constitutional. Railroad Co. v. Hecht, 65 U. S., 168 (1877). Upon the consolidation of two corporations, both of the old ones are dissolved. Hence a provision of the new charter regulating rates is constitutional. Shields v. Ohio, 95 U.S., 319 (1877). A shortening of the statute of limitations relative to enforcing the statutory liability of stockholders is legal. Terry v. Anderson, 95 U. S., 628 (1877). An exemption from taxation upon payment of a certain tax is inviolable. Farrington v. Tennessee, 95 U.S., 679 (1877). An exemption of the capital stock from taxation does not exempt the tangible property of the corporation. Railroad Co. v. Gaines, 97 U. S., 697 (1878). The business transacted under a corporate charter is subject to the police power of the state. Under the reserved power the legislature may pass any law affecting the powers of a corporation. Beer Co. v. Massachusetts, 97 U. S., 25 (1877). The agreement of the state to accept the notes of a bank in payment of taxes is irrepealable. Keith v. Clark, 97 U.S., 454 (1878). If the business of the corporation becomes a nuisance, it is not protected by its charter. Fertilizing Co. v. Hyde Park, 97 U. S., 659 (1878). The consolidation of two railroad corporations dissolves both of them and creates a new one. Exemptions of the old corporation from taxation are thereby lost, Railroad Co. v. Georgia, 98 U. S., 359 (1878). An exemption from taxation is inviolable. University v. People, 99 U.S., 209 (1878). Congress cannot repudiate its contracts any more than a state can, but under a reserved right it may amend a charter. Sinking Fund Cases, 99 U.S., 700 (1878). An issue of bonds by a municipality, voted before but issued after a constitutional amendment prohibiting

such is valid. Fairfield v. County of Gallatin, 100 U. S., 47 (1879). Under its reserved power to amend a charter, the legislature may increase the license fees to be paid by a street-car company to the city. Railroad Co. v. Philadelphia, 101 U. S., 528 (1879). The repeal of a law allowing suit to be brought against a state is constitutional, though not providing for the enforcement of the judgment and though the debt sued on was incurred before the reneal. Railroad Co. v. Tennessee, 101 U.S., 337 (1879). Au exclusive ferry privilege given by a county without legislative authority to a corporation does not prevent the granting of ferry privileges by the legislature. Wright v. Nagle, 101 U.S., 791 (1879). A lottery license for twenty-five years may be repealed before the expiration of that time. Charters are not protected by the above constitutional provision, but only the contracts of charters. Stone v. Mississippi, 101 U.S., 814 (1879). A statute validating irregularly issued municipal bonds is legal. Thompson v. Perrine, 103 U. S., 806 (1880). Statutory authority to issue bonds after a road has been built through a certain town is repealed by a constitutional prohibition against municipal subscription where the road was not built before the constitutional amendment. Railroad Co. v. Falconer. 103 U. S., 821 (1880). An exemption from taxation is protected by this constitutional provision. Asylum v. New Orleans, 105 U.S., 362 (1881). Under a reserved right to repeal a charter, the legislature may repeal a railroad charter, and transfer the public franchises to another corporation, upon due compensation being paid to the dissolved corporation. Greenwood v. Freight Co., 105 U. S., 13 (1881). Under the reserved power any amendment may be made that does not defeat or impair the object of the charter. Close v. Glenwood Cemetery, 107 U.S., 466 (1882). An exemption from taxation cannot be given when the state constitution forbids it. Louisville, etc., R. R. Co. v. Palmer, 109 U. S., 244 (1883). Where a corporation is bankrupt, the legislature may authorize a vote of the bondholders on the question of recapitalization and reorganization without foreclosure, and may provide that those not voting be counted as voting affirmatively. A bondholder not voting within the prescribed time cannot afterward enforce payment of interest on his original bonds, Gilfillan v. Union Canal Co., 109 U. S., 401 (1883). By statute in Canada a majority of railroad bondholders may bind the minority to a plan of recapitalization of a bankrupt road. The constitutional provision herein does not apply. Canada Southern R. R. v. Gebhard. 109 U. S., 527 (1883). Under the reserved power of amendment, the rates charged by a corporation may be regulated. Spring, etc., Water-works v. Schottler, 110 U. S., 347 (1884). Where the corporation does not raise the constitutional question in the state court from which the appeal is taken, the supreme court of the United States has no jurisdiction herein. Susquehanna, etc., Co. v. West, etc., Co., 110 U. S., 57 (1884). A legislature cannot take away a municipality's power of taxation so as to affect the payment of a judgment against the municipality. Nelson v. St. Nelson's Parish, 111 U. S., 716 (1883). Contracts protected herein are nevertheless subject to the police power of the state. Statutes protecting the public health or morals may vary the contract. Butchers' Union Co. v. Crescent City Co., 111 U. S., 746 (1883). To same effect, see New Orleans Gas Co. v. Louisiana Light Co., 115 U.S., 650 (1885), holding also that the constitutional prohibition applies to changes by state constitutions as well as by statutes. An exclusive gas privilege is protected even against a prior general statute reserving the right to repeal all charters, it appearing that the particular charter contained words implying such protection. Louisville Gas Co. v. Citizens' Gas Co., 115 U.S., 683 (1885). An exemption of the corporation from taxation may be so worded as to exempt also the shares of stock, New Orleans v. Houston. 119 U. S., 265 (1886). An exclusive privilege relative to water-works is protected. Tammany Water-works v. New Orleans Water-works, 120 U. S., 64 (1886). A state constitution itself is not a contract protected against change. Church v. Kelsey, 121 U.S., 282 (1886). A contract is not protected herein against statutes passed previous to the formation of the contract. Lehigh Water Co. v. Easton, 121 U. S., 388 (1886). A statute which repeals a judicial remedy for enforcing payment of municipal bonds to a railroad, the remedy being in existence when the bonds were issued, is void. Seibert v. Lewis, 122 U. S., 284 (1886). Where a charter granted a monopoly, with a few exceptions and a city was left to apply the exceptions, a decision of the state courts that the city had properly applied the exceptious cannot be reviewed by the supreme court of the United States. New Orleans, etc., v. Louisiana, etc., Co., 125 U. S., 18 (1888). A constitution passed after a charter is granted may require compensation to be paid by corporations taking private property for public use, for property injured or destroved by constructing or enlarging their works, highways or improvements. Penn. R. R. v. Miller, 132 U. S., 75 (1889). Where a legislature retains the right to amend the charter of a street railroad company, it may compel the company to pave for a foot outside of the tracks, although the original charter of the company required it to pave only between the tracks. Sioux City St. R'v v. Sioux City. 138 U.S., 98 (1891). Where subsequent to the granting of a charter a general act gives an exclusive franchise to a certain class of corporations, this general act does not constitute a contract, it being a gratuitous proceeding. Wheeling, etc., Bridge Co. v. Wheeling Bridge Co., 188 U. S., 287 (1891). Although a city has granted an exclusive right to a corporation to supply a city with water from a certain source, yet it may grant the right to a different party to supply the water from a different source. Stein v. Bienville, etc., Co., 141 U.S., 67 (1891). Where an exemption from taxation has been modified by later agreement, the decision of the highest court of the state construing that modification as doing away with the exemption cannot be reviewed by the supreme court of the United States. Henderson Bridge Co. v. Henderson City, 141 U. S., 679 (1891). The legislature of a state may, as against a city in that state, modify a contract between the city and a water-works company. New Orleans v. New Orleans, etc., Co., 142 U. S., 79 (1891). Under its reserved power to amend or repeal any charter, the legislature may repeal an exemption from taxation. Louisville Water Co. v. Clark, 143 U.S., 1 (1892). A statute and city ordinance may impose a license tax on a street railroad, although prior thereto the city had sold the franchise to the company with exclusive rights, in consideration of the company's paying a large price and also an annual real-estate tax. New Orleans, etc., R. R. v. New Orleans, 148 U.S., 192 (1892). A statute authorizing purchasers of railroads at foreclosure sales to reorganize may be incdified so as to levy an incorporation fee upon reorganization thereafter taking place. People v. Clark, 148 U.S., 397 (1893).

§ 986. Congress shall have power "to regulate commerce with foreign nations and among the several states." Art I, § 8. A bridge across the Ohio river, without being authorized by congress, although authorized by the state of Virginia, is, if it actually interferes with navigation, a nuisance and may be abated. State of Pennsylvania v. Wheeling, etc., Bridge Co., 13 How., 518 (1851). But a subsequent act of congress legalizing such a bridge removes all objection to it. 19 How., 421 (1855). The court will not necessarily enjoin the building of a bridge over a navigable stream, even though congress has not authorized it. Gilman v. Philadelphia, 3 Wall., 713 (1865). See, however, on the same subject, The Passaic Bridge, 3 Wall., 782. A tax on every passenger carried out of the state is held invalid as interfering with the performance of the functions of the federal government. Crandall v. State of Nevada, 6 Wall., 35 (1867). The regulation by the state of foreign insurance corporations is not a regulation of commerce. Paul v. Virginia, 8 Wall., 168 (1868). The taxation by the state of a corporation incorporated by it, and also incorporated by the United States, is legal. Thomson v. Pacific Railroad Co., 9 Wall., 579 (1869). Insurance business by foreign companies may be regulated by a state. Liverpool Ins. Co. v. Massachusetts, 10 Wall., A state tax of railroad corporations levied on every thousand pounds of freight transported is unconstitutional as regards that part of the freight which goes out of the state or is brought into the state. State Freight Tax Case, 15 Wall., 232 (1872). But the state may tax the gross receipts of railroads, even though such

receipts are partly from interstate traffic. State Tax on Railway Gross Receipts. 15 Wall., 284 (1872), cp. sub. A city license fee exacted from corporations transporting goods beyond the state, greater than the city license fee for companies transporting goods within the state, is constitutional. Osborne v. Mobile, 16 Wall, 479 (1872). A state may require railroads running into it to annually fix and post its rates. Railroad Co. v. Fuller, 17 Wall., 560 (1873). A state tax on a railroad corporation measured by the actual value of such proportion of its shares of stock as the length of the road in the state bears to the whole length of the road is constitutional. Delaware Railroad Tax, 18 Wall., 206 (1873). A railroad contract with the owner of an elevator to give the latter certain business is not abrogated by reason of an act of congress which enables the former to dispense with the elevator. Railroad Co. v. Richmond, 19 Wall., 584 (1873). A charter provision that the railroad should pay to the state one-fifth of its receipts from passenger traffic is constitutional, even though the road runs into another state and obtains part of said proceeds therefrom. Railroad Co. v. Maryland, 21 Wall., 456 (1874). The act of congress relative to telegraph companies prevents a state from giving a monopoly of telegraph business in the state to one company. Pensacola Tel. Co. v. West, ctc., Tel. Co., 96 U. S., 1 (1877). Vessels plying between states may be taxed in the state of the corporation owning them. Transportation Co. v. Wheeling, 99 U.S., 273 (1878). A municipal corporation owning wharves may charge wharfage therefor, though the wharves accommodate interstate commerce. Packet Co. v. St. Louis, 100 U. S., 423 (1879); Vicksburg v. Tobin, id., 430. But there must be no discrimination against the commerce from other states. Guy v. Baltimore, id., 434. A state tax on each message received or sent out by a telegraph company is unconstitutional. Telegraph Co. v. Texas, 105 U. S., 460 (1881). A municipality may forbid vessels landing at any except municipal wharves. Packet Co. v. Catlettsburg. 105 U. S., 559 (1881). Reasonable wharfage may be demanded by a city for the use of its wharves. Transportation Co. v. Parkersburg, 107 U.S., 691 (1882). A state statute prohibiting foreign corporations from doing business in the state unless a certificate is filed, etc., does not prevent the collection of a debt for machinery delivered by the foreign corporation to parties in the state. Cooper Manufacturing Co. v. Ferguson, 113 U.S., 727 (1884).

Interstate commerce is exclusively within the control of congress. A state tax on a ferry corporation, the ferry being interstate, is unconstitutional, if it amounts to a tax on the receiving and landing. The state may collect moneys only as compensation for property employed, or facilities for using it, or by an ordinary tax on property. Gloucester Ferry Co. v. Pennsylvania, 114 U. S., 196 (1884). A state tax of \$50 per car per annum on passenger coaches run over railroads in the state is unconstitutional so far as it applies to coaches run from or into other states, or across the state, and owned by a foreign corporation, though leased to the railroads. Pickard v. Pullman Southern Car Co., 117 U. S., 34 (1885); Tennessee v. Pullman Southern Car Co., id., 51. A state statute forbidding railroads to charge more for a short haul than for a long haul is unconstitutional so far as it applies to hauls beyond the state. Wabash, etc., Railway Co. v. Illinois, 118 U. S., 557 (1886). A state tax upon the gross receipts of a foreign transportation company is void, as interfering with interstate commerce, where the gross receipts included receipts for carrying freight into, out of, and across the state. Fargo v. Michigan, 121 U. S., 230 (1887). So also of a tax on a steamship company's gross receipts, where the traffic was interstate and with foreign countries. Philadelphia Steamship Co. v. Pennsylvania, 122 U. S., 326 (1887); questioning State Tax, etc., 15 Wall., 284, supra. A state regulation of interstate telegraphic communication is unconstitutional. Western U. Tel. Co. v. Pendleton, 122 U. S., 347 (1887).

A statute requiring railroad engineers to be examined for color blindness is constitutional. Smith v. Alabama, 124 U. S., 465 (1887); Nashville, etc., Railway v. Alabama, 128 U. S., 96 (1888). A bridge across a navigable river is legal when authorized by a state, although congress has not authorized it, there being no act

of congress prohibiting it. Willamette, etc., Co. v. Hatch, 125 U. S., 1 (1888). A statute which prohibits the bringing of liquor into a state, with certain exceptions, is void. Bowman v. Chicago, etc., R'v. 125 U. S., 465 (1888). A statute authorizing an injunction against a telegraph company from operating its wires until a tax is paid is void if the wires are used on post-roads. Western, etc., Co. v. Massachusetts, 125 U. S., 530 (1888). A telegraph company doing an interstate business cannot be compelled to pay a license fee in order to do business within a state. Leloup v. Mobile. 127 U.S. 640 (1888). A state may tax a telegraph company on its receipts from telegrams given and delivered within the state, but not ou interstate telegrams. Ratterman v. Western U. Tel. Co., 127 U. S., 411 (1988). A state tax levied upon the franchise of a railroad corporation which is chartered by the federal government, and which runs through several states, is unconstitutional. California v. Central Pac, Railroad Co., 127 U. S., 1 (1888). A state cannot tax a telegraph company for all business done by it in the state, including messages carried partly within and partly without the state. Western U. T. Co. v. Alabama, 132 U. S., 472 (1889). A state may require railroads to furnish separate accommodations for white and colored persons, the statute applying only to commerce within the state. Louisville, etc., R'y v. Mississippi, 133 U. S., 587 (1890). An agent in San Francisco for a railroad from Chicago to New York, but not selling tickets in Sau Francisco, cannot be taxed in the state of California for the privilege of doing business there. McCall v. California, 136 U. S., 104 (1890). A state cannot tax a foreign railroad corporation engaged in interstate commerce even though such foreign corporation runs into the state and has an office in the state. Norfolk, etc., R. R. v. Pennsylvania, 136 U. S., 114 (1890). A state may tax a foreign sleeping-car company on its capital stock, the basis of the taxation being such proportion of the capital stock as the number of miles of railroad traversed by the company in the state bears to the number of miles traversed in all the states. Pullman Palace Car Co. v. Pennsylvania, 141 U. S., 18 (1890). It is unconstitutional for a state to fine the agents of a foreign express company for doing business in the state without first obtaining a license from the state, and showing that the company has a capital of at least \$100,000. Crutcher v. Kentucky, 141 U.S., 47 (1891). A state may tax a railroad running from the state into other states on the gross receipts of the railroad earned in the state, the amount of such gross receipts being ascertained by the number of miles operated in the state as compared with the number of miles operated out of the state. Maine v. Grand Trunk R'y, 142 U. S., 217 (1891). The statute of New York imposing a tax upon the entire capital stock of foreign corporations doing business in the state is legal, even though it may be unjust. Horn Silver Mining Co. v. New York, 143 U. S., 305 (1892). A state may tax traffic from one point in the state to another point in the state, even though the traffic passes through a different state. Lehigh Valley R. R. v. Pennsylvania, 145 U.S., 192 (1892).

§ 987. "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Art. IV, § 2. A corporation is not a "citizen" in the sense here used, and this provision confers no rights upon a corporation. Pembina Mining Co. v. Pennsylvania, 125 U. S., 181 (1888). So held where a state prohibited foreign insurance companies from doing business unless licensed by the state. Paul v. Virginia, 8 Wall., 168 (1868). Also where a license fee and payment to cities of a percentage of premiums received were required. Ducat v. Chicago, 10 Wall., 410 (1870). See, also, Liverpool Ins. Co. v. Massachusetts, 10 Wall., 566 (1870); Philadelphia Fire Association v. New York, 119 U. S., 110; Doyle v. Continental Ins. Co., 94 U. S., 535 (1876); Cooper Manufacturing Co. v. Ferguson, 113 U. S., 727 (1875).

§ 988. The United States courts have jurisdiction of cases arising between citizens of different states, and between citizens and foreign states, and between citizens and citizens or subjects of foreign states. Art. III, § 2. See, also, Amendments, art. XI. In the early case, Bank of United

States v. Deveraux, 5 Crauch, 61 (1809), the supreme court of the United States held, per Marshall, C. J., that the citizenship of a corporation depended not on the place where it was incorporated, but on the citizenship of its various stockholders. But this decision was subsequently overruled and is no longer the law. As regards the right of a corporation to sue or be sued in the federal courts, a corporation is now held to be a citizen of the state which incorporated it. Railway Co. v. Whitton's Adm'r, 13 Wall., 270 (1871); Louisville, etc., Railroad v. Letson, 2 How., 497 (1844); Marshall v. B. & O. Railroad, 16 id., 314 (1853); Covington, etc., Co. v. Shepherd, 20 id., 227 (1857); Cowles v. Mercer County, 7 Wall., 118 (1868); Express Co. v. Kountze Bros., 8 id., 342 (1869); Insurance Co. v. Morse, 20 id., 445 (1874). If a corporation is incorporated in two states it consists of two corporations, one in each state. Ohio, etc., Missouri Railroad v. Wheeler, 1 Black, 286 (1861). See, also, § 909, supra.

An agreement of a foreign corporation, as a condition of its being allowed to do business in the state, that it will not remove cases from the state to the United States courts, is not binding. Insurance Co. v. Morse, 20 Wall., 445 (1874). But in case the corporation violates such agreement the state may then forbid its doing any further business. Doyle v. Continental Ins. Co., 94 U. S., 535 (1876). See, also, Barron v. Burnside, 122 U. S., 186 (1886), to the effect that the agreement not to remove is void.

Congress has enacted various statutes defining the cases in which suits may be instituted in or removed to the federal courts. See §§ 757, 758, 839, supra.

When a corporation is created by congress itself, congress may give or take away from the federal courts jurisdiction of the suits in which that corporation may be a party. This is constitutional, since the case arises under the law of the United States which grauts the charter. Osborne v. United States Bank, 9 Wheat, 738 (1824), where jurisdiction was given to the federal courts. See, also, Kennedy 1. Gibson, 8 Wall., 498 (1869), relative to national banks. By amendment of the national banking act in 1882 and 1888, such banks are, for purposes of litigation, now considered citizens of the state wherein they are located. National Park Bank v. Nichols, 4 Bin., 315 (1869); Manufacturers' National Bank v. Baack, 8 Blatch., 137 (1871); St. Louis, etc., Bank v. Allen, 5 Fed. Rep., 551 (1881). The various Pacific railroads incorporated by the United States may bring suit in or remove them to the federal courts. Pacific Railroad Removal Cases, 115 U.S., 1 (1884); United States v. Union Pacific Railroad Co., 98 U. S., 569 (1878); U. S. Rev. Stat., § 640; Kain v. Texas Pacific Railroad Co., 3 Cent. L. J., 12 (1875); Yard v. Durant, 4 Cliff., 113 (1869); Fisk v. Union Pacific Railroad Co., 6 Blatch.: 362 (1869); Ames v. Kansas, 111 U. S., 449 (1883); Hughes v. Northern Pacific Railroad Co., 18 Fed. Rep., 106 (1883); Southern Pacific Railroad Co. v. California, 118 U.S., 109 (1886).

§ 989. No person shall "be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation." — Amendments, art V. This amendment restricts the powers of congress, but does not restrict the powers of the states. Thorington v. Montgomery, 147 U. S., 490 (1893). The federal government cannot condemn the property of a canal company, except upon paying compensation for the franchise, that is, the earning power of the canal in addition to the actual value of the tangible property. Monongahela Nav. Co. v. United States, 148 U. S., 312 (1893).

§ 990. No state shall "deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."—Amendments, art. XIV. This provision is often invoked by corporations in connection with the provision against impairing the obligation of contracts. The following decisions have been made:

Statutes reducing railroad rates are constitutional. Munn v. Illinois, etc., Rail-1948

road, 94 U.S., 113 (1876). See, also, the remaining cases in that volume, which together are called "The Granger Cases." The taxation of railroads by apportionment among the municipalities through which they run is not prohibited by the above amendment. State Railroad Tax Cases, 92 U.S., 575 (1875). It is constitutional for a municipal corporation to levy taxes for the draining of swamps. Davidson v. New Orleans, 96 U. S., 97 (1877), a case which fully discusses the meaning of "due process of law." Validating investments by foreign corporations does not deprive the borrower of property "without due process of law." Gross v. United States Mortgage Co., 108 U.S., 477 (1883). As further illustrative of the exercise of the police power of the state in reference to corporations, see Slaughter House Cases, 16 Wall., 36 (1872), upholding a monopoly given to a corporation. and also passing upon the application of the amendments to the United States constitution: Bartemeyer v. Iowa, 18 Wall., 129 (1873), holding that a state may prohibit the sale of liquors, but quære as to the effect of the constitutional amendment in the case of liquors on hand at the time of the state prohibitory act. To same effect, Beer Co. v. Massachusetts, 97 U.S., 25 (1877). The legislature, under its police power, may regulate slaughtering, even though it has contracted not to do so. Butchers' Union Co. v. Crescent City Co., 111 U. S., 746 (1883). The legislature may compel railroads to build fences and may prescribe double penalties for omission. Missouri Pacific Railway Co. v. Hanes, 115 U. S., 512 (1885). Under its general legislative powers the legislature may regulate water rates. Spring Valley, etc., Works v. Schottler, 110 U. S., 347. Prohibitory laws are constitutional. Foster v. Kansas, 112 U. S., 201 (1884); Mugler v. Kansas, 123 U. S., 623 (1887). Allowing property to be taken on condemnation for mill race overflow purposes is constitutional. Head v. Amoskeag Manufacturing Co., 113 U.S., 9 (1884). It is constitutional to tax railroad property differently from other classes of property. Kentucky Railroad Tax Cases, 115 U.S., 321 (1885). The legislature may regulate railroad rates, unless the right has been clearly granted away: may authorize commissioners to regulate rates, and may require fences to be built Railroad Commission Cases, 116 U.S., 307, 347, 352 (1886). A state tax levied on railroad property not specified in the taxation statute is void under this provision of the United States constitution. Santa Clara County v. Southern Pacific Railroad Co., 118 U. S., 394 (1885). This constitutional provision does not prevent a state from imposing a tax on a foreign insurance company for doing business in the state, inasmuch as the corporation is not admitted into the state until it pays the tax. Philadelphia Fire Association v. New York, 119 U.S., 110 (1886). But a corporation is a "person" in the meaning of this provision, Pembina Mining Co. v. Pennsylvania, 125 U.S., 181 (1888), holding, however, that a state may regulate the right of foreign corporations to do business in the state. A reduction of railroad rates is constitutional, although the rate is to vary according to the length of the road, and results in disastrous loss to the railroads. Dow v. Beidelman, 123 U.S., 680 (1888),

A statute rendering railroads liable to their employees for injuries caused by the negligence of their fellow-servants is constitutional. Missouri Pacific Railway Co. v. Mackey, 127 U. S., 205 (1889). So, also, is a statute rendering a railroad liable for double the value of stock killed by it, Minneapolis, etc., Railway Co. v. Beckwith, 129 U. S., 26 (1889), holding also that corporations are "persons" within the meaning of the above constitutional provisions. A state statute may require locomotive engineers to be examined in regard to their capacity to distinguish color signals. Nashville, etc., R'y v. Alabama, 128 U. S., 96 (1888). It is constitutional for a state to tax a railroad for bonds issued by the company. Bell's Gap R. R. v. Pennsylvania, 134 U. S., 232 (1890). A statute of a state allowing its railroad commission to reduce railroad rates, and not providing for a judicial inquiry as to the reasonableness of the reduction, is unconstitutional, the company having been denied the right to put in evidence on the subject. Chicago, M. & St. P. R'y v. Minnesota, 134 U. S., 418 (1890); Minneapolis, etc., R'y v. Minnesota, id., 467

(1890). The New York statute imposing a tax upon foreign corporations doing business in the state is legal, the tax being measured by the dividends. Home Ins. Co. v. New York, 134 U. S., 594 (1890). Congress has power to repeal its charter of the Mormon Church in Utah, and to use the property of the corporation for other charitable uses. Mornion Church v. United States, 136 U. S., 1 (1890). The legislature of a state may, as against a city in the state, repeal a statute which allows the city to offset taxes due from a water-works company against moneys due from the city to the company for water. New Orleans v. New Orleans, etc., Co., 142 U. S., 79 (1891). A state may impose a tax on express companies, provided the tax is imposed only on business done within the state. Pacific Express Co. v. Seibert, 142 U. S., 339 (1892). A state may compel the railroads to pay the salaries and expenses of the state railroad commission. A corporation is a "person" within the meaning of the above amendment. A state tax on the gross income of railroads in proportion to the number of miles operated in the state is legal. Charlotte, etc., R. R. v. Gibbes, 142 U. S., 386 (1892). The statute of New York imposing a tax upon the entire capital stock of foreign corporations doing business in the state is legal, even though it may be unjust. Horn Silver Mining Co. v. New York, 143 U.S., 305 (1892). The statute of Michigan reducing railroad passenger rates according to the amount of income a mile is legal, there being no evidence that such reduction would diminish the entire income of the company. Chicago & Grand Trunk R'v v. Wellman, 143 U. S., 339 (1892). The statute of New York reducing the charges of grain elevators is legal. Budd v. New York, 143 U.S., 517 (1892). The statute of New York compelling corporations using electrical wires in cities to place such wires under ground is legal. New York v. Squire, 145 U. S., 175 (1892). A statute may require railroad companies to build fences along their roads. Minneapolis, etc., R'y v. Emmons, 149 U. S., 364 (1893). § 991. Corporations created by the United States.—The constitutional

§ 991. Corporations created by the United States.—The constitutional power of the federal government to create a corporation has been a political as well as a judicial question. The United States Bank, through the influence of Alexander Hamilton, was chartered by the federal government in 1791, and was rechartered in 1816. The constitutionality of these charters was vigorously attacked by the Democratic party, and in 1833 President Jackson vetoed and defeated a third charter to such an institution. A similar charter was vetoed by President Tyler in 1841. The advent of the Republican party to power, and the outbreak of the civil war, brought new political ideas into force. The result has been that the federal government has granted many charters to two classes of enterprises — national banks, and railroads running into two or more states. In 1862 congress chartered the Union Pacific Railroad Company (12 Stat. at Large, 489). In 1864 congress chartered the Northern Pacific Railroad Company; in 1866 Company; and other charters have been granted. The incorporation of national banks was anthorized by a general statute passed in 1868.

In an early decision by Chief Justice Marshall the legality of the charter of the United States Bank was upheld. McCulloch v. State of Maryland, 4 Wheat., 316 (1819). See, to same effect, Osborn v. U. S. Bank, 9 Wheat., 738 (1824). The constitutionality of the present national bank charters has also been upheld. Farmers', etc., National Bank v. Dearing, 91 U. S., 29 (1875); Legal Tender Case, 110 U. S., 421, 445 (1883).

Congress has power to create corporations in the District of Columbia. Hadley v. Freedman's Savings, etc., Co., 2 Tenn. Ch., 122 (1874); Williams v. Creswell, 51 Miss., 817 (1876); Daly v. National Life Ins. Co., 64 Ind., 1 (1878).

A railroad incorporated by the United States may be compelled by mandamus to perform its duties. Union Pacific Railroad Co. v. Hall, 91 U. S., 343 (1875); same case below, 3 Dill., 515. It is well settled that a corporation incorporated by the United States is exempt from the operation of state laws, so far as these affect the corporation in its use as an instrument of government by the United

• States. Farmers', etc., National Bank v. Dearing, 91 U. S., 29 (1875). Such, also, is the rule in regard to state usury laws, and state taxation of such corporations. See Railroad Co. v. Peniston, 18 Wall., 5 (1873); National Bank v. Commonwealth, 9 Wall., 353 (1869); Thomson v. Pacific Railroad, 9 Wall., 579 (1869); and § 569,

\$ 992. National Banks.—By the national banking act the articles of association may contain any "provisions, not inconsistent with law, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs," § 5133. R. S. U. S. Incorporation is by filing a certificate, under the general incorporating act. § 5135. The corporation shall exist for twenty years, unless the articles of association or two-thirds in interest of the stockholders prescribe otherwise. The corporation may at any time change its officers. It shall not commence business until authorized to do so by the comptroller of the currency. \$ 5136. It shall not take a mortgage on real estate. It shall not hold real estate taken on a debt for over five years. \$ 5137. The capital is to be \$50,000 or over if in a city of less than six thousand population; \$100,000 or over if less than fifty thousand: \$200,000 or over if over fifty thousand people. \$ 5138. Fifty per cent. of the capital stock is to be paid in upon organization, and ten per cent. on or before each succeeding five months. § 5140. It may reduce the capital stock on a two-thirds vote of all the stock. § 5143. No stockholder who has failed to pay calls on his stock shall vote at elections. § 5144. See 36 Fed. Rep., 246. There must be five or more directors. They hold office for one year. § 5145. Directors must be citizens of the United States: three-fourths must have been residents of the state for a year; and each must own ten or more shares of stock. § 5146. The directors must take an oath. § 5147. Stockholders are liable for corporate debts to an amount equal to and in addition to the subscriptions for their stock. § 5151. Executors, administrators, guardians and trustees are not liable on stock, but the trust fund is liable. § 5152. The deposit of United States bonds owned by the national bank, with the United States treasurer, as security that the bank will redeem the paper money that the national banking act authorizes it to issue, is a subject of minute regulation. See § 5157, etc. For usury the bank forfeits the interest, and if the interest is already paid, twice its amount may be recovered back. § 5198. Before a dividend is declared, one-tenth of the profits are to be added to the surplus fund, until the latter is twenty per cent. of the capital. § 5199. The bank shall not purchase or loan on the security of its own stock. \$ 5201. In case of impairment of capital stock, the stockholders must be assessed to replace it. § 5205. Five reports are to be made during each year. § 5211. Shares of stock in national banks may be taxed by the states. § 5219. The comptroller may appoint a receiver of a bank whenever he is satisfied that it is insolvent. Act of June 30, 1876, § 1. National banks are citizens of the state where they are located, so far as litigation is concerned. Ch. 373, Acts of 1887. They may increase their capital stock upon a two-thirds vote in interest of the stock. Ch. 73, Acts of 1886. Upon the expiration of the bank charter, the charter may be renewed by two-thirds in interest of the stock, but dissenting stockholders must be bought out at an appraised valuation of their stock. Ch. 290, Acts of 1882. For purposes of suit, a national bank is a citizen of the state in which it is located, Ch. 866, § 4, L. 1888.

§ 993. The Interstate Commerce Act.—By act of congress of February 4, 1887, commonly called "The Interstate Commerce Act," all railroads running from one state into another were rendered subject to the following provisions: Railroad charges are to be reasonable. Discriminations between persons are prohibited. So, also, are discriminations between localities or kinds of traffic. Railroads must give equal facilities to all connecting lines. Greater charges, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance, are prohibited. Pools between competing roads are

prohibited. Ten days' notice must be given of advances in rates. Free passes are prohibited. Five commissioners are appointed by the president of the United States, with the concurrence of the senate, to apply the law. The powers, duties and functions of this commission, however, are somewhat limited. See 37 Fed. Rep., 567. By the act of March 3, 1889, amendments were made requiring three days' notice of reductions in rates; railroad officials are made subject to imprisonment as well as fines for violation of the act, and shippers are made liable also for inducing a violation. A witness being examined in connection with an alleged violation of the interstate commerce act cannot be compelled to testify if his testimony would criminate himself. Counselman v. Hitchcock, 142 U. S., 547 (1892). The interstate commerce act does not prevent a railroad from selling a "party-rate ticket" for ten or more persons at a less rate than that charged to a single individual. Interstate Commerce Commission v. B. & O. R. R., 145 U. S., 263 (1892).

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